



Promoting Restorative Justice for Children



New York, 2013

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GLOSSARY OF TERMS

Arrest: the act of apprehending a person for alleged commission of an offence or by the action of an authority.¹ According to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “[a]rrest [...] shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”

Child: article 1 of the Convention on the Rights of the Child (CRC) defines a child as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”

Child involved with the juvenile justice system: a child may become involved with the juvenile justice system when he or she is a victim, witness or, as defined under article 40(1) of the CRC, when he or she is “alleged as, accused of or recognized as having infringed the penal law”. Children may also become involved with the juvenile or criminal justice system when they are considered to be in danger by virtue of their behaviour or the environment in which they live.²

Child-friendly justice: child-friendly justice refers to “justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level”, and that give “due consideration to the child’s level of maturity and understanding the circumstances of the case”.³

Convicted: a child is convicted when he or she is found guilty of having committed an offence by the decision of a competent authority.⁴

Crime prevention: the active creation of an environment that ensures for the child a meaningful life in the community and fosters a process of personal development and education that is as free from crime and violence as possible;⁵ an environment that deters children from committing an offence, engaging in violent acts or becoming victims of violence.

Deprivation of liberty: any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.⁶

Detention: the condition of a detained person, that is “any person deprived of personal liberty except as a result of conviction for an offence.”⁷

Diversion: Diversion involves removal of a child from criminal justice processing. A child is diverted when he or she is alleged as or accused of having infringed the penal law but the case is dealt with without resorting to formal trial by the competent authority.⁸ Diversion may involve measures based on the principles of restorative justice.

Facilitator: a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.⁹

Juvenile justice system: a system that consists of the laws, policies, guidelines, customary norms, systems, professionals, institutions and treatment specifically applicable to children involved with the justice system.¹⁰

Non-custodial measure: a measure to which a child may be sentenced by a competent authority that does not include deprivation of liberty.¹¹

Offence: any behaviour (act or omission) that is punishable by law under the respective legal systems.¹²

Minor offence: in many countries, minor offences, such as speeding or using public transport without a ticket, are considered as misdemeanours, with a separate code or provision devoted to these offences. Other countries consider these offences to be “administrative” in nature and they do not form part of the criminal code. Such offences are not subject to criminal investigation, nor do they fall within the competence of a prosecutor, but are dealt with in lower level administrative tribunals.¹³ The domestic legal definition of a minor offence usually represents the group of offences for which children who come into contact with the juvenile justice system can benefit from diversion.

Mediation: an attempt at settling the differences between two contending parties by the intervention of a third neutral party whose role has been accepted by the two opponents. There is no obligation on the part of the contending parties to accept the decision of the mediator. In mediation, the negotiations are carried on through the plenipotentiaries of the mediating power, and not directly between the contending powers.¹⁴

Parties: the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.¹⁵

Pre-sentence detention: a child is held in pre-sentence detention when he or she is deprived of liberty and is awaiting a final decision on his or her case from a competent authority.¹⁶

Reintegration: the promotion of the child’s sense of dignity and worth and the child’s respect for the human rights of others, with the aim of supporting the child to assume a constructive role in society.¹⁷ This goes hand in hand with the development of the abilities to deal with risk factors so as to function successfully in society, thereby improving the quality of life of the person and the community.¹⁸

Restitution: (1) return or restoration of some specific thing to its rightful owner or status; (2) compensation for benefits derived from a wrong done to another; (3) compensation or reparation for the loss caused to another (e.g. by criminal acts or human rights violations).¹⁹

Restorative justice process: any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by the crime, together participate actively in the resolution of matters arising from that crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.²⁰

Restorative justice for children: any programme that uses restorative processes and seeks to achieve restorative outcomes that promote the child’s rehabilitation and reintegration.

Restorative justice outcome/agreement: an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.²¹

Sentence: a final decision about a child’s case - notwithstanding any right of appeal – made by a competent authority.²²

Serious offence against a person: homicide, non-intentional homicide, kidnapping, sexual assault or abuse, assault or an attempt to carry out any of these acts.²³

Status offence: an act or behaviour that is only punishable if the person committing it is under eighteen years of age, or is believed to be under eighteen.²⁴

Violence: under article 19 of the CRC, all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.²⁵

1

INTRODUCTION

Today, more than 1 million children are deprived of their liberty worldwide,²⁶ and countless children face violent and degrading treatment throughout the criminal justice process. In light of this dramatic situation, it is imperative to promote strategies that provide an alternative to detention and custodial sentences for children.

