

**CRITICAL ANALYSIS OF THE UNITED NATIONS DECLARATION
OF BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE
PROGRAMS IN CRIMINAL MATTERS**

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Leuven, Belgium:
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1.0 Literature Review

1.1 Introduction

This literature review will seek to provide a theoretical basis from which to understand the United Nations preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters. In order to provide a context from within which to understand the draft elements, a number of issues will be addressed in this section. First, the definition and principles of Restorative Justice used for the basis of the declaration. Second, a number of terms will be examined and defined within the restorative paradigm. Third, an examination of specific issues within the Restorative Justice theoretical framework will be undertaken, so as to better understand the construction of the United Nations principles. Lastly, this literature review will then be concluded by determining if there is an agreed upon *acquis restorative*¹ to legitimate whether the principles have a sound foundation from which to be based upon.

1.2 Defining Restorative Justice

How does one define Restorative Justice? Defining Restorative Justice is not an easy task as there are many diverging definitions being postulated by theoreticians and practitioners all over the world. The United Nations Working Party on Restorative Justice, the group that constructed the basic principles, decided to utilize one well known definition and 11 principles to best answer this question. The most logical place to start this discussion is with that working definition,

“Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” (Marshall)²

There are many variations of this definition, with Marshall’s being the one most recognized and accepted. The examination of this debate in its’ entirety is well beyond the scope of this analysis and will not be scrutinized in this context. It is important to acknowledge that the Marshall definition was adopted by the working party even with its’ admitted shortcomings and that this decision may have unintended consequences. This analysis will thus limit itself to examining the basic principles in the context of the Marshall definition because that is what it is based upon, while ensuring to critically examine the ramifications of this decision in the overall analysis. Perhaps what is most

¹ Carver, A. Trujillo, J., Vanfraechem, I., Willemsens, J., *Restorative Justice Theory in Europe and North America, a comparison*. 2000. Not published.

² Paul McCold, *Working Definition United Nations Working Party on Restorative Justice*. This was found on the internet site : <http://www.restorativejustice.org/campus/ActionDefineRJdefinitions.html> on May 2nd, 2001.

important is the eleven principles of Restorative Justice that Claassen³ outlined, that was accepted as part of the overall definition. It is important to examine these principles to see beyond this static definition and its potential controversial nature, if one wants to fully understand the basis for this declaration.

1. Crime is primarily an offense against human relationships, and secondarily a violation of a law (since laws are written to protect safety and fairness in human relationships).

This principle is directly reflected and substantiated in the well accepted definition of Zehr that says, viewed through a restorative lens, “crime is a violation of people and relationships.”⁴

2. Restorative Justice recognizes that crime (violation of persons and relationships) is wrong and should not occur, and also recognizes that after it does there are dangers and opportunities. The danger is that the community, victim(s), and/or offender emerge from the response further alienated, more damaged, disrespected, disempowered, feeling less safe and less cooperative with society. The opportunity is that injustice is recognized, the equity is restored (restitution and grace), and the future is clarified so that participants are safer, more respectful, and more empowered and cooperative with each other and society.

This principle is pointing out the theoretical difference between the retributive system and the restorative system. In our current system, there is the potential for all parties involved to be further victimized, harmed and stigmatized through the mechanisms of the state. This principle is pointing out that these concerns have been the norm in the former system and that the latter system should, if implemented correctly, provide an effective response to further infliction of injustice.

3. Restorative Justice is a process to "make things as right as possible" which includes: attending to needs created by the offense such as safety and repair of injuries to relationships and physical damage resulting from the offense; and attending to needs related to the cause of the offense (addictions, lack of social or employment skills or resources, lack of moral or ethical base, etc.).

This principle outlines some of the types tools that should be used in Restorative Justice processes, with the emphasis being upon solving the outlined problem not the specific remedy. Tools such as restitution⁵, victim services⁶, and social services for the offender⁷

³All Principles come from:

Claassen, Ron, *Restorative Justice: Fundamental Principles*. Presented May 1995 at NCPCR; revised May 1996 at UN Alliance of NGOs Working Party on Restorative Justice.

⁴ Zehr, Howard. *Changing Lens: A New Focus for Crime and Justice*. Scottsdale, Pennsylvania; Waterloo Ontario: Herald Press, 1990. Pg. 181.

⁵ *To get a specific understanding of how restitution has been integrated into the paradigm and process examine the two following publications to gain an understanding:

1) Weitekamp, Elmar. “Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA.” *In Restorative Justice on Trial: Pitfalls and Potentials of Victim Offender Mediation--International Research Perspectives*, edited by Heinz Messmer and Hans-Uwe Otto. Dordrecht: Kluwer Academic Publishers, 1992.

2) Van Ness, Daniel and Strong, Karen. *Restoring Justice*. Cincinnati, OH: Anderson Publishing Co., 1997.

⁶ *Victim Services as restorative processes are addressed in:

are all parts of this total process that have been addressed in the restorative literature. Hudson and Galaway conclude that “this personal involvement distinguishes the restorative justice approach”⁸

4. The primary victim(s) of a crime is/are the one(s) most impacted by the offense. The secondary victims are others impacted by the crime and might include family members, friends, witnesses, criminal justice officials, community, etc.

This principle delineates the different types of victims while recognizing that the secondary victims are and should also be a necessary part of the restorative process as they are impacted by the crime.

5. As soon as immediate victim, community, and offender safety concerns are satisfied, Restorative Justice views the situation as a teachable moment for the offender; an opportunity to encourage the offender to learn new ways of acting and being in community.

This point would be best described as the point at which the reintegration of the offender back into the community is actively undertaken.⁹

6. Restorative Justice prefers responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion, since healing in relationships and new learning are voluntary and cooperative processes.

This outlines a response to crime that is holistic and thorough, that deals effectively and respectfully with all parties to a crime in a participatory way.

7. Restorative Justice prefers that most crimes are handled using a cooperative structure including those impacted by the offense as a community to provide support and accountability. This might include primary and secondary victims and family (or substitutes if they choose not to participate), the offender and family, community representatives, government representatives, faith community representatives, school representatives, etc.

This is best illustrated in specific processes such as, family group conferencing¹⁰ and circle sentencing.¹¹ The idea is to engage the community in a more active way in participating in the resolution of conflicts.

Dignan, Jim, and Cavadino, Michael. *Which Model of Criminal Justice Offers the Best scope for Assisting Victims of Crime?* In *Support for Crime Victims in a Comparative Perspective: A collection of essays dedicated to the memory of Prof. Frederic McClintock*. Leuven University Press. 1998. pgs.139-168.

^{7*}This Subject is well discussed and laid out in both:

1) Bazemore, Gordon. “*After Shaming, Whither Reintegration: Restorative Justice and Relational Rehabilitation.*” Forthcoming in *Restoring Juvenile Justice*, edited by Gordon Bazemore and Lode Walgrave. Amsterdam: Kugler International Publications, 1997.

2) Van Ness, Daniel and Strong, Karen. *Restoring Justice*. Cincinnati, OH: Anderson Publishing Co., 1997.

⁸ Hudson, Joe and Galaway, Burt. *Restorative Justice: International Perspectives*. 1996. pg., 3.

⁹ Braithwaite, John. *Crime, Shame, and Reintegration*. New York: Cambridge University Press, 1989.

¹⁰ Maxwell, G. and Morris, A. *Research on Family Group Conferences With Young Offenders in New Zealand*. In: J. Hudson, et al. (eds.), *Family Group Conferences: Perspectives on Policy and Practice*. Monsey, NY: Criminal Justice Press, pp. 88-110. 1996.

¹¹ Stuart, B. (1996). *Circle Sentencing: Turning Swords into Ploughshares*. In: B. Galaway and J. Hudson (eds.), *Restorative Justice: International Perspectives*. 1996.

8. Restorative Justice recognizes that not all offenders will choose to be cooperative. Therefore there is a need for outside authority to make decisions for the offender who is not cooperative. The actions of the authorities and the consequences imposed should be tested by whether they are reasonable, restorative, and respectful (for victim(s), offender, and community).

This principle recognizes that by retaining voluntary, cooperative processes, there will remain certain parties that choose not to participate. If that choice is made, it is necessary to ensure that they are still provided as restorative a process and sanction as possible. One obvious omission from this principle is the recognition that victims may not be ready or willing to participate. The potential consequences for an offender to be denied restorative opportunities has to be considered as well as victims needing time to decide if they want to participate.

9. Restorative Justice prefers that offenders who pose significant safety risks and are not yet cooperative be placed in settings where the emphasis is on safety, values, ethics, responsibility, accountability, and civility. They should be exposed to the impact of their crime(s) on victims, invited to learn empathy, and offered learning opportunities to become better equipped with skills to be a productive member of society. They should continually be invited (not coerced) to become cooperative with the community and be given the opportunity to demonstrate this in appropriate settings as soon as possible.

This principle outlines the idea that Restorative Justice is not based definitively upon an abolitionists' perspective and the demise of correctional institutions. This principle is clearly suggesting that incarceration is needed in cases of public safety wherein the release of the offender will result in possible harm to the community or himself. It also outlines that if incarceration is to be used, it should not be used just for punishments sake, but rather as a tool to help better prepare the offender for his reintegrate back into the society in a restorative way.

10. Restorative Justice requires follow-up and accountability structures utilizing the natural community as much as possible, since keeping agreements is the key to building a trusting community.

Community involvement is not supposed to stop after a process is completed. Successful reintegration requires community responsibility and participation to ensure offender accountability.¹²

11. Restorative Justice recognizes and encourages the role of community institutions, including the religious/faith community, in teaching and establishing the moral and ethical standards which build up the community.

This recognizes that the community must take an active role in Restorative Justice processes and outcomes if they are to be a continuing success. Overall, these principles give us greater insight into what Restorative Justice truly is in theory so as to be able to operationalize this term in practical application of the declaration. When combined with the Marshall definition, it provides a structural framework from which to understand the U.N. declaration, as they did not specifically define Restorative Justice itself within the

¹² Braithwaite, John. *Crime, Shame, and Reintegration*. New York: Cambridge University Press, 1989.

basic principles. The main reason for this omission was to prevent an unintended limitation of the continuing dialogue on the concept of Restorative Justice.¹³

1.3 Defining Community

The term community is not specifically mentioned in the above definition, but cited numerous times in the eleven principles and needs to be examined. This examination will hope to underscore the problem of coming to an agreed upon definition for Restorative Justice and also help to provide a more detailed framework from which to understand the basic principles.

It seems like not only North American Restorative Justice, but Anglo-Saxon Restorative Justice theorists share a common belief on the concept of community as a party in restorative initiatives. They present community as a necessary element in Restorative Justice, perhaps even as the most basic element. On the other hand, it looks like outside of those countries, mainly in continental Europe, a legalistic perspective of the development of Restorative Justice is more relevant than community involvement. Legal safeguards, the position and participation of the State, and the connections between restorative initiatives and the traditional criminal justice system are more often included in the discussion of this philosophical framework in Europe.¹⁴

North American Restorative Justice was originally characterised by the focus on private approaches and the denial of the public-interest dimension. This is clear in Zehr's '*Changing Lenses*'¹⁵, and its focus on face-to-face victim-offender mediation. Community based initiatives had strong support in North America, not as Restorative Justice, but as Aboriginal Justice, Neighbourhood Justice Centres, and other such models (Marshall, 1987), and only lately became associated with the restorative ideas. Perhaps one of the most influential factors was the work of John Braithwaite¹⁶ in Australia. The concept of positively influencing offenders by being shamed by their community, favoured the idea of placing social control in the close community. Although some sustain that the Reintegrative Shaming approach is not part of the core of Restorative Justice, it clearly influenced the restorative ideas by engaging the community as a party in restorative oriented instruments.

Communitarianism has a different influence and effect on Restorative Justice. For some, it is one of the key concepts of the restorative approach, for others, it is too difficult to digest. The problem is that we keep on asking each other, every time someone uses this term: "what do you mean by *community*?" In Europe, some would say that they do not

¹³ Paul McCold, *Working Definition United Nations Working Party on Restorative Justice*.

¹⁴ Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth...Towards an Integrated Model for the Restorative Paradigm*. Unpublished paper presented at the 10th World Victimology Conference in Montreal. August, 2000.