This report examines the potential of restorative justice programmes to facilitate conflict resolution and provide appropriate protection to children. This applies to the justice system, whether children are victims, offenders or witnesses, but it also applies in a range of other contexts, including at school, in residential care units, in social welfare settings and in the community.

The primary purpose of restorative justice is just that — to restore justice. Within families, schools, communities, organizations, civil society and the State, restorative justice provides peaceful conflict resolution and contributes to cohesive and democratic societies.

In many countries, restorative justice may be perceived as a new and unfamiliar concept. However, in a number of traditional societies restorative justice values, such as healing, reconciliation and mutual respect, have long served to resolve conflict and strengthen community bonds. Indeed, restorative justice derives from ancient forms of community justice, practiced around the world, that focus on establishing reconciliation between offenders and those affected by the offence, in order to restore social harmony.

In recent decades, traditional forms of restorative justice have started to be adopted in both judicial and non-judicial settings, a process that is resulting in a paradigm shift away from retributive models of justice (see Box 1). Rather than assess how much punishment is inflicted, restorative justice measures how much harm is repaired or how much recurrence of violence is prevented through an effective process of reintegration of young offenders into society.

Box 1. From retributive to restorative justice²⁷	
Old paradigm: Retributive	New Paradigm: Restorative
Focus on establishing blame and guilt	Focus on problem solving, liabilities and obligations, focus on the future
Stigma of crime permanent	Stigma of crime removable
No encouragement for repentance and forgiveness	Possibilities for repentance and forgiveness
Dependence upon proxy professionals	Direct involvement by participants
Action directed from State to offender	Victim and offender's role recognized in both problem and solution
Offender accountability defined as taking punishment	Offender accountability defined as understanding impact of action and helping decide how to make things right
Response focuses on offender's past behaviour	Response focuses on harmful consequences of offender's behaviour
Imposition of pain to punish and deter/prevent	Restitution as a means of restoring both parties; reconciliation/restoration as a goal
Community represented abstractly by the State	Community as facilitator

Restorative justice has been most readily applied to cases of children who become involved with the justice system, both for minor and serious offences. Box 2 provides a practical example of how a restorative justice approach can make a positive difference to all those involved.

Box 2. Harassment in school – the power of restorative justice in a civil case

A 13 year-old girl was experiencing daily harassment on her way to school and during recess from a group of five boys between the ages of 11 and 12. With time, the situation grew worse, to the point that the girl no longer wanted to leave her house, did not participate in after-school activities and barely managed to attend school. She told her mother she no longer wanted to live. Her mother was desperate. Feeling that the school was unable to address the situation, she decided to make a report to the police.

Thanks to a proposal from the police officer handling this case, the parties were offered a restorative process and the case was referred to the mediation service. A conference was organized with the involvement of all those affected by the situation, including the boys' parents. Pre-meetings with all parties - the five offenders and their parents, the victim and her mother - were a crucial part of the preparations. In the pre-meetings the parties agreed to include their teachers, since this conflict had also affected the school.

The conference was an emotional process for all involved. The offenders did not realize before this meeting the impact their actions had had upon the girl. At a certain point in the process, one of the boys stood up, walked across the room, shook the girl's hand and apologized, and then he hugged her. The other boys followed. Each one also wrote an apology to the girl in his own words.

After this meeting the harassment ended and the situation in school improved dramatically for the girl. The mother later told the conference facilitators that her daughter was now a happy young girl, attending school and participating in extra-curricular activities. A short time after the conference took place, the police officer who had proposed the restorative process received a bouquet of roses with a handwritten note from the girl, saying simply: Thank you for life!

This case offers an example of creative thinking from the police in a civil case. The conference model made the boys reflect on their actions, helped them gain an understanding of the impact of these actions on the girl, and it made it easier for them to take responsibility. At the same time, the victim had the opportunity to share her story and describe the impact of these actions on her life. By speaking out she took an important step in casting off her role as a victim.²⁸

As chapter 2 of this report discusses, restorative justice can take many forms, including mediation, conciliation, conferencing and sentencing circles. Common to all these approaches is a focus on healing, respect and strengthened relationships.