¹⁵ Zehr, Howard, *Changing Lenses*. 1990.

¹⁶ Braithwaite, John, *Crime, Shame and Reintegration*. 1989.

have to talk about community, because they have it.¹⁷ There is an argument that the mobility rate of the North American population makes it necessary to defend the idea of community to link people to where they live. Bazemore and Walgrave (1999) underline the idea that when North Americans speak about the community, Europeans attribute that meaning of 'community' to the State or society. These types of cultural differences have to be kept in mind when considering the fact that the Restorative Justice definition is still far from being a completed one.

1.4 Defining Retributive Terms in a Restorative Context

There are a number of other terms that have to be addressed within the restorative context in order to best understand the central analysis of the United Nations Declaration. These terms include: punishment, due process and proportionality.

1.4.1 Restorative Punishment?

Punishment is a term that is much maligned in the Restorative Justice theoretical framework. One must begin with an examination of what is the traditional view of punishment, and is this notion incompatible with the principles of Restorative Justice? Von Hirsch clearly indicates that the sentencing theory of commensurate desert is based on the retributivist theory of punishment.¹⁸ The theory of just deserts does not provide a philosophy of punishment and thus refers to the rationale of retribution for justifying the use of punishment. Utilitarianism and retributivism have been used as a means to provide the rationales of punishment that have been reflected in the principles of sentencing theories within North American and European criminal justice systems to justify punishment. Von Hirsch further argues that just deserts provides a fair and equal distribution of justice using the principle of commensurate deserts, otherwise defined as proportionality, to guide the sentencing decisions. Thus the sentence is based on the individuals past actions and the seriousness and severity of the offence perpetrated. Punishment is given out because it is deserved.¹⁹

But how does one define punishment exactly? Is punishment a synonym for incarceration? Daly examined this issue and presented two levels of analysis.²⁰ There is a large meaning of punishment as a social institution as defined by Garland. In this definition, punishment is a complex and differentiated legal process that involves discursive frameworks of authority and condemnation; a repertoire of penal sanctions, institutions, and agencies. It also includes a rhetoric of images by which the penal process

¹⁷ Nadeau and Trujillo. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm*. 2000.

¹⁸ Von Hirsch, Andrew. *Doing Justice*. (1976)

¹⁹ Gapp, T., Tavcer, S., Daems, T., A Comparative Analysis of the Electronic Monitoring Programs in Belgium and California: Within the Theoretical Framework of Old and New Penology. Non-published paper. K.U.Leuven 2001.

²⁰ Daly, Kathleen. *Does Punishment Have a Place in Restorative Justice?* Paper presented to the Australia and New Zealand Society of Criminology Annual Conference, Perth, 28-30 September 1999.

is represented to its various audiences.²¹ Disagreement occurs when one shifts from the large to the small meaning of punishment, as the examination turns to the tools used in punishing. Wright (1991) argues that whereas punishment is an intended deprivation, non-punishment is intended to be constructive. The result is that there is a certain amount of imprecision and variation in how people use this term. Some will argue that punitive sanctions are punishment, whereas the non-punitive ones are not, collapsing them both as one-dimensional. Daly further proposes that one conceptualize retribution, punishment, and punitive/non-punitive as separate dimensions, each having its own continuum of meaning.²² In the meantime, it is concluded that when these terms are used, we are not talking about the same thing.

What becomes clear in the restorative lexicon is that certain restorative advocates such as Fattah, link punishment directly to incarceration.²³ One has to then question whether or not sanctions such as community service, compensation, having to attend a counseling program, or restitution should be considered to be punishment, or not? Daly argues that,

“Restorative justice advocates should reconsider what punishment means. Rather than repressing or eliminating the term, it is essential that one should work with people’s everyday understandings of punishment and the emotions connected to it. These (approaches) may prove to be more malleable and less punitive than many have imagined.”²⁴

What does this mean in Restorative Justice terms? The conclusion would be that when one says punishment, one has to qualify what we mean. If certain restorative advocates say we should not punish for the sake of punishing, what they really mean is that one should not incarcerate someone for the sake of incarcerating someone. The end conclusion is that this term has to be further examined so that the controversy surrounding punishment within Restorative Justice can be solved.

1.4.2 Reparative Punishment

Having used this qualified definition, it opens a discussion on the concept discussed by Van Ness, that of reparative punishment.²⁵ He asks what is the appropriate response to a crime, and what punishment should follow? He argues that in a restorative framework punishment must contribute to reparation. So *reparative punishment* means the formalized steps taken by the offender to heal the wounds of crime or make amends for wrongdoing. ‘Formalized steps’ are those done as part of a state-supervised process.²⁶ It could be that this idea of reparative punishment is the vehicle through which one can

²¹ Daly, Kathleen. *Does Punishment Have a Place in Restorative Justice?*

²² *Ibid.*

²³ Fattah, Ezzat, *Support for crime victims in a comparative perspective*. Pg. 99-110.

²⁴ Daly, Kathleen. *Does Punishment Have a Place in Restorative Justice?*

²⁵ Van Ness, Daniel. *Draft: A Restorative Future for Juvenile Justice?* Paper Presented to the Restorative Justice for Juveniles Conference. Tuebingen. October, 2000.

²⁶ Van Ness, Daniel. *Draft: A Restorative Future for Juvenile Justice?*

reconcile the term punishment with Restorative Justice, without invoking the term incarceration.

1.4.3 Due Process

The term Due Process needs to be examined within the context of Restorative Justice. Due Process is a notion that counterbalances the potential misuses of power within the retributive system. This notion further protects citizens from the State's powers to arrest, prosecute, and carry out the sentence of a conviction (Van Ness and Strong, 1997 at 15). There are three notions within the definition of due process: the right to be presumed innocent, the right to a fair trial and the right to assistance of counsel.²⁷ One could discuss detailed arguments on how all of these due process rights are violated or put in jeopardy by restorative practices and how one could counter these concerns.²⁸ However, this is beyond the scope of this analysis and as such this analysis will concede that Restorative Justice programs do not always protect these rights, and argue that, in all cases it should not necessarily do so automatically. These three notions were put in place to combat State arbitrariness, whereas Restorative Justice principles of reparation, accountability, responsibility, openness and active participation may be inhibited by the strict application of said notions. It has to be understood that due process rights may be necessary in the current retributive system but may be inappropriate in a Restorative Justice context. What has to be determined is what guarantees and to what extent those guarantees should be extended to participants in this type of process. One has to look at restorative processes in the context of its unique approach, rather than to just import concerns from a process that is fundamentally different. Perhaps, due process rights are not as fundamental to citizens when there is a more open dialogue, active participation or an agreed upon solution or sanction. The main conclusion is that, due process rights may need to be strictly ensured within a restorative process, but before that decision is made, it is essential that one assesses this process with a different mindset than one would towards a traditional retributive process.

1.4.4 Proportionality

The term proportionality is also another term that has been 'borrowed' from the Retributive System that needs to be re-examined to determine if it is entirely applicable within a restorative context. The Declaration of Leuven on the Advisability of Promoting the Restorative Approach to Juvenile Crime stated that,

²⁷ Bassiouni, M Cherif. "Human Rights in the Context of Criminal Justice: Identifying Procedural Protections and Equivalent Protections in National Constitutions." *Duke Journal of Comparative and International Law* 3 (1993): 235. from http://www.restorativejustice.org/RJ2r_Due_Process.htm

²⁸ *Refer to http://www.restorativejustice.org/RJ2r_Due_Process.htm for a detailed account of these arguments on Due Process. For Due Process concerns of Young Offenders see http://www.restorativejustice.org/conference/UN/RJ_UN_EDumortier.htm .

“the outcome of any restorative process should not transgress a maximum which should be in proportion to the seriousness of the harm and to the responsibility and the capacities of the offender.”²⁹

This portion of the declaration was addressing the proportionality concern within the traditional system, but is the restorative version of proportionality the same as that which is discussed in retributive discourse? Commensurate deserts principle, - otherwise known as proportionality or just deserts – argues that the severity of punishment should be commensurate with the seriousness of the wrong (Von Hirsch, 1976:66). In the traditional context, proportionality was linked in large part to ensuring some form of proportional treatment for all in the context of sentencing, and in this context, sentencing is directly related to period of imprisonment. Von Hirsch’s internal composition of the scale argued that infractions of equal seriousness be punished with equal severity.³⁰ In all, proportionality has to be seen in its traditional context of being a counterweight to arbitrary punishment, in the form of disproportionate periods of incarceration. Whereas it has to be acknowledged that Restorative Justice processes are not including the same proportionality of punishment, that is a direct link between punishment and incarceration. This could be considered a relatively minor legal distinction, but it is an important one, in that legal norms related to the retributive system cannot be applied directly to restorative processes. When one discusses proportionality, it is imperative that one does not impose the just deserts model of justice into a restorative framework, because this is a fundamentally different paradigm of thought. There may be a need to safeguard this right, but one has to ensure to examine proportionality from a restorative context. In the very least, the notion of proportionality has to be reexamined and its’ applicability reaffirmed within a Restorative Justice framework. This distinction has to be kept in mind when one examines the text of the basic principles.

1.5 How to Measure if a System is Restorative or Not?

Now that a number of key terms are defined within the Restorative Justice framework, it is necessary to examine the question of how to define a process as restorative or not? The basic principle will provide a framework from which to do this in practice, although there is a missing theoretical discussion that is not included in that context that will be examined here. How restorative does a process have to be, to be considered Restorative Justice? This is a fundamental discussion amongst practitioners, theoreticians and policy makers. As the definition of Restorative Justice is not delineated within the context of the declaration, the assumption is validly made that this was done so as to not limit Restorative Justice when it is clearly a process, paradigm and theory that is still evolving. The assumption can be made that the basic foundations were being created so as to provide a strong restorative basis from which to build in the future. Van Ness argues that it is improbable that Restorative Justice will completely replaces all facets of a retributive system. It would be more likely that in an envisioned *restorative system*, the values and

²⁹ This was voted upon and adopted at the First International Conference on Restorative Justice for Juveniles. May, 1997. Leuven.

³⁰ Von Hirsch. *Doing Justice*. 1976. Pg., 91.

principles of restorative justice will be predominant and competing values and principles will be sufficiently subordinate that the system's outcomes will be more restorative than anything else.³¹ The question to be answered, is how predominant must a restorative system be to be considered a Restorative Justice system governed by restorative processes? Van Ness (2000) argues that a just process has three components:

“First, crime is followed by reparation (meaning victim services and reparative punishment). Second, victims, offenders and communities participate in determining and implementing the reparative punishment. Third, they do so in such a way that all parties make peace.”³²

He further outlines the definitions of all of these terms, but in this analysis, it is only necessary to demonstrate that there is a potential continuum for restorative processes to test their ‘restorativeness.’ Whether, this is the definitive one, or if changes are needed to be made to specific definitions, this example serves to illustrate two points. First, that not only is there a controversy over what Restorative Justice actually is, but second, there is uncertainty as to how restorative a system has to be, in order to be considered a restorative one. This continuum outlines three frameworks; the fully, moderately and minimally restorative systems to gauge the restorativeness of a process.³³ All of the three systems are based upon a sliding scale as outlined from top to bottom that allows the reader to determine how high on each of the three columns a particular process falls. This combination of the three columns would lead to the determination of which system the particular process better reflected, a fully, moderately or minimally restorative system. Van Ness argues that,

“A restorative justice system will need to have available, multiple options for each of the components in order to deal with the divergent circumstances presented to it. A restorative justice system will even have programs that are identified with current justice systems, such as places for incapacitation of offenders who pose a danger to others. The presence of these options should not lead us to reject the system as antithetical to restorative justice -- it is the frequency and reasons for usage of those options that will determine the restorative nature of the system.”³⁴

In concluding, it is important to state that these above mentioned specifics are not the most important point. Rather, it argues that restorative processes may very well have to work within retributive structures and even go as far as to accept the fact that some of their distinct features may be incorporated into the overall process. Claassen provides a similar tool, that he dubs the ‘J-Scale,’ a tool to measure Restorative Justice.³⁵ He argues that by using a continuum, it can be helpful in determining the outcomes of restorative processes to ascertain if our justice processes are actually implementing Restorative Justice. He utilizes a Likert scale continuum to convey the point that that ‘we are not talking about a simple either/or situation, nor are we likely to arrive at a place where it

³¹ Van Ness, Daniel. *Draft: A Restorative Future for Juvenile Justice?*

³² Ibid.