In the context of the criminal justice system, child-sensitive restorative justice can be introduced at any stage of the process, from the moment of a child's arrest or apprehension, to reintegration and follow-up. It generally involves bringing together the victim, the offender, his or her parents or guardians, child protection and justice actors, and the community, in a safe and structured environment. Through a non-adversarial and voluntary process, based on dialogue, negotiation and problem-solving, restorative justice aims to rehabilitate and reintegrate the young offender, by helping to reconnect him or her with the community. This involves ensuring that the offender understands the harm caused to the victim and the community and acknowledges accountability for criminal behaviour and reparation of its consequences.

Restorative justice for children need not necessarily be an alternative to the criminal justice system. It can also be, where appropriate, a supplement to this system that can be applied to

convicted children and children deprived of liberty. In this case, it has a strong potential to reduce recidivism.

In their most developed form, restorative justice programmes for children represent a truly holistic approach. Based on the best interests of the child, they go beyond the criminal justice system to include the provision of necessary services and support, including access to education and health services, psycho-social support, vocational training and the provision of alternative activities and interests to avoid children falling back into previous behavioural patterns and engaging in risky behaviour with peers. Holistic restorative justice for children is therefore based on a multi-sectoral approach involving effective communication and coordination among different service providers and different sectors.

1. THE IMPORTANCE OF RESTORATIVE JUSTICE

The 2006 United Nations (UN) Study on Violence against Children highlighted the extent of violence against children involved with the justice system, and this topic has, in turn, become a priority for the Special Representative of the Secretary General on Violence against Children (SRSG). Children are exposed to psychological, physical and sexual violence during arrest and interrogation, or while being held in police custody; they are likewise vulnerable to violence at the hands of staff and adult detainees in detention centres; and they also endure violence as a form of punishment or sentencing. This includes stoning, amputation, capital punishment and life sentencing.²⁹

Girls involved with the justice system are particularly vulnerable to violence and abuse, in part because of their lower status in society and in part because they constitute a minority – albeit a growing minority - of prisoners in all countries.³⁰

The thematic report issued by the SRSG, in cooperation with the United Nations Office on Drugs and Crime (UNODC) and the Office of the High Commissioner for Human Rights (OHCHR)³¹ on *Prevention of and Responses to Violence against Children within the Juvenile Justice System* identifies the risks and systemic factors contributing to violence against children within this system. According to the report, the majority of detained children are awaiting trial, and large proportions of these children are held for minor offences and are first-time offenders.³²

The thematic report sets out important recommendations and strategies to prevent and respond to violence against children within the juvenile justice system. Guided by international standards, including article 40 of the Convention on the Rights of the Child (CRC), and with a view to maximising children's protection from violence, the report urges States to develop and use effective alternative mechanisms to formal criminal proceedings that are child- and gender-sensitive. These alternatives include diversion, restorative justice processes, mediation, and community-based programmes, including treatment programmes for children with substance abuse problems.

The importance of restorative justice has become still greater in light of the growing social misperception that child-offending (often understood in the context of armed and gang violence) is on the rise and poses a threat to security in the community. The perceived threat of juvenile delinquency, often fuelled by inflammatory media reports and, at times, by political agendas, increases social pressure for the criminalization of children and adolescents and, hence, for the introduction of lower ages of criminal responsibility and longer periods of deprivation of liberty. As a result, child populations in detention have been growing exponentially.

With a view to reversing this worrying trend, significant efforts are under way in several regions to reiterate and strengthen children's rights in the justice system. An important positive development in this respect is the movement to promote the use of restorative justice mechanisms.³³ A number of countries already recognise the value of promoting restorative justice processes for children and are introducing legislation to this end (see Box 3 for details of Indonesia's new legislation on restorative justice due to enter force in 2014).

Box 3. A new paradigm and a new mindset: Indonesia adopts legislation on restorative justice³⁴

- The law is framed by the CRC and addresses children as offenders, as victims and as witnesses of crimes.
- Status offences are decriminalized.
- The minimum age of criminal responsibility is raised from 8 to 12 and marital status no longer constitutes grounds for treating the child as an adult.
- Children's right to legal counsel and other assistance and to access justice before an objective and impartial court and in closed proceedings is recognized, as is the right to humane treatment and freedom from torture and other inhuman, cruel and degrading treatment or punishment.
- Protection of privacy and confidentiality of the child's identity in public media is guaranteed.
- Arrest, detention or imprisonment can be used only as a last resort and for the shortest possible time.
- Only specialized personnel can handle cases of children involved with the justice system.
- Police, prosecutors and judges are required to prioritize diversion and restorative justice in cases of an offence punishable with a sentence of imprisonment of up to a maximum of seven years and when the child is not a recidivist.
- Legislation provides a variety of sentencing options, including admonishment, non-institutional and institutional treatment, social services, supervision and vocational training.