³³ To examine the Three Restorative Justice Systems in their entirety, refer to Appendix 1, Figure 1.

³⁴ Van Ness, Daniel. *Draft: A Restorative Future for Juvenile Justice?*

³⁵ * To examine this J-Scale, refer to Appendix 1, Figure #2.

cannot be improved.’³⁶ These examples illustrate that there is a debate as to how restorative a system must be to be considered Restorative Justice, and how to actually measure this differentiation. Both of which serve to underscore the fact that one dominant Restorative Justice definition has not been agreed upon, but a common basis from which to move forward with is comparable.

1.6 *Acquis Restorative?*

The final point of discussion in this literature review will be to determine whether or not there is enough in common in the restorative theoretical and practical framework discussed in this analysis to form an *acquis restorative*.³⁷ In European Community law, the French word ‘*acquis*’ is used in treaties and other legal instruments to make reference to the basics of the legal and political tradition guiding the European integration and synthesising previous developments always to be included and respected in future actions and by future members. Linking that word to Restorative Justice, we ask ourselves if there are similar grounds in Restorative Justice that are shared and accepted by all those involved in the restorative movement. Does a common restorative tradition or a common framework exist, and more importantly, is it extended world-wide? This leads to the need to attempt to identify a minimal common understanding of what Restorative Justice is, agreeable by all of us whether we are from North American, Europe, Australia, or the other corners of the globe.

1.6.1 Common Understanding of Restorative Justice?

Hudson and Galaway’s work is considered as the major contribution to the ‘rediscovery’ of Restorative Justice during the 1970s (Weitekamp, 1997). Another source often quoted is Nils Christie’s ‘*Conflicts as Property*’³⁸, written in 1976, in which the author argues for establishing an alternative to the penal system and to the professionals who deal with those conflicts. He defends the idea of an alternative, where the parties in a conflict themselves are active in the process of finding a solution to their problem. This alternative would be a system that is more oriented towards victims and their needs and wishes. He introduced the need to revitalise and strengthen local communities through an alternative way of dealing with conflict resolution, through the use of neighbourhood courts - an autonomous civil forum for conflict resolution - not because of the relevance from a crime preventive viewpoint, but because of the importance of such meetings themselves. This should be, according to Christie’s idea, a system of laymen in the role of mediators. The conflict then would be brought back to its proper owners so that reparation and reconciliation between the parties are made possible. Christie’s work has an important impact in consequent penal reforms not only in his own country of Norway, but also in the rest of the world. His ideas are mentioned in almost every introduction to

³⁶ Claassen, Ron., *The J Scale: Measuring Restorative Justice*. Center for Peacemaking and Conflict Studies. 1996.

³⁷ This analysis was first compiled in, Nadeau, J. Trujillo, J. *The End of the Restorative Justice Myth: Towards an Integrated Model*. Montreal 2000.

³⁸ Christie, Nils. *Conflicts as Property*. British Journal pgs. 1-14. 1976

Restorative Justice as one of the starting points and as one of the most influential analyses in the development of what only later would be called Restorative Justice, although the author's ideas were mainly based on an abolitionist perspective.

The first writer to create a really integrated and comprehensive model of Restorative Justice was Howard Zehr (Marshall, 1999), firstly in a small pamphlet called '*Retributive Justice, Restorative Justice*' (1985), and later in his book '*Changing Lenses*' (Zehr, 1990). Zehr presented Restorative Justice as an 'alternative justice paradigm', in opposition to each of the main aspects and principles underlying legal or retributive justice. In his vision through this new lens, he stressed the benefits to victims and enabling offenders to assume active responsibility in making right the wrong done, repairing the harm they had caused. Personal interaction between victim and offender, reconciliation and forgiveness, were presented as perfectly in line with Christian notions, and justified in religious terms.³⁹ Zehr's work was influential, and is still being presented world wide in other people's research, like the work of Umbreit, Wright and Harding. Those authors originally treated Restorative Justice as synonymous with victim-offender mediation and put the emphasis on private negotiations as a response to crime.

Other major influential works to be mentioned, and that are almost always found in the first pages of any book on Restorative Justice, are such authors as Wright (1991), Umbreit (1994), Harding (1982), and Bazemore and Walgrave (1999). Perhaps one work that needs to be specifically mentioned is '*Crime, Shame and Reintegration*' by John Braithwaite (1989). The idea of reintegrative shaming, as a positive instrument to reintegrate offenders back into their communities, in opposition to the alienating shaming of the State, has a great influence in the restorative theory and practice. This theory, originally a theory of social control, argues that offenders could be positively influenced by being shamed by their circle of acquaintances of their own community.⁴⁰ But in practice, they were negatively influenced by the alienating shaming the State uses in the form of criminal punishment. Social control should be moved from the hands of the State to the community as far as possible. He reinterpreted New Zealand's family group conferencing in terms of his theory and introduced that practice in Australia under the idea of practising reintegrative shaming. Van Ness (1997) suggests that the foundation of Restorative Justice could be based on three principles and four values. Bazemore and Walgrave (1999) accept those principles as 'the core principles' according to their view of restorative ideas. Van Ness explains that crime means more than law breaking, that it also causes injuries to victims, offenders and communities, whatever we decide to call 'community' and whatever size we intend to give to it. The three principles listed below are based on that first premise. Van Ness argued that,

“if crime means more than law breaking, then; justice requires that we work to heal victims, offenders and communities injured by crime; victims, offenders and communities should be given opportunities for active involvement in the justice process as early and fully as possible; we must rethink the relative roles and responsibilities of the government and the community.”(Van Ness, 1997)

³⁹ Zehr, Howard, *Changing Lenses*. 1990.

⁴⁰ Braithwaite, John. *Crime, Shame & Reintegration*. 1989.

Van Ness redistributes those tasks as, in promoting justice, the government should be responsible for preserving a just order and the community for establishing peace. In addition to these principles, Van Ness proposes four ancillary principles, basic values underlying Restorative Justice, namely *encounter, reparation, reintegration and participation*.

Braithwaite discussed a number of Restorative values that have to be added to this growing *acquis*. These Restorative values are also found in many international human rights agreements and include the values of:

“The Restoration of human dignity, of injury to the person or health, of damaged human relationships, of communities, and emotional restoration. This list also includes the Restoration of freedom, of compassion or caring, of peace, of empowerment or self-determination, of a sense of duty as a citizen, and also the values of mercy and forgiveness.”⁴¹

He argued that many people will find these values vague, lacking specificity of guidance on how restorative practices should be appropriately run. As it is necessary for standards to be broad if one is to avert legalistic regulation of restorative justice, which would be at odds with the philosophy of the new legal paradigm. The idea being that in the end, there is a need for deliberative regulation that clarifies the values we expect restorative justice to realise.⁴²

This paper would advocate that there is indeed a solid restorative foundation to build from when one includes; the Claassen principles, the aforementioned internationally influential common readings on Restorative Justice, in conjunction with the three principles and four values as presented by Van Ness and the Braithwaite list of restorative values. A foundation that would represent the basics of the philosophical framework that one could call an *Acquis Restorative*. This potential *acquis* is by no means completed nor entirely delineated, but this analysis has attempted to demonstrate the apparent foundation used in building the United Nations basic principles. This outlined *acquis*, in the very least, provides a solid foundation upon which to examine and understand the United Nations basic principles on Restorative Justice.

⁴¹ Braithwaite, John, *Standards for Restorative Justice*. UN Ancillary Meetings. Vienna. April 2000.

⁴² Braithwaite, John, *Standards for Restorative Justice*.

2.0 Analysis of the Declaration of Basic Principles on the Use of Restorative Justice Programs in Criminal Matters

This analysis will critically examine each individual principle of the United Nations Declaration of Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. The goal of this critical analysis is twofold. First, this analysis will attempt to isolate specific problems in the text from both the theoretical and practical viewpoints of Restorative Justice. Second, this analysis will then postulate potential suggestions as to how to address these potential problems and why it is necessary to do so. The end goal of this critical analysis is to ensure that through constructive criticism this declaration reflects the basic fundamental ideals and principles that underpin the Restorative Justice paradigm.

2.0.1. Definitions

2.1 “Restorative Justice Program” means any program which uses restorative processes or which administers restorative outcomes.

This definition is a composite of restorative processes and restorative outcomes, both of which shall be examined in greater depth individually. As such, one cannot provide further relevant analysis at this juncture.

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

The main issue that arises with this definition is from the standpoint of the victim. The interest in Restorative Justice alternatives has grown because its’ central focus is different from the traditional justice system by including the victim as a central player. If this principle is in fact one of the fundamental focuses of Restorative Justice then, it should be made explicitly clear that a *restorative outcome* has to have a more direct effect on the victim. In this definition, a *restorative outcome* is *any other program or response designed to accomplish reparation of the victim and community*, which is trying to be inclusive so as not to define a *restorative outcome* too narrowly. In order to serve victims more effectively, it is imperative that this definition be further expanded.

2.2.1 Practical and Theoretical Considerations

Practically, a better illustrated example of the impact on the victim that goes beyond a narrow view of *accomplishing reparation for the victim* would be appropriate to reflect the importance of the victims needs being addressed in a restorative outcome. A possible term that could be considered for this declaration to address this issue is ‘healing’.

Whereas this may or may not be the appropriate term within this context, a Restorative Justice outcome has to be intrinsically linked to more than just simple reparation for the victim. The problem with using reparation as a solitary term is that it is not delineated,

which leaves room for a wide latitude of options to achieve the desired goal. This lack of clarity may have been intended, but the result could be quite unintended, that being that this ‘goal’ of a restorative outcome would be directly linked to restitution alone. If this narrow interpretation is adopted there remains the possibility that states could misuse the ideal of Restorative Justice through the implementation of victim restitution schemes. Member states could simply enlarge or develop compensation funds - that many already have in place for victims of violent crime – and submit their ‘old’ policy as progressively restorative. Not only could they inaccurately call their schemes restorative outcomes, but they could further damage the ideal of Restorative Justice through poor practice. This result would tarnish the reputation of and future viability of Restorative Justice. Implemented in this way, this Declaration would result in a true disservice for victims. A disservice that would arise as we would end up with founding principles that would result in only half measures for victims, that in itself fundamentally contradicts the change that Restorative Justice is trying to affect. A possible practical solution would be to insert a word or phrase such as the following in the text:

“Examples of restorative outcomes include restitution, community service, and any other program or response designed to accomplish reparation **and / or healing of the victim.**”

‘Healing’ may not be the desired word, but there is a need for such a word or phrase in this context. If this addition was to be incorporated then it would ensure that restitution was not used as the lone tool to achieve victim reparation.

2.3 “Restorative Process” means any process in which the victim, the offender and/or any other individuals or community members are affected by a crime participate actively 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 has two important issues within that must be addressed. Both of these issues can result in the exclusion of stakeholders from their own process and it is this potential exclusion that will be in the analysis of this definition. The first issue arises from the underlying assumption in the definition that Restorative Justice process *must include* both the victim and offender and / or any other individuals or community members if it is to be considered a restorative process. The second issue relates to the first and derives from the examination of the words, *participate actively*. The latter will be addressed first and the former as a part of that discussion.

2.3.1 Actively Participate

It is stated that restorative processes should be available at all times throughout the criminal justice process. If this principle is to be applied then the scope of this declaration cannot be so strictly limited vis-à-vis the term actively participate. If this incongruity is not reconciled then a restorative process would not be able to engage in helping to reintegrate an offender at the end of his sentence in a situation where the victim was unwilling to be a party. While in an inverse situation where a victim wants to proceed from the outset in a restorative way but the offender is not ‘ready’ to be held accountable

or to take responsibility, does the system simply exclude the victim from other restorative processes that would help them regardless of offender involvement?