For children who become involved with the justice system, restorative justice offers an approach that is flexible and based on mutual recognition and respect among participants. Furthermore, restorative justice can be adapted to meet the specific requirements of individual children and, likewise, to reflect different social and cultural contexts. Restorative justice approaches have the potential, therefore, to promote and protect the best interests of the child throughout the various procedural stages, whether he or she is a victim or offender.

2. THE INTERNATIONAL LEGAL FRAMEWORK FOR RESTORATIVE JUSTICE

The establishment of a restorative justice programme is framed by significant international standards on the protection of the rights of children involved with the criminal justice system.³⁵ The CRC recognizes the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth so as to reinforce the child's respect for the human rights and fundamental freedoms of others, taking into account the age of the child and the desirability of promoting his or her social reintegration, and his or her assumption of a constructive role in society (article 40 (1)). The CRC encourages the establishment of a separate justice system specifically applicable to children (article 40 (3)); anticipates measures to deal with the child without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected (article 40 (3) (b)); and foresees a variety of dispositions to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate both to their circumstances and to the offence (article 40 (4)).

These important provisions have been further complemented by significant international standards set out below. The normative framework provided by relevant international legal instruments is developed in more detail in Annex I to this report.

- The UN Standard Minimum Rules for the Administration of Juvenile Justice, “the Beijing Rules”, General Assembly resolution 40/33, 29 November 1985;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173, 9 December 1988;
- The UN Guidelines for the Prevention of Juvenile Delinquency, “the Riyadh Guidelines”, General Assembly resolution 45/112, 14 December 1990;
- The UN Standard Minimum Rules for Non-custodial Measures, “the Tokyo Rules”, General Assembly resolution 45/110, 14 December 1990;
- UN Rules for the Protection of Juveniles Deprived of their Liberty “the Havana Rules”, General Assembly resolution 45/113, 14 December 1990;
- Guidelines for Action on Children in the Criminal Justice System, Economic and Social Council resolution 1997/30, 21 July 1997;
- Guidelines on justice for child victims and witnesses of crime, Economic and Social Council 2004/27, 2004.

In this area, it is equally important to take into account the guidance provided by the Committee on the Rights of the Child, particularly through its General Comments No.10: Children's rights in juvenile justice, adopted in 2007; No. 12: The right of the child to be heard, adopted in 2009; and No. 14: The right of the child to have his or her best interests taken as a primary consideration, adopted in 2013.³⁶

Furthermore, the Economic and Social Council has adopted basic principles on the use of restorative justice, encouraging the development of mediation, conciliation, conferencing and sentencing circles as an effective alternative to formal criminal justice mechanisms.³⁷ These themes were central to the First World Congress on Restorative Juvenile Justice, held in 2009, in Peru, and figure high in the Lima Declaration on Restorative Juvenile Justice, adopted by the Congress (Box 4).

Box 4. The Lima Declaration on Restorative Juvenile Justice

The First World Congress on Restorative Juvenile Justice¹, held in Lima, Peru, was attended by some 1000 participants from 63 countries, representing governments, the judiciary, civil society, professionals working with or for children, the media, academia and UN agencies.

The Lima Declaration recalls the aims of juvenile justice as set out in article 40 (1) of the CRC and other international standards, and expresses serious concerns at the status and quality of the juvenile justice systems around the world, including the very limited or non-existent efforts to deal with children involved with the justice system without resorting to judicial proceedings. However, the information presented at the Congress also showed that alternative measures, including restorative justice programmes, contribute to a child's reintegration and encourage him or her to assume a constructive role in society.

The Declaration emphasizes that restorative justice should be an integral part of the juvenile justice system and applicable in all stages of the juvenile justice process, either as an alternative measure or in addition to other measures. Restorative justice should be offered as an option to all persons affected by crime, including direct victims and their families, and offenders and their families.

In addition to the significant normative framework provided by international standards, restorative justice for children is supported by a number of important regional standards. The relevant standards associated with the African, European and Inter-American human rights systems are set out in Annex II.