The restorative process definition states that in order for a process to be considered restorative, those different groups *affected by a crime participate actively together*. The consequence that follows from this strict definition is that the victim and the offender and/or any other individuals or community members who are affected by a crime all have to be involved and have to participate actively together. The result of this delineation is that our definition has in fact become very specifically limited. If this is the intention of the text, then the crafters of this document are excluding certain groups from restorative processes and this exclusion has to be addressed. If this is not the intention of the definition then it needs to be made clearer so that in practice that exclusion will not be the unintended result. These issues have to be considered within this context before a decision is made.

Regardless of how this definition was intended to be interpreted, in both of the above mentioned explanations, there are four repercussions. The first consequence of a strict interpretation is that we effectively rule out Restorative Justice where both or all parties cannot work together in an encounter setting. This would limit Restorative Justice processes to only mediation, circle sentencing and or conferencing, if and only if, a face-to-face meeting were to occur, this in turn leads to the next three outcomes.

Firstly, that this type of restorative process would in most cases only be applicable for minor crime. The reason for this conclusion is that in the instances of serious crime, direct, face-to-face active participation is not always possible, necessary or advisable, especially in cases of spousal abuse or violent sexual crimes. Secondly, in a process such as mediation, it is the process that is in itself important, not exclusively the face-to-face encounter. This type of encounter is a laudable climax, however, it is not in many cases necessary to the restoration of the victim or offender.⁴³ It is the process itself of dealing with a crime, the discussions, therapy, openness, acceptance and accountability that helps to bring about the 'resolution' that we state is the goal of the process. The way in which this definition is now worded, the emphasis is placed upon the actual meeting, which may or not be relevant in all cases to the final objective nor a necessary part of the 'process'. The final outcome is that this declaration using this unclear definition will be delineating a vision of what is and is not a restorative justice process through its exclusivity, a view that is, in the very least, controversial.

2.3.2 *Theoretical Considerations*

This issue leads into a theoretical debate that is fundamental to the future of Restorative Justice on an international scale, a discussion of what process is more or less fully or

⁴³ David Gustafson, Toward a Justice that Heals. *Address to the prison Governors Leuven, Belgium*. Sept.11/97.

partially restorative.⁴⁴ While, this debate is controversial, there is an acknowledge need to begin an overall process of separating bad practices from the best practices. The theoretical discussion will necessitate that a decision is made regarding certain programs that would undoubtedly fall under the category of partially or moderately restorative according to the strict definition of a restorative process. This declaration, while trying to be inclusive is in fact stating that a process has to be fully restorative or it is not a restorative justice program, which is a bold path to choose. A specific example to illustrate this point begins with a process that helps heal the victim. Whether this is through restitution, therapy or just plain information sharing, any such process that helps the victim to deal with the aftermaths of a crime and to heal, should be considered restorative in nature. If these restorative measures are taken without the direct involvement of the offender have we not had a process that was restorative for the victim and the community? Conversely, if the victim chooses to not cooperate for personal reasons in the process yet the offender takes steps to take responsibility and accountability for his actions with the end result being a successful reintegrated offender into the community, has there not been a restorative outcome? Is the community not safe and restored again? Succinctly, if a program is only able to help a victim in a restorative way or conversely only the offender and this process is able to repair the harm that was inflicted, for at least one of the parties, is that not a restorative process? Therefore, if this declaration states that a restorative process is one that includes *the victim and offender and / or individuals involved or concerned community members who must participate actively together in order to resolve the matters arising from a crime* then it can be intrinsically interpreted in practice to state that a restorative process has to be fully restorative in order to be considered Restorative Justice. As debatable as this discussion is, caution has to be taken before a unilateral decision is made to choose this definition as ‘the’ definition because we will be automatically excluding potentially effective tools in the Restorative Justice arsenal. Van Ness broached this debatable subject in his three models of Restorative Justice, it is imperative that this declaration does not cut short the badly needed discussion in this area of how restorative a process must be, before it can be called Restorative Justice?

In conclusion, by not specifically deciding, we are choosing a path and that path may have unintended consequences. In the future, when a competent body such as the International Court of Justice, the International Criminal Court or a National Legislature attempts to apply these restorative principles using these guidelines as a template, they will attempt to ascertain what exactly the framers of this document intended. Thus it has been demonstrated that by having chosen to elucidate this definition in its current form, a very specific course may very well have been chosen in practice. This will result in a restorative process and by extension Restorative Justice that can only be realized or implemented ‘if and only if’ it deals with all parties together. The caveat here is that we have to at least be aware of the magnitude of this decision and ultimately choose if this is the type of restorative process that should be considered.

⁴⁴ Dan Van Ness, *The Future of Restorative Justice*. A Paper presented at the Tuebingen Conference on Restorative Justice for Juveniles in October of 2000.

2.4 “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 program.

The issue of what is a community has to be addressed within this context. There is a great debate within the realm of restorative justice theory as to what constitutes a community.⁴⁵ The concept of cultural relativity has to be brought into the equation when discussing community. Cultural relativity is a concept that means that any type of process has to take into account different cultural norms and situations before it can be implemented effectively. Thus any restorative process has to be altered to make it culturally specific so that it is relevant for different populations. With this in mind, if there is only one definition of community, or if it is left undefined, then there could possibly be a problem with the implementation of certain processes within a community for no other reason than it was designed for different cultural imperatives. Practically, this document is wise to limit a community in this context to *community members affected by the crime*, which is sufficiently broad to allow different cultures to be as inclusive as their society demands without specifically excluding any one group. The restorative debate about the true definition of community is an ongoing one, and in this instance, an open definition may be the appropriate response.

2.5 “Facilitator” means a fair and impartial third party whose role is to facilitate the participation of victims and offenders in an encounter program.

The wording of this definition may actually limit the role of the facilitator in a detrimental way. A facilitator in this definition is limited and restricted into a role of being solely a facilitator of an encounter program. If this limitation is indeed too restrictive, it is necessary to decide if this is a desired constraint? One way to address this issue is to determine if the phrase ‘main role’ should be added to the definition? A facilitator would then be a *fair and impartial third party whose main role is to facilitate the participation of victims and offenders in an encounter program*.

The negative impact of this potential restriction can be seen within the setting of a mediation. In this context, the facilitator is not simply the person involved in the actual meeting, but important throughout the entire process. It is these other duties that make up the majority of the actual work done within this entire process. It is necessary to then determine if the definition of ‘facilitator’ in this declaration has to be expanded to acknowledge the wide-ranging duties of a facilitator or if it is sufficient as it stands now.

2.6.0 Use of Restorative Justice Programs.

2.6 Restorative Justice programs should be generally available at all stages of the criminal justice process.

To have this principle implemented in practice and not only in theory will be a difficult undertaking in most Member States. The implementation of this principle is in theory an important first step towards the acceptance of Restorative Justice practices. Essentially, this allows for states to phase in restorative practices and undertake pilot programs

⁴⁵ Refer to Section 1.3 in the Literature Review for more detail.

without having to also commit to entirely altering their existing justice systems. That said, it is imperative that there are Restorative Justice alternatives at all stages of the criminal justice process. The encouragement of this principle is that it provides a mechanism to allow for the gradual adaptation of criminal justice systems into more restorative ones over time. If a Member State has reservations about implementing restorative processes at the investigation and trial phases, it has the mechanism in place to experiment with implementation of restorative processes at other points along the continuum. This would ensure that all parties could access these services and be allowed restorative responses to crime.

This is illustrated best from the perspectives of both the victim and the offender. All people respond differently to trauma and victimization and in the instance of a victim or an offender, some take more time to be able to properly deal with the aftermath of a crime. It is imperative that neither of these parties is pushed into a process when they are not ready, and doubly as important that neither is denied a restorative alternative because of that inability to participate.

2.7 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 proportionable obligations.

2.7.1 Free and Voluntary Consent

The first sentence of this article states that a *restorative processes should be used only with the free and voluntary consent of the parties* and this distinction has certain consequences and implications attached to it for both victims and offenders. Firstly, the victim should only be involved if he or she gives their free and voluntary consent. This concept is very important as a victim should only be a part of a restorative process at the point in time in which they feel that they are ready to do so. If this course of action is to be followed, then it will result in certain policy implications.

First, if a victim does not want to be involved in the early stages of this type of criminal justice process then an offender could be denied a valuable opportunity to take responsibility for their actions from the outset. This lost opportunity could very well damage their possibilities for fully taking accountability and reintegration into the community. It also could result in unequal treatment from one person to another as a trend of disproportionate sentences and sanctions could be applied in absence of restorative alternatives. This would be exemplified in a situation wherein one victim were willing to use a restorative process and another not, the result being that the sentence that the offender received in the traditional setting could be disproportionate to that agreed to in the restorative outcome. The current criminal justice system, if it hopes to avoid revictimization, has to achieve a balance between attempting to be as restorative as possible throughout all stages of the proceedings while ensuring that the victim is not forced into a process they are not comfortable with or ready for.

Secondly, the issue of *free and voluntary consent* of the offender is a contentious one. The fact remains that as long as state instruments are involved within the realms of criminal justice, there is going to be a necessary component of state repression involved, which contradicts any notion of free and voluntary consent. The conflict revolves around whether or not a restorative process can or should have any elements of repression or coercion in it? While it is debatable that a state cannot force an offender to be accountable or responsible through repressive strategies, it can be agreed that an element of coercion is needed to ensure that offenders face up to their norm breaking behaviour. There has to be a way to reconcile this Claassen principle with necessary state coercion and control. In the very least, states have to ensure that the consequences imposed, if a restorative response is not utilized, are reasonable, restorative and respectful.

2.7.2 Ability to Withdraw Consent – Practical Issues

The second sentence of this principle allows for all parties to be *able to withdraw consent at any time during the process*, which is a central idea of the restorative system. This clause has two practical policy implications that deal with potential problems of the process. The initial issue is connected to the 6th principle of this Declaration that states that *Restorative Justice processes should be generally available at all stages of the criminal justice process*. It is imperative that if the latter and the former principles are to co-exist then there has to be viable and accessible processes in place for participants to utilize. This needs to be done in order to ensure that those who wish to withdraw consent do not feel implied pressure to continue or risk losing out on any type of restorative alternative. If a participant withdraws their consent and involvement, then they must be able to reinitiate a Restorative Justice program at a different stage in the proceedings. It must be implicit and explicit that neither party should be deprived of the possibility to attempt to repair the harm that was committed at any time, even if they previously withdrew. It has to be underlined that this process is not sole opportunity to try the restorative system, it has to be readily accessible for all parties. If this is not the case, people will in practice feel they do not have the ability to withdraw their consent at any time due to unfair pressure to participate that may be real or perceived. Until restorative processes are available in all systems, at all stages, steps will need to be taken to minimize this pertinent concern.

The latter practical issue is that if one of the parties withdraws their consent and involvement in the process does this necessitate that the entire restorative process stops? Practically, is it possible for the process to continue on for those who are interested in doing so, if there are ways in which to accomplish this? This problem relates back to a previous issue within the sphere of definitions, as processes are defined as those within which the parties actively participate. This problem is highlighted again as the possibility exist wherein the value of the restorative process itself can be negated if those who want to continue in a different form or variation of restorative process are not allowed to as a matter of policy. Concretely, if parties are able to withdraw at any time and that decision ends any type of restorative process for both parties, then this whole restorative approach is in jeopardy. A restorative process could easily become immobilized as people could, acting in bad faith, threaten to quit the proceedings in exchange for concessions or simply

just result in a system stuck at a stand still. Either scenario would result in a failed restorative process and all parties would be without viable alternatives to the current justice system. Putting this issue in the context of the Van Ness graduated systems of Restorative Justice makes things become more salient.⁴⁶ In that example, it is possible to meet the threshold of a moderately restorative process without the inclusion of one or more of the parties. The ultimate question in this context is how restorative do we insist that a process be, to be considered a restorative process?

2.7.3 Reasonable and Proportionate Obligations

The final issue in this section addresses the contention that agreements should *contain only reasonable and proportionate obligations*. This concluding principle sounds like a legal necessity that implies fairness and justice for all, what it does say implicitly in terms of Restorative Justice is far more insidious. The term proportionality, as discussed in the literature review, is a legal one deriving directly from the retributive model of justice. It is a legal instrument that is directly equated with punishment, sentencing and in the theoretical sense, the theory of 'Just Desserts'.⁴⁷ In the context of Restorative Justice, it is necessary to acknowledge that proportionality may have a different meaning than it does in the Retributive System. As such, the same levels of importance attached to this term may not be applicable as proportionality takes on a different balancing of priorities.⁴⁸

2.8 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.