3. THE PREPARATION OF THIS REPORT

In June 2013, the SRSG joined the Governments of Indonesia and Norway in the organization of an international expert consultation on restorative justice for children. This meeting, held in Bali, Indonesia, reviewed different models of restorative justice for children, as well as national legislation and experiences, including those promoted in Australia, Brazil, Indonesia, Northern Ireland, Norway, Peru, the Philippines, South Africa and Thailand.

This consultation, which informs the present report, brought together representatives from ministries of justice, ombudspersons, judges, prosecutors, police officers, restorative justice conference facilitators, restorative justice programme managers, international child rights experts, researchers and child protection officers.³⁸ A full list of participants is included in Annex III.

The objectives of the consultation were: to provide an overview of available models of restorative justice for children and of legal structures that support such programmes at the national, regional and community levels; to draw attention to positive developments and promising practices, as well as shortcomings and challenges in the use of restorative justice processes for children within formal and informal justice systems; and to highlight legal obligations, roles and responsibilities of State institutions and the need to integrate efforts at all levels and with all stakeholders. Important lessons were drawn from those countries where law reform and a paradigm shift from punitive approaches to child-sensitive restorative justice programmes have led to the rehabilitation and reintegration of children at the community level.

This report is, in addition, based on a desk literature review, and draws on case studies from Australia, Brazil, Montenegro, Norway, Peru, the Philippines, South Africa, Thailand and the USA.

2

RESTORATIVE JUSTICE MODELS

At the heart of all restorative justice is the goal of restoring the harm caused by an offence rather than punishing the crime. This goal can be achieved by means of a range of practical procedures, and communities organise their restorative justice conferences in different ways in order to meet their specific needs. This chapter sets out some of the principal restorative justice models and explains why they have been adopted as formal conflict resolution mechanisms in State justice systems, and how they operate.

1. FAMILY GROUP CONFERENCING (FGC)

FGC is a restorative justice model that derives from traditional means of dispute resolution found among the Maori in New Zealand. The model has since been widely adopted in Australia, as well as Brazil, Canada, Peru, the Philippines, Thailand, South Africa and the USA, among others.

FGC was first formally introduced as a practice for young offenders through the New Zealand Children, Young Persons and Their Families Act 1989. One of the underlying reasons for this change were the serious concerns shared among Maori and Pacific Island communities concerning the juvenile justice system at the time. These communities felt that this system took into account neither the responsibilities that young offenders had toward their communities, nor the harm that their offences caused to these communities.³⁹ These concerns resulted in the incorporation of ancient Maori conflict resolution mechanisms in the formal juvenile justice system.

The traditional Maori conferencing practice derives from the concept of collective responsibility with regard both to decision-making and to wrong-doing and the appropriate measures to address this wrong-doing. Emphasizing collective responsibility and justice, the FGC approach draws on community strengths, resources and experience, not only in developing solutions to conflicts, but also by involving the community in the consideration of the underlying factors contributing to delinquency, such as child abuse and neglect.⁴⁰ These changes have been accompanied by a growing recognition of the interests of the victim, and the importance of the active involvement of the victim in the resolution of the harm caused by an offence.

New Zealand's Children, Young Persons and Their Families Act encompasses a "presumption in favour of diversion",⁴¹ meaning that all offences by children will primarily be referred to an FGC, with a view to keeping children away from formal court proceedings. The Act requires that arrest – including traditional means of arrest - be restricted to situations in which it is absolutely necessary to prevent further offending, and should only take place once an FGC has been convened. Even in cases where the child has been arrested, there is still a presumption in favour of diversion, and unless the child does not qualify, he or she will be referred to an FGC convened by a youth justice coordinator who, in turn, makes a recommendation for or against prosecution.

The introduction of FGC into the Young Persons and Their Families Act, has meant a change in police culture and, specifically, an increase in police warnings – today 44 per cent of non-serious offences committed by children are dealt with through police warnings. Slightly more serious

offences, which account to about 30 per cent of all cases, are diverted through police-based youth diversion programmes. FGCs are applied in about 25 per cent of all cases of child offending.⁴²

Restorative justice was introduced as a part of New Zealand's formal criminal justice system in 2002 – and hence applied to adult offenders - through the Sentencing Act, the Parole Act, and the Victims' Rights Act.⁴³ Restorative justice programmes currently being implemented in the country include: “a court-referred restorative justice process being piloted by the Ministry of Justice in four District Courts”; “17 community-managed restorative justice programmes funded through the Crime Prevention Unit” and a “number of local community groups who receive referrals from court, but primarily rely on community sources for funding”.⁴⁴

The FGC model has subsequently been implemented in many other countries, and while it is reinterpreted in each setting, there are features of the process that are common to all. The aim of an FGC is to enable parties to take collective responsibility for the offence and its resolution.⁴⁵ An FGC is usually called by a trained facilitator and involves the participation of all those affected by the offence. Most commonly this will include the victim and offender together with their respective families and/or support persons, as well as others affected by the offence and those who may help contribute to the resolution of the conflict, including police officers and social workers.