2.8.1 Effective Procedural Safeguards

There are three issues that arise from this principle, the initial two relating to the need to have effective procedural safeguards and the latter examining a basic difference between restorative and retributive systems. Firstly, this principle states that parties need to concede the basic facts of the case, which in most instances means that the offender has to acknowledge his guilt as a precondition for participation. In practice what this does is exclude those who dispute their guilt or responsibility in the criminal act. Where an offender is already incarcerated for a crime, this pre-condition is logical as it is a part of the process of accountability that comes after he is found factually guilty. What about those situations wherein the facts are still in doubt? Does this not limit Restorative Justice in practice to those situations where people have pleaded guilty if restorative processes

⁴⁶ See Appendix 1. Figure 1.

⁴⁷ Von Hirsch, Andrew. *Doing Justice*.

⁴⁸ * This difference in definition for proportionality between the retributive and restorative processes is outlined in the Literature Review. In short, the main difference is that in the retributive process, proportionate refers to the sentence of incarceration given out, whereas in the restorative process, the sanctions are of normally of a different nature. This difference has to have some implication in the relative importance of proportionality to both systems.

want to be incorporated into the justice system at the front end?⁴⁹ If restorative processes do not make concessions so as to be able to deal with those at the initial stage of establishing the truth, then it will continue to miss out on conducting restorative outcomes to a large segment of the population. However, the term *should normally* provides a flexibility that could be a potential remedy to this problem. Nevertheless, it does not go far enough to dispel fears that future practice could very well exclude growth of restorative processes into new areas.⁵⁰

Secondly, these restorative principles reflect the ideal that restorative processes must not be inadvertently used as a further state instrument of coercion and repression. There have been concerns that within restorative processes explicit threats could be made to offenders to coerce them into participating. The threat being that if they refused to participate, then they would be vigorously prosecuted as a consequence.⁵¹ Acknowledging that there is a need for both state coercion and repression in dealing with judicial matters, there has to be a balance between ensuring that parties will not be forced into a process that they are not interested in and guaranteeing that offenders are held accountable for their actions. If a restorative process is to be used and applied in good faith, then there has to be trust and free will - to a certain degree - from all parties involved, including the state. Essentially, criminal justice officials must ensure not to use the option of a Restorative Justice process as a 'carrot' to encourage offenders to take responsibility; with the only alternative being a large 'hammer'.

2.8.2 *Legal and Factual Guilt and Taking Responsibility*

The final issue of note is the difference between legal and factual guilt and taking responsibility. Firstly, if an offender is found factually not guilty, then one would argue that the importance of the offender having to take responsibility for the harm caused would be negated. However, if an offender was found 'legally' not guilty but was in actuality factually 'responsible' there is a moral dilemma and an ethical obligation present. That being that the offender has to take responsibility for his actions and the harm that was committed to the victim and the community, and that the state must be the one that guarantees that these obligations are met. Whereas states and judicial systems have traditionally wanted legal certainty, if restorative principles are to be upheld by governments, then this conundrum must be addressed in whole or at least in part. A restorative process from the outset attempts to deal with the problems that were actually caused, whether a court does or does not find the alleged offender to be technically guilty. There needs to be an examination of this fundamental legal premise if Restorative

⁴⁹* Restorative processes such as circle sentencing ultimately establish the truth, as it is determined within the process. But there is no restorative process that acts to replace the fact finding role that is undertaken by the traditional trial process.

⁵⁰ Specifically, there is a need to begin the discussion on how and if Restorative Justice can be used in International Settings or at a Collective level of victimization. There is a need to determine if there is potential to have a restorative centered system that has a process that begins at the fact finding stage and moves through to a final restorative outcome that deals with international crimes.

⁵¹ Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm.*

Justice is to be widely implemented or if more victims are to be served. This examination would then lead to a possibly solution to the final question that arises. This question asks, if the court finds the offender to be ‘legally’ not-guilty does that negate the real harm that has been actually inflicted upon the victim and the community? This very situation is the one that has disillusioned the general public with the traditional retributive system and its inability to repair the harm that has been caused. Once again the mentality difference between the retributive and restorative systems cannot be overlooked when applying process. Perhaps more of a focus on restorative processes and less on technical legal issues would serve justice more aptly and serve the public more effectively.

2.9 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 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.

2.9.1 Power Imbalances

This principle takes on greater importance when restorative processes of a more serious nature such as inter-familial abuse and sexual crimes are considered. Restorative processes that have dealt with these serious issues have generally been offender driven programs, which has been a valid criticism from various victim rights advocates and organizations.⁵² This perception has led to misinterpretations, misunderstandings and mistrust of restorative processes by advocates in these areas and their concerns must be addressed adequately. The state has an obligation to not propagate power imbalances inherent within the system.⁵³ Victim advocate groups tend to argue that government processes tend to be offender driven and examine victims needs and concerns as an after thought, if at all, as they are used as tools to convict or conversely reintegrate the offender. They argue that in these restorative processes there can then be an inordinate amount of pressure by the state placed upon crime victims to participate.⁵⁴ This pressure could then lead to the subordination of the needs of the victims by those of the offenders causing further harm. It is concerns like this that maintains the trepidation felt towards Restorative Justice by victim advocacy groups.

2.9.2 Safety Issues

The next sentence in this principle focuses on the important need to ensure that the physical and psychological safety of victims of crime should never be taken lightly. It has to be highlighted that these concerns are paramount if revictimization is to be avoided, this cannot be understated or overlooked.

⁵² Llewellyn, Jennifer, Howse, Robert, *Restorative Justice ~ A conceptual framework*. (At Footnote 102)

⁵³ Reeves, Helen *The victim support perspective* in Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community*. Pg., 47.

⁵⁴ Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm*.

2.9.2 Consultation of the Parties

The last underlying concern regards the final sentence in the principle that argues that *the views of parties themselves need to be considered about the suitability of restorative processes or outcomes*. One of the biggest problems is that this is a great theory and aspiration, but that little will be done to consult any of the parties before any restorative process is implemented. This is substantiated by the fact that there has been little to no critical empirical research to date that substantiates what crime victims and offenders see as suitable processes and outcomes for their conflicts.⁵⁵ Most processes have taken an interesting idea and attempted a pilot project, with this concern being only thought of after the fact. This is a specific area that needs to be researched if restorative practices are to pay more than lip service to this principle. As things stand, parties are not adequately informed about what options there are available. There has to be an effort to achieve greater transparency if the community, victims and offenders are going to be able to appreciably judge the suitability of using restorative alternatives and outcomes.

2.10 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.

2.10.1 Impossible Restorative Processes and Outcomes?

There is a need to examine the apparent underlying assumptions in the phrase, *where restorative processes and/or outcomes are not possible*. The assumption here is that there are some restorative processes that do not, in fact, work. Why has it already been determined that certain restorative processes will not work and who has determined in an empirical manner that all or some restorative processes in fact are tenable or unsustainable? One does not want to put forth restorative processes as the panacea to the world's problems, but placing arbitrary limitations down from the outset, can hardly be seen as constructive. It is imperative to shift the focus to try to ascertain where the potential is in using Restorative Justice alternatives, not to assume that there are areas of impossibilities in advance. A possible solution to this would be to insert the words, *within existing Criminal Justice Systems* at the end of the aforementioned sentence. This would serve to clarify that this declaration is examining restorative processes within existing Criminal Justice Systems and that a judgement is being made as to Restorative Justice potential. There would then be a further need to empirically test and research the extent to which restorative processes can and cannot be possible.

2.10.2 What is a Restorative Outcome?

The second issue to be examined is that the latter part of this principle is in fact a restorative type outcome in and of itself. The intention of this principle is to submit that

⁵⁵ Daly, Kathleen. *Does Punishment Have a Place in Restorative Justice?*

when restorative processes and outcomes cannot be accomplished, officials should do all they can to encourage responsibility, reintegration and other restorative ideals. This analysis contends that if these actions are effectively carried out, then they are in reality engaging in a restorative process that will result in a restorative outcome. If criminal justice officials were to do all that they could to encourage the *offender to take responsibility vis-à-vis the victim and the reintegration of the victim and/or offender into the community* when a restorative process and/or outcome is not possible, then is this not a restorative justice outcome itself? In this instance, restorative principles are being used to help repair the harm that has been inflicted upon the community and if this is undertaken then can the result be considered a restorative outcome?

The problem is that this declaration has defined restorative outcome and process far too definitively as discussed previously. This argument helps to further question the notion of *where restorative processes and/or outcomes are not possible*, because if this action is in itself an outcome then our options of where a restorative processes do not work has been significantly narrowed? To answer this concern, perhaps an emphasis could be that part of the process that leads to a restorative outcome is the responsibility placed upon criminal justice officials at different stages of the system to do all they can to encourage restorative outcomes. A practical example being that in a situation where there is no potential for the parties to come together to find a solution, the presiding judge could try a restorative approach in the sentencing phase. This would therefore remain true to restorative principles and contribute to a restorative outcome in the end. The conclusion is that since the boundaries of where and what restorative processes are limited, innovative and alternative approaches have to be taken to allow for reparation, responsibility and reconciliation to occur.

2.10.3 The Need to Consider the Theoretical Basis of Restorative Justice?

The final hypothesis is that the total sum of the parts of Restorative Justice are more than how they are simply structured in the definition section. In the very least, the defining of Restorative Justice that is effectively accomplished by this document has to be more inclusive and expanded. The fact is, Restorative Justice is not defined in this declaration and the idea that Restorative Justice is more than simply a process or outcome is reflected in the definition and principles used by the Working Party who constructed these basic principles. The Marshall definition and Claassen principles reflect that Restorative Justice is more than just a legal definition, it is a way of thinking and a mentality change that is entirely different from that of the current mindset of the Retributive Justice System. It cannot be understated that this mentality shift is important to the proliferation of the restorative model. One can construct a structure, but if the underlying values and norms are not considered when this model is applied, then Restorative Justice will be a failure before it begins.

2.11.0 Operation of Restorative Justice Programs

- 2.11 Guidelines and standards should be established, with legislative authority when necessary, that govern the use of Restorative Justice programs. Such guidelines and standards should address:**
- a) **The conditions for the referral of cases to Restorative Justice programs**
 - b) **The handling of cases following a restorative process**

The establishment of guideline and standards is a necessity as far as promoting and legitimating restorative programs. The first two points are necessary if Restorative Justice programs are to be effective when implemented, and are rather clear as to not need further examination or explanation. Points 'c', 'd', and 'e' all need to be examined in further detail.

2.11.1 c) The qualifications, training, and assessment of facilitators

There is a need to ensure quality control as to the qualifications, training and assessment of facilitators although a balance needs to be struck between two differing restorative philosophies on the make up of who a facilitator actually should be. There are two main schools of thought, the first argues for an informal non-beaurocratized Restorative Justice facilitator and the second group that recognizes the need for highly trained and qualified facilitators.⁵⁶ This issue will be addressed more thoroughly in section '2.17 Facilitators.' The emphasis in this context is to introduce this argument as a central issue to the core ideals of a restorative system. The end result that has to be kept in mind is that how well trained facilitators are and what level of education and standards that will be required for facilitators will definitively and unequivocally have a serious impact on the future composition of Restorative Justice processes.

2.11.2 d) The administration of Restorative Justice programs

There is a need to formalize or in the very least legalize Restorative Justice programs and its administration, however, any such body of guidelines must keep in mind that a Restorative Justice system is by nature different than that of the traditional retributive system. This recognition has certain ramifications as traditional measures of judicial system effectiveness such as cost-effectiveness, reduced recidivism and satisfaction rates may not be the most effective tools in terms of judging Restorative Justice program effectiveness. This is not to diminish the measurability or success rate of restorative programs within the scope of these issues as the limited research that has been conducted has shown positive results in this regard (Braithwaite; Umbreit; Daly) Most of these limited studies have shown that Restorative Justice programming is in the very least as effective if not markedly better when compared to traditional criminal justice system programs. Nevertheless, as comparable as these tools may be, if the differences in mentality between the restorative and retributive systems is not acknowledged then there will be negative repercussions. There could be the possibility that Restorative Justice as an alternative justice system would fail because it is being judged by the wrong set of rules and regulations. An example of this would be if governments were to compare

⁵⁶Dumortier, Els. Neglecting Due Process for Minors: A Possible Dark Side of the Restorative Justice implementation?. U.N. Ancillary Meetings. Vienna. April 2000.
http://www.restorativejustice.org/conference/UN/RJ_UN_EDumortier.htm .

apples (the Retributive System) and oranges (Restorative Justice) and conclude that the outcome of making sauce of the latter as ineffective because it does not result in similar tasting ‘apple-sauce.’ Simply put, analogies aside, the need to formalize and legalize the restorative process is apparent but it should not be evaluated by the same criteria as the system that it evolved as a response to. If Restorative Justice is to be held to the same criteria for measurement as the retributive system, yet has different fundamental principles underlying its construction, then it will be doomed to failure before it is given an opportunity to grow. This base difference has to be considered in the construction of any such guidelines or evaluation process

2.11.3 e) Standards of competence and ethical rules governing operation of Restorative Justice programs

There is a need for such a set of ethical rules and guidelines governing the operation of Restorative Justice programs. This is a process that has to be undertaken after having examined the *acquis* restorative very carefully. This *acquis* would be the central core beliefs, common values, practices and standards that can be found amongst all restorative programs and that should be the basis of this declaration. This declaration is a first step towards properly defining those core values while room needs to be left for this area to evolve and grow effectively. If a restrictive set of rules are set out prematurely, it may negatively affect the evolution of the restorative *acquis* in the future. The Working Party, as discussed in the Literature Review, acknowledges these core ideals in constructing this declaration. Unfortunately, this declaration fails to even acknowledge these principles within the construction of its definitions, which leaves the fundamental foundation of the restorative paradigm unclear and without context. Without the guiding principles of Restorative Justice more clearly defined, we leave the application of restorative processes to Member States. In this instance, they can do as they see fit, which could very well result in situations where they may follow the letter of the law in the form of the declaration but most definitely not the spirit of the law, vis-à-vis the guiding principles of Restorative Justice. This analysis is not suggesting at this time a type of suffocating regulatory approach, but the central core of Restorative Justice must be acknowledged before it is marginalized through wrongful application.

2.12 Fundamental procedural safeguards should be applied to Restorative Justice programs and in particular to restorative processes.

Fundamental procedural safeguards are necessary in any governmental legal setting, including Restorative Justice. The question one must ascertain is whether or not the restorative context provides the same legal and procedural safeguards for both offenders and victims as they currently enjoy in their respective legal systems. It is imperative to note that these procedural safeguards do not necessarily reflect specific fundamental Restorative Justice principles, nor it could be argued, should they. It must be observed that by integrating these principles – while commendable – we are setting out Western legal and judicial thought and mentality to a process that came from a traditional origin that did not have these core principles as central ideals. In the Western legal setting it has to be determined how far due process rights should be extended in so far as to not undermine restorative processes. It is common in many Restorative Justice initiatives that the offender has to admit guilt as a pre-condition to being allowed to participate, thus

negating an absolute right to due process norms if the offender wants to proceed from the outset in a restorative way.⁵⁷

Restorative Justice programs are supposed to be processes that people understand, in the traditional setting, local law and custom worked because people understood its value and the merit of their actions and participation in that system. Cultural relativism has to be at the forefront of any Restorative Justice program. Not only does Restorative Justice have to be adaptable and beneficial for local, provincial or federal settings, it has to be equally adaptable for differing international cultural situations. This means that in some cases Restorative Justice processes may be in conflict with strict due process norms. This is not an argument to allow for lax guidelines and principles that would undermine human rights concerns or provide for bad practices but a reminder that Restorative Justice is supposed to be culturally relative. That means that in some cases this ideal of due process in whole or in part may be a hindrance in the attempt to repair the harm that was committed to a victim, offender or the community.⁵⁸

Finally, if strict Due Process rights are to be observed and integrated into this declaration then, it has to be acknowledged and understood that there may be adverse fundamental changes made to Restorative Justice principles. Practically, this could change the very nature of restorative processes. These potential consequences shall be examined in greater detail in the following sub-sections on safeguards of this analysis.

2.12.1 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.

This is arguably a necessary standard, but it is a principle that brings up at least one concern. Are we in practice setting standards that many states or local governments can not meet and thus miss out on the opportunity for the application of Restorative Justice principles because certain judicial and legal norms can not be met. A concrete example of this conundrum is demonstrated in the case of the Rwandan Gacaca. The Gacaca is a process that contains many restorative elements and that is going to be implemented on the National level for survivors of the Genocide. This collective response will attempt to effectively deal with 115,000 offenders charged with crimes against humanity and genocide.⁵⁹ It is impossible to say that all of these people should have adequate legal representation or advice before or after the process. If that were to be the case, then this initiative would not be possible and an excellent attempt to heal the conflicts and harm suffered by a nation would be lost. This analysis is not arguing that the Gacaca is an example of a Restorative Justice process at a Collective Level, as it is at best a moderately restorative process. The importance of this example is to demonstrate that a

⁵⁷ Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm.*

⁵⁸ In processes such as Family Group Conferencing and Circle Sentencing and the Gacaca, due process in the strictest sense may not be possible as different procedural norms apply. The main differences with due process in a restorative process compared to a retributive process are outlined in the Literature Review.

⁵⁹ *Rwanda Plans Impressive Logistics For New Court System.* Hirondelle News Agency (Arusha) April 30, 2001. <http://allafrica.com/stories/200104300375.html>

process like the Gacaca has a number of restorative ideals and principles as part of its' ethos and has the potential to be considered a restorative response to collective forms of victimization. Currently, aside from Truth Commissions, there has been little attempt to apply Restorative Justice to instances of mass victimization or international crime, which is something that Restorative Justice theorists and advocates have to now examine. The further importance of the Gacaca example is to demonstrate that if such a process was to be even examined as a potential restorative process it could be disqualified outright. This disqualification would be as a result of the strict application of this declaration, as the Gacaca could not meet the burden of this principle.⁶⁰

What has to be made evident is that these processes themselves have to be understandable for the average person as argued previously in this analysis. If this burden is not met, then such a program will be ineffective by design and result in a process in need of a new group of 'legal professionals' to act as interpreters for ordinary citizens. That would produce a system that was out of touch with the common man and unable to deal with the aftermath of mass victimization and crime, much as the traditional justice system has become a process that has failed in that regard. In summation, this safeguard should be a feature in most restorative processes, while those same processes must ensure that every participant understands the process and their role within that structure. The term, *should* allows for restorative processes to continue where this is impractical or impossible to be totally applied in certain jurisdictions. What this safeguard does is potentially limit the scope of restorative processes from dealing with crimes on the collective level such as genocide and other crimes against humanity, if this safeguard is to be strictly applied.

2.12.2 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 decisions.

This principle, if constructed properly in practice, would demonstrate the core ideals that differentiate Restorative Justice from the traditional system. This ideal is that all parties involved should understand what is going on in the process and their role within that process. This is an ideal that would help to answer the problem presented in the previous principle. If people fully understood the process and its consequences, would they need guaranteed legal advice to be enshrined as a safeguard? This is one of the main benefits of a Restorative Justice process, in theory, as it is a process that truly involves all people pertinent to the resolution of a crime or conflict, not just state organs far removed from daily life. The advantage of Restorative Justice would be that its' transparency to the average person reduces the need to access a lawyer in all conflicts and allows people to be able to deal with their problems in a process that they understand.

2.12.3 c) Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

⁶⁰ For a Complete analysis of the Restorative Potential of the Gacaca process in Rwanda to deal with Mass Victimization and Crimes of Genocide examine the M.A. Paper presented by Jason Nadeau to the Katholieke Universiteit Leuven. Critical Analysis and Practical Application of the U.N. Declaration of Basic Principles. (2001). Unpublished.

The degree to which this principle is applied is a fundamental debate within the theoretical framework of Restorative Justice. This debate can be seen from both the perspective of the victim and the offender.

2.12.3.1 *Victims Issues*

The victim in the traditional criminal justice process has been removed as a central figure and at best plays the role of the witness while the state takes over the conflict.⁶¹ In response to this, in the restorative process the victim becomes the central figure and takes an active role. As the central figure of this process, the victim has to have the right to not be involved if he or she is not ready or does not want to participate. This should be considered as an inalienable right, a right that cannot be infringed by the state by unfair means.⁶² This specific concern has been voiced by victim advocacy groups regarding certain restorative processes such as Victim-Offender Mediation, that are accurately perceived as being offender driven.⁶³ This then has resulted in the offender being the main focal point of the process with the victim once again becoming a secondary player. If Restorative Justice is to answer to these criticisms it has to be flexible enough to deal with the different needs and concerns of victims. It has to be able to react when they are ready to participate at whatever point that is during the criminal justice process. The final analysis is that victims cannot be coerced into participating in a Restorative Justice process. If these processes are to answer victim criticisms, then they must not remain offender driven and move victims concerns to the forefront.

2.12.3.2 *Offenders Issues*

The participation of the offender in an Restorative Justice process presents an entirely different situation, one that causes a serious debate amongst Restorative Justice advocates. Whereas it is agreed upon in the Claassen principles that the offender should not be overly induced by unfair means to participate in a Restorative Justice process, there is a debate as to how much coercion a state can use in ensuring this participation. In terms of ensuring public safety concerns there is a need for state control and certain coercive measures in order to maintain order. The question is how far can that coercion go in a restorative process before it ceases to be a restorative justice process?⁶⁴ This fundamental debate comes down to two points of contention that should be addressed in a larger forum than the confines of this analysis, and as such, this analysis will only outline that which can be examined here. Firstly, can an offender be forced to participate in a restorative process at all? Some Restorative Justice advocates go as far as to argue that participation has to be completely voluntary or it loses its effectiveness and restorative elements. The compromise would appear to be a delicate balancing act that is amplified by the second point. If there is a certain amount of coercion acceptable where should the

⁶¹ Christie, N., *Conflicts as property*, *The British Journal of Criminology*, vol. 17, nr. 1, 1977, 1-15.

⁶² Umbreit, Mark *Victim Meets Offender* pg.4.

⁶³ Reeves, Helen. *The victim support perspective*.

⁶⁴ This refers to the Models of Restorative Justice presented in the Van Ness Paper presented in Tuebingen on variations of restorative systems.

line be drawn? Where does one differentiate between being induced by unfair means to participate in a Restorative Justice process and an acceptable level of compulsion? These questions have to be accorded sufficient thought and debate when this declaration is discussed as these points are fundamental to the core principles of Restorative Justice. To overlook them would create problems in the future application of such a declaration at any level.

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

This principle raises a number of privacy issues that have to be examined. All of these issues can be best understood within the context of a Victim-Offender Mediation encounter scheme, wherein sensitive and personal information necessarily needs to be discussed in order for progress to be made.

The first issue reflects the fact that there will need to be a legal guarantee that the restorative processes will remain confidential and not be subsequently disclosed without the agreement of the two parties. Without this guarantee, this uncertainty could jeopardize the basic level of trust that is needed to undertake these types of proceedings.⁶⁵ There cannot be an open line of communication established in the context of an encounter process if either party is worried that their confessions and discussions will negatively affect them in future proceedings or embarrass them publicly. Therefore, an open and honest environment with trust as its basis is needed if an offender is to be held accountable for his actions. This is also necessary in order for a victim to feel safe from further victimization through his or her participation. If this trust is not apparent and there is fear of 'incriminating' oneself unintendedly, then both the victim and the offender could lose faith in this type of process.

The second issue deals with libelous actions and breaches of confidentiality by actors in the process itself. The basis for this exchange is a dialogue built upon mutual respect, trust and safety which can easily be negated by one or the other party providing information to the media that would hurt or further victimize the other participant or participants.⁶⁶ The victim can be easily revictimized if this process is abused where adequate safeguards are not put into place. The offender can potentially have his future case before a criminal proceeding damaged with leaked information that becomes public knowledge. Both of these types of scenarios deriving from a breach of confidentiality, would result in a lack of confidence in the new system. This outcome would ultimately undermine the credibility of Restorative Justice and the desire of people to choose it as an alternative. This possible negative outcome should be cause enough to ensure adequate safeguards to combat this possibility.