The participants discuss the offence, giving both victim and offender the opportunity to describe their experience and the consequences of the offence. In this way, the offender is able to build an understanding of the harm caused. The parties then attempt to find an appropriate resolution to the conflict through a collective agreement, identifying the obligations of the offender to repair the harm caused by the offence. Together, all participants in an FGC develop a proposal for a suitable diversionary programme, which is presented to the court and to which the offender must consent freely. The FGC can also suggest a sanction to be enforced by the court. The conference often concludes with the signing of an agreement.

The court acts as an oversight mechanism to ensure that the agreement is legally sound, and that it is appropriate in light of the offence. The court also has a follow-up function, to assess compliance with the agreed diversion programme. If the court finds that the agreement has been successfully fulfilled, then the case will be formally withdrawn. In the case of non-compliance, the case will be referred back to the court for formal sanctioning.⁴⁶

The key elements of the FGC procedure are set out in Box 5.

Box 5. The Family Group Conference procedure

- 1) The facilitator contacts the victim and the offender to explain the process and officially invite them to participate in the conference.
- 2) The facilitator also asks the victim and offender to identify “key members of their support systems” who they wish to participate in the FGC.
- 3) The conference typically starts with the offender's account of the offence, followed by those who have been affected by the offence. However, if the victim wishes to begin, then he or she can do so.
- 4) The victim has the opportunity to ask questions to the offender and to express his or her feelings.
- 5) The victim identifies “desired outcomes”, which will help shape the agreement of the conference, however, all conference participants contribute to the outcome of the conference.⁴⁷
- 6) The agreement sets out how the offender will repair the harm caused.⁴⁸

FGC has been used to address offences against children, such as cases of child maltreatment⁴⁹ and domestic violence. It has also been used to address various types of non-serious and serious offences committed by children, including arson, minor assault, drug related offences and vandalism. FGCs have also been successfully used to address community conflicts and social welfare cases,⁵⁰ as well as incidents of domestic violence and drug abuse.^{51,52}

FGCs have, in addition, been implemented in non-judicial settings, such as schools and residential care facilities.

Box 6. Family Group Conferencing: Zack's story⁵³

“I used to hang around the estate with my friends and have a laugh. People complained to my mum saying that I was a menace. This really stressed her out as she already had a lot to cope with and things weren't going so well at school either. So my mum was unhappy and residents on the estate wanted us evicted and I was about to get kicked out of school. The welfare officer at the school suggested a Family Group Conference, I thought I might as well try it. He said that me and my family would be in charge of making the decisions. My mum, auntie plus some local residents and my teacher, came along, as well as the school welfare officer.

In the first part we discussed the situation all putting our points of view across. Some other people from the estate said they felt really intimidated by me and my friends and it was making it hard for them to go out. I hadn't realized how bad it was and I felt really sorry. Then mum and I talked about everything that was stressing us out. It felt good because people seemed to care about us.

Then all the workers and residents left the room so it was just me and my mum and my auntie and we came up with the ideas about how to make things better. I decided I wanted to do some voluntary work on the estate to earn some respect and show I was really sorry. We talked about things that would help me get on better at school, like having some extra help with the things I find hard, because I want to get an apprenticeship when I leave. And going to football club so I don't always hang around with the same people. The residents liked the idea and they even suggested getting other residents together to help my mum out with the shopping and things.

I'm glad I had the FGC. My mum and I are getting on better now and I like doing work on the estate. I'm pleased the residents aren't scared anymore. I don't find school that easy but I'm making more of an effort now because I want to make something of myself.”

Variations on the FGC model

FGCs were introduced in Australia in the early 1990s, using a model based on the theory of “reintegrative shaming”⁵⁴ rather than the stigmatic shaming of offenders.⁵⁵ Reintegrative shaming theory focuses shaming on the act instead of the person.⁵⁶ It was first adopted in New South Wales in a district called Wagga Wagga and has since become known as the Wagga Wagga model.