⁶⁵ Umbreit, Mark. *Victim Meets Offender: The impact of Restorative Justice and mediation*. 1994.

⁶⁶ Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm*.

2.13.1 The Need for Transparency

The third issue relates directly to those legal institutions that value the importance of the principle of transparency in their legal proceedings. Placed in a practical Restorative Justice context, legal hearings are supposed to be conducted in an open and fair manner, but a restorative process contradicts this as parties must not disclose information unless both parties agree. What happens when one of the parties feel that they have been ill-treated or further injured if there is no public 'watchdog' mechanism in place? Perhaps a solution to this possibility would be to have an organ or body that could be consulted if there was an alleged misuse of power or problem that arose from the proceedings. In the very least, in order to ensure transparency and an adequate community belief that this type of system could work in a large-scale capacity, some form of appeals process or oversight would seem appropriate. This may be a minor point when compared to the previous two discussion points, but it is a valid concern that needs to be at least kept in mind in terms of evaluating this principle.

2.14 Judicial Discharges based upon agreements arising out of Restorative Justice programs 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 underlines the importance of balancing the needs of the victim and offender with those of the state. It is imperative that if a restorative process is to have any credibility that results in actions that do not end up victimizing those involved, judicial discharges must have the same status as judicial decisions or discharges. By way of practical example, if a victim and offender through a restorative process, achieve a restorative outcome that they are perfectly content with, the state can still choose to do something else all together. It can impose a further sanction or negate the agreed upon outcome and ignore the wishes of all parties involved in the name of justice. The danger here is that a state agency, when overriding any such agreement would in fact victimize or revictimize all parties involved through this attempt to enact justice, a justice based upon different ideals and values.

The issue of proportionality could be brought up in this context as a legitimate concern. If some cases were accepted and others overruled by the judicial authorities, where would the restorative proportionality be? The end result is that if a restorative process is to be implemented with the hopes of helping to repair harm in the communities and to provide a better more equitable form of justice, then it should not be overridden by contradictory judicial rulings. As long as the parties involved are satisfied with the outcome and it is indeed a restorative outcome, there is a need to ensure these agreements are legitimated.

2.15 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.

This principle underscores a major differentiation between the retributive and restorative systems that has to be highlighted. This difference revolves around the presumption of

innocence and legality of guilt versus taking responsibility, accountability and repairing the harm that has occurred. This is a fundamental difference between the two paradigms and if they will be working interchangeably within the current systems for the foreseeable future these differences cannot be overlooked when switching from one process to the other. The traditional systems place emphasis on legal guilt and thus encourages offenders to maintain innocence and deny any responsibility until 'legally' proven otherwise. The restorative process moves away from strict legal guilt and deals with fixing the harm caused by one party to the other while encouraging those involved to take responsibility for their actions in a more constructive way. Where this difference is apparent is when a restorative process fails to reach an agreement. The first step, as outlined previously in this declaration, is that in a restorative process, the parties should acknowledge the basic facts of a case as a basis for participation.⁶⁷ The breakdown of a restorative process according to this principle, should not be used as evidence of guilt, thus providing a much needed safeguard. Unfortunately, in a retributive system based upon legal guilt this admission is central to the case of the prosecution and hard for authorities to ignore, unless they are legally obliged to do so. Therefore, when making the transition from a restorative to a retributive process it is imperative that there be a mechanism to safeguard the rights of all parties, specifically when certain rights are not inherent to both opposing philosophies. This must be considered in order to ensure that the safeguards outlined here and in principle 2.8 be respected. This is necessary in order for restorative processes to be in any way effective and ultimately not undermined.

2.16 Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative program 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.

In the preceding discussion, the idea of creating a mechanism through which the protection of fundamental safeguards could be assured was introduced. This principle is underlining the need for such a mechanism that would safeguard the transfer of parties from one system to the other without infringing upon their rights. This principle suggests that if parties agree to opt for a restorative process and end up returning to the traditional system, this attempt at alternative justice cannot be used negatively in any way, shape or form. This principle is essentially suggesting the safe transfer of parties from one approach to the other, this being the mechanism discussed above. The need for this is based upon the retributive system enshrining different ideals than the restorative system. In a transfer of jurisdiction, certain findings in the latter could be used against either party in a continuation of the former process. If this protection is not ensured through a safeguarding mechanism, parties will be reluctant to expose themselves to unneeded risk and simply opt to ignore potential restorative opportunities to resolve their conflicts.

⁶⁷ * Principle 2.8, All parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process.

2.17.0 Facilitators

2.17 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 the interpersonal skills necessary to conducting restorative processes.

The debate between Restorative Justice advocates concerning facilitators revolves around the need for professionalization in this field. These principles outline the need for someone who is well trained, highly skilled and who possesses excellent interpersonal skills in order to properly carry out the required tasks.⁶⁸ The argument is the degree to which these facilitators need to be professionalized and that there is a concern that these people be representatives from the community more so than lawyers and judges are perceived to not be in traditional judicial systems (Hudson and Galaway, 1996, p. 5; Christie, 1977, p. 11). The concern is that existing lawyers, mediators and judges will co-opt restorative processes and keep these processes as inaccessible and mysterious as the current system is to the average person.⁶⁹ Restorative Justice arose in part as a response to people wanting to be able to take part in the remedies of their own conflicts to a greater degree than is currently allowed. More importantly, people want to understand what is going on and not to have to have a highly skilled interpreter decipher the entire process. The argument is not that there is a need for highly trained people in this field, but to what degree that training has to be formalized and professionalized. This principle has to reflect the fact that Restorative Justice is based upon involving the community, in a different way than the current system, and this involvement is in large part through the participation of the facilitator in some instances.⁷⁰ There is a need for standards and guidelines in this area, to ensure best practice, but these principles have to be vigilant in ensuring that it does not lay the ground work for the creation of unrealistic, unnecessary and arbitrary restrictions upon facilitators in different cultural contexts.⁷¹

2.18 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.

Impartiality and neutrality are essential to the role of a facilitator, however, it is important to not associate these traits with lack of understanding or empathy. In restorative processes, a facilitator needs to balance the needs and wishes of all parties in an effort to repair the harm that occurred. While needing to be impartial and neutral, it must be acknowledged this is not a strictly legal process. The restorative philosophy includes considering emotions and impartiality on the part of the facilitator does not preclude empathy or caring.

⁶⁸ Dumortier, Els, *Neglecting Due Process for Minors: A Possible Dark Side of the Restorative Justice implementation?* United Nations Crime Congress: Ancillary Meeting. Vienna, Austria, 2000.
http://www.restorativejustice.org/conference/UN/RJ_UN_EDumortier.htm

⁶⁹ Braithwaite, John. *Standards for Restorative Justice* United Nations Crime Congress: Ancillary Meeting. Vienna, Austria, 2000.

⁷⁰ One could argue that in the VOM model, the community participation is in fact the facilitator, as direct participants in the encounter are usually limited to the primary parties.

⁷¹ Braithwaite, John. *Standards for Restorative Justice*.

In order for the facilitators to respect the dignity of the parties and ensure that the parties act with respect towards each other, the facilitator has to create a safe environment. If people are going to deal with very serious and personal issues arising from crime in a restorative way, then there has to be an environment that they perceive as safe. Otherwise parties to this type of process will be most likely unable to open up and begin the process of restoration, accountability, responsibility and healing. Unfortunately, this principle demonstrates that this declaration has succeeded in distancing the core ideals of Restorative Justice from the legal international framework. It has provided an excellent legal framework from which to base practice, but it has provided no context from within which to base that practice. Once again this result demonstrates that there is more to a restorative process or outcome than is provided for in this draft document. This declaration has to recognize that Restorative Justice is not only an alternative dispute mechanism but a change from a retributive mentality to a restorative one.

2.19 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.

There are two Restorative Justice concerns, that of the victim and the offender, that arise from this principle regarding the serious problem of power imbalances. A facilitator is responsible for providing a safe and appropriate environment for the restorative process, a responsibility that is particularly important when considering the physical safety of victims. Power imbalances can be seen in many forms within the context of the victim; intra-familial violence, spousal abuse, crimes of a violent and / or sexual nature, and including but not limited to any person in a position of authority or power over the victim.⁷² If the facilitator does not recognize this potential for harm and act accordingly then such a process can result in revictimization of those already effected by a crime. Victim advocacy groups are already wary of a restorative solution to these serious issues and as such there is a need to ensure that any further chance of victimization is minimized adequately and this issue addressed specifically.⁷³

The second concern mirrors that of the first, as an offender can also be negatively affected by an uneven power imbalance. While acknowledging that the offender will be subject to a certain level of power imbalance that arises from state control mechanisms it must be ensured that any imbalance is in compliance with principle 12 (c).⁷⁴ Finally, it is especially poignant in the example of the young offender to note the necessity for providing a safe environment. This group is especially vulnerable to this threat and this principle would be best served by adding an additional phrase at the following section of the above principle, *they should be sensitive to any vulnerability of the parties especially power imbalances*. The assertion is that, while *vulnerability of the parties* is broad enough to include this specific topic, the issue of power imbalances is too important to be left unspecified.

⁷² Llewellyn, Jennifer, Howse, Robert, *Restorative Justice ~ A conceptual framework*. At Footnote 102-107

⁷³ Reeves, Helen *The victim support perspective* in Martin Wright and Burt Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community*. Pg., 47.

⁷⁴ Principle 12 (c), Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

2.20 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.

This principle further outlines the need for professionalization. It can be argued that much of the bad practise that has occurred in the field of restorative justice has happened as a result of programs being ill prepared to resolve all of the issues and problems surrounding revictimization and many other concerns of both victims and offenders. One concern that needs to be addressed is that a facilitator must be able to effectively screen a victim and the members of the community that are involved in any type of restorative process. Offenders are currently heavily screened throughout the entire criminal justice process by psychiatrists, police, case workers and probation officers whereas this assessment on the victims side is not as comprehensive. There is a need in the restorative framework to have someone trained to recognize possible conflicts or problems before they occur with victims as well. Practically, there is always the possibility that a victim will use a restorative process for something other than what it is intended for, which necessitates a trained individual who can provide a safe and balanced environment for all parties. If issues of truth and guilt are already established as a precursor to participating in a restorative process then this problem is potentially minimized. If restorative processes are to expand to deal effectively with crimes from the beginning of the criminal justice process, then these individuals need to be able to safeguard all parties physical and mental safety from victimization.

2.21.0 Continuing development of restorative justice programmes

2.21 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.

2.22 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.

2.23 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.

These three principles shall be examined in one context as they are interrelated. There are many successful pilot projects and programs that demonstrate the possibility and potential of Restorative Justice, enough to encourage further growth and expansion into this area. However, there is a strong need for vigilance as the full impact of restorative processes have not been entirely verified. This serious lack of longitudinal empirical data to support or refute the results of restorative processes cannot be overlooked. There are a

number of such studies being undertaken throughout the world at this moment to conclude that there is promise in Restorative Justice processes.⁷⁵

Nonetheless, if there is going to be a true expansion into the restorative paradigm then Member States have to take seriously the need to *promote research on and evaluation of restorative justice programs* in addition to the programming itself. Practically, this expansion by Member States comes down to an issue of funding. One solution to the lack of empirical data due to under-funding would be for the academic community to step up its efforts in the area of evaluation and research. This argument could be taken one step further in that it is necessary that academic institutions and government agencies forge stronger links. This would necessitate an expansion of *principle 2.21* so as to be more inclusive than just covering the consultation and cooperation outlined above. For this declaration to make this link, this principle should expand to include academic institutions along with *criminal justice authorities and administrators of restorative justice programs*. This further link would solidify a concerted effort to provide a sound empirical foundation to the continuation of the restorative model.

There is more than anecdotal evidence to encourage optimism with regards to restorative processes meeting the needs of citizens, but there is still not conclusive evidence to support that what victims, offenders and the community really want is Restorative Justice. Restorative Justice is not the panacea to the worlds' criminal justice problems, nor should it sell itself as such. Until the void of lack of research and reliable information is filled, hopes of restoring victims, offenders and communities will remain more theory than reality. This need for facts should encourage Member States to support regular, rigorous evaluation and modifications of any such process so that a more definitive answer can be found. In all, Restorative Justice is an evolving system that has to be allowed room to undergo change if it is to become an effective response to crime and victimization.

2.24 Conclusions

If Restorative Justice is to become a legitimate legal alternative in the international setting, this declaration is a promising first step. In all, this declaration is an excellent comprehensive tool that has the potential to provide an international legal framework from which Restorative Justice can evolve. This analysis presented relevant areas of concern from both the theoretical and practical restorative viewpoints that need to be considered when finalizing this draft declaration. The final analysis is that the ultimate challenge of this declaration will be to properly balance retributive legal norms and considerations with restorative principles and convictions in producing the end result. This declaration has to ensure that it is able to reflect those fundamental ideals and principles that are the basis of the Restorative Justice paradigm as it begins this legitimating process. There is much potential in Restorative Justice alternatives for victims, offenders and communities of the world, potential that cannot be realized if this declaration is not inclusive of all of these parties.

⁷⁵ Research from Mark Umbreit, the RISE and SAJJ projects in Australia and various European projects (Thames Valley etc.) support this further experimentation.

Appendix 1

(Figure 1 – Van Ness Restorative Systems – Fully, Moderately and Minimally Restorative)

| | | |
|--|--------------------------------------|---|
| Crime is followed by victim services and reparative punishment | All parties participate | All parties make peace |
| Crime is followed by reparative punishment or victim services | Victims and offenders participate | Victims and offenders make peace |
| Crime is followed by non-reparative punishment and victim services | Offenders or victims participate | Victims and community make peace OR Offenders and community make peace |
| Crime is followed by non-reparative punishment only | Reparative punishment is imposed | Reduced stigmatization or isolation of both victim or offender |
| Crime is followed by nothing | Non-reparative punishment is imposed | Reduced stigmatization or isolation of either the victim or the offender |
| | Nothing happens | Safety obtained through separation of offender from victim and/or community |

Figure 2 – Claassen - J-Scale

| The J-Scale: Measuring Restorative Justice | | |
|---|---------------------|--|
| Moral wrong of crime (violation of persons and relationships) minimized | not RJ<1-2-3-4-5>RJ | Moral wrong of crime recognized |
| Victim, community and offender safety concerns recognized | not RJ<1-2-3-4-5>RJ | Victim, community and offender safety concerns primary |
| Disempower victims, offenders and community from acting constructively | not RJ<1-2-3-4-5>RJ | Empower victims, offenders and community to act constructively |
| "Making things as right as possible" a secondary concern | not RJ<1-2-3-4-5>RJ | Primary focus on "making things as right as possible" (repair injuries, relationships and physical damage) |

| | | |
|---|----------------------------|--|
| Primary focus on violation of law | not RJ<1-2- 3-4-5>RJ | Violation of law a secondary concern |
| Victim wounds and healing ignored | not RJ<1-2- 3-4-5>RJ | Victim wounds and healing important |
| Offender wounds and healing ignored | not RJ<1-2- 3-4-5>RJ | Offender wounds and healing important |
| Primary decisions and activity between offender and gov't; offender family, victim and community ignored | not RJ<1-2- 3-4-5>RJ | Primary decisions and activity between victim and offender (or substitutes) and their communities, with government help as needed |
| Actions of officials with coercive power or in positions of authority left unchecked | not RJ<1-2- 3-4-5>RJ | All actions tested by whether they are reasonable, related and respectful |
| Government coercive/authority structures the primary response; victims, community and offender left out of process | not RJ<1-2- 3-4-5>RJ | Government coercive/authority structures used as backup when victim or offender not cooperative or either sees the process as unfair |
| Coercion assumed as primary mode of relating to offenders; orders given to offender rather than inviting offender to be cooperative; no attempt at agreements | not RJ<1-2- 3-4-5>RJ | Invitations to offender to be cooperative are primary; agreements preferred over orders; coercion backup response |
| Placements focus on restrictions and following orders | not RJ<1-2- 3-4-5>RJ | Placements focus on safety and/or training and equipping for living in community |
| Religious/faith community not involved in justice process | not RJ<1-2- 3-4-5>RJ | Religious/faith community encouraged and invited into cooperative aspects of justice process |

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Scoring:

26 or Less • Justice response dominated by government and very costly: emotionally, spiritually, and financially. High fear in the community. Many mini -communities alienated and angry. Very high crime rate.

52 or More • Justice response balanced between government and community. Mini and macro communities empowered to participate in and contribute to the emotional, spiritual, and financial health of all the members of the community. Very low crime rate.

Appendix 2

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.

Bibliography

Braithwaite, John. *Crime, Shame, and Reintegration*. New York: Cambridge University Press, 1989.

Braithwaite, John, *Standards for Restorative Justice* United Nations Crime Congress: Ancillary Meeting. Vienna, Austria, 2000

Bazemore, Gordon. *After Shaming, Whither Reintegration: Restorative Justice and Relational Rehabilitation*. Forthcoming in Restoring Juvenile Justice, edited by Gordon Bazemore and Lode Walgrave. Amsterdam: Kugler International Publications, 1997.

Bazemore, G. and Walgrave, L. *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Monsey, Criminal Justice Press. (1999)

Carver, A. Trujillo, J., Vanfraechem, I., Willemsens, J., *Restorative Justice Theory in Europe and North America, a comparison*. K.U.Leuven. 2000. Not published.

Christie, N., *Conflicts as property*, The British Journal of Criminology, vol. 17, nr. 1, 1977, 1-15.

Claassen, Ron, *Restorative Justice: Fundamental Principles*. Presented May 1995 at NCPCR; revised May 1996 at UN Alliance of NGOs Working Party on Restorative Justice.

Claassen, R. *Restorative Justice Principles*. *VORP News*, Clovis, California, July-November, 14p. 1995.

Claassen, Ron. *Restorative Justice Principles: 'Restorative Justice' Primary Focus on People, Not Procedures*. Center for Peacemaking and Conflict Studies. 1996.

Claassen, Ron. *The J Scale: Measuring Restorative Justice*. Center for Peacemaking and Conflict Studies. 1996.

Daly, Kathleen. *Does Punishment Have a Place in Restorative Justice?* Paper presented to the Australia and New Zealand Society of Criminology Annual Conference, Perth, 28-30 September 1999.

Daly, K. *Restorative Justice: The Real Story*, Paper revised from that presented to the Scottish Criminology Conference. Edinburgh, 21-22 September 2000.

Dignan, Jim, and Cavadino, Michael, *Which Model of Criminal Justice Offers the Best scope for Assisting Victims of Crime?* In Support for Crime Victims in a Comparative Perspective: A collection of essays dedicated to the memory of Prof. Frederic McClintock. Leuven University Press. 1998.

- Dumortier, Els. *Neglecting Due Process for Minors: A Possible Dark Side of the Restorative Justice implementation?*. U.N. Ancillary Meetings. Vienna. April 2000.
- Falck, S., *The Norwegian Community Mediation Centers at a Crossroads*, in Messmer, H. and Otto, H.-U., Restorative Justice on Trial, Dordrecht/Boston/London, Kluwer, 1992, 131-136.
- Fattah, E *A critical assessment of two justice paradigms: contrasting the restorative and retributive justice models*. In Fattah. E and T. Peters (eds.) Support for crime victims in a comparative perspective. Leuven University Press.
- Galaway, B. and Hudson, J., *Restorative Justice: International Perspectives*, Amsterdam, Kugler, 1996,
- Gustafson, David. *Toward a Justice that Heals*. Address to the prison Governors Leuven, Belgium. Sept.11/97.
- Harding, J., *Victims and Offenders: needs and responsibilities*, London : Bedford Square Press. 1982.
- Human Rights Watch. *Leave None to Tell the Story: Genocide in Rwanda*. New York, FIDH/HRW, 1999a.
- Human Rights Watch. *World Report 2000*. New York, HRW, 1999b.
- Marshall, T., *Mediation: A New Mode of Establishing Order in Schools*, The Howard Journal, 1987, nr. 1, 33-46.
- Marshall, T., *Restorative Justice. An Overview*, London, Home Office Research Development and Statistics Directorate. 1999.
- Maxwell, G. and Morris, A. *Research on Family Group Conferences With Young Offenders in New Zealand*. In: J. Hudson, et al. (eds.), Family Group Conferences: Perspectives on Policy and Practice. Monsey, NY: Criminal Justice Press, pp. 88-110. 1996.
- Nadeau, Jason and Trujillo, Jesus. *The End of the Restorative Justice Myth....Towards an Integrated Model for the Restorative Paradigm*. Unpublished Paper presented at the 10th World Victimology Conference in Montreal. August, 2000.
- Pranis, Kay. *Restoring Community: The Process of Circle Sentencing*. Paper presented at "Justice without Violence: Views from Peacemaking, Criminology, and Restorative Justice," June 6, 1997
- Stuart, B. *Circle Sentencing: Turning Swords into Ploughshares*. In: B. Galaway and J. Hudson (eds.),Restorative Justice: International Perspectives. 1996.

UN Security Council Resolution 955 of 8 November, 1994.

Umbreit, M., *Victim meets offender. The impact of Restorative Justice and mediation*, Monsey, Criminal Justice Press. 1994.

Uvin, Peter. *Ethics and the New Post-Conflict Agenda: the International Community in Rwanda after the Genocide*. Watson Institute for International Studies. Brown University.

Van Ness, Daniel and Karen Strong. *Restoring Justice*. Cincinnati, OH: Anderson Publishing Co., 1997.

Van Ness, Daniel. *Draft: A Restorative Future for Juvenile Justice?* Paper Presented to the Restorative Justice for Juveniles Conference. Tuebingen. October, 2000.

Vandeginste, Stef. *Justice, Reconciliation and Reparation After Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda*. University of Antwerp

Von Hirsch, Andrew. *Doing Justice*. (1976)

Von Hirsch, Andrew. *Past or Future Crimes*. (1986)

Walgrave, L. *Declaration of Leuven: On the Advisability of Promoting the Restorative Approach to Juvenile Crime*. Restorative Justice for Juveniles. Potentialities, Risks and Problems, Leuven, Leuven University Press, 1998.

Weitekamp, Elmar. *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*. In Restorative Justice on Trial: Pitfalls and Potentials of Victim Offender Mediation--International Research Perspectives, edited by Heinz Messmer and Hans-Uwe Otto. Dordrecht: Kluwer Academic Publishers, 1992.

Weitekamp, E., *The paradigm of Restorative Justice: potentials, possibilities and pitfalls*. *Keynote lecture for the 9th International Symposium on Victimology* (unpublished), Amsterdam. 1997.

Weitekamp, E., *The History of Restorative Justice*, in Bazemore, G. and Walgrave, L. (eds.), Restorative Juvenile Justice: Repairing the Harm of Youth Crime, Monsey, New York, Criminal Justice Press, 75-102 (75). 1999.

Wright, M., *Justice for Victims and Offenders*, Buckingham, UK: Open University. 1991.

Zehr, H., *Retributive justice, Restorative Justice*, Elkhart, In: CC Office of Criminal Justice. 1985.

Zehr, Howard. *Changing Lens: A New Focus for Crime and Justice*. Scottsdale, Pennsylvania; Waterloo Ontario: Herald Press, 1990.

Web Citations

Bassiouni, M Cherif. *Human Rights in the Context of Criminal Justice: Identifying Procedural Protections and Equivalent Protections in National Constitutions*. Duke Journal of Comparative and International Law 3 (1993): 235. from http://www.restorativejustice.org/RJ2r_Due_Process.htm

McCold, Paul, *Working Definition United Nations Working Party on Restorative Justice*. May 2nd, 2001 <http://www.restorativejustice.org/campus/ActionDefineRJdefinitions.html>

Llewellyn, Jennifer, Howse, Robert, *Restorative Justice ~ A conceptual framework* <http://www.lcc.gc.ca/en/themes/sr/rj/howse/index.html#top>

Hirondelle News Agency. *Rwanda Plans Impressive Logistics For New Court System*. (Arusha) April 30, 2001. <http://allafrica.com/stories/200104300375.html>