The Wagga Wagga model was adopted in order to establish an effective “cautioning scheme” for child offenders and children at risk of offending, and was designed to address the growing perception that offending by children was on the rise.⁵⁷ In this case, the conference is led by a trained police officer rather than an independent conference facilitator and is recognized as being an “effective method of transforming police attitudes, role perceptions and organisational culture”.⁵⁸ In order to maintain the restorative nature of the process the conference is “carefully

scripted”.⁵⁹ The Wagga Wagga model has also been transferred to other areas in Australia, as well as to Canada, the United Kingdom and the USA.

Another variation of FGC has been developed in Northern Ireland, where the Justice (Northern Ireland) Act provides for restorative Youth Conferences to be offered by both the Public Prosecution Service and the Youth Court to all young people who admit to an offence. This approach has been found to satisfy victims and reduce re-offending.⁶⁰

In Thailand in 2003, the Department of Juvenile Observation and Protection launched a restorative justice programme known as Family and Community Group Conferencing (FCGC) as an alternative non-prosecution measure for child offenders who have committed crimes warranting a sentence of 5 years of prison or less (see Box 7).

FCGC was inspired by the New Zealand experience, but has been developed in accordance with Thai community values. The model has been successfully implemented across the country and is supported by pre-existing legislation. It has proven to be an effective diversion method and has significantly decreased recidivism: among children who have completed FCGC, recidivism rates are 3 to 4 per cent, whereas the rate of recidivism among children in the conventional criminal justice system is 15 to 19 per cent.⁶¹

During FCGC, the court has an oversight function, only intervening if it considers that the restorative justice conference and the elaboration of the agreement has not been conducted lawfully and in respect of the rights of the child.⁶² If the rehabilitation plan devised during the conference is considered to have been fulfilled, the court will issue an order to strike the case from the case list.⁶³ After closing the formal case, the child receives the necessary support services to continue reintegration and rehabilitation after the end of the agreement, if needed.

Some serious cases have been referred to FCGC upon request of a regional judge. In Thailand experts, “[...] agreed that it [FCGC] provided a venue for a child and his/her parents to openly discuss the problem at hand, created a better understanding within the family, and gave the victims the right to speak.”⁶⁴

Box 7. Family and Community Group Conferencing in Bangkok: a story recorded by UNICEF Thailand

“Last month, 14-year-old Wit was arrested by police for stealing a 10-kilogramme spool of electrical wire from a house where he was employed as a part-time construction worker. He spent one night behind bars at the local police station before his weeping and distraught mother bailed him out.

A few years ago, Wit, a high school dropout, would have been formally charged with theft, and he probably would have ended up being sentenced to a term in a juvenile detention centre. But under an innovative programme that seeks to keep young, first-time offenders out of the formal criminal justice system, Wit is now doing a service of his own choosing in favour of the community— cleaning the large mosque in the Bangkok suburb where he lives.

Wit’s case was diverted to the Family and Community Group Conferencing, a “child-friendly” government programme that deals with children who have committed minor crimes. In addition to diverting children away from the formal system, it seeks to restore social harmony between the victim and child offender as well as within the community at large.”⁶⁵

2. VICTIM OFFENDER MEDIATION (VOM)

VOM is a model used widely in Canada, the USA and several European countries. It is most commonly applied in cases involving minor offences committed by children, although recently the model has also been employed for more serious offences. VOM is sometimes used as an alternative to formal prosecution, by means of diversion, but most commonly VOM is employed as an alternative referral by the court after the offender has made a formal admission of guilt.⁶⁶

The primary focus of VOM is to reconcile the victim and offender, and the mediation process focuses on these parties. The model is based on the requirement that the offender and victim first recognize their respective roles in the offence and agree voluntarily to participate in the process.⁶⁷ Separate pre-mediation sessions, conducted by a facilitator, are held with the victim and the offender to assess the issues to be discussed during VOM. The victim and offender then meet in a “safe, structured setting” where they engage in a discussion or dialog, mediated by a trained facilitator. This gives the victim the opportunity to describe how the offence has affected him or her, as well as how he or she has experienced the offence. The offender is also given the opportunity to provide his or her account of the offence, as well as set out his or her personal circumstances. This process allows for the offender to “learn about the impact of their offence”. Together the victim and offender develop a “mutually acceptable plan that addresses the harm caused”⁶⁸.

Box 8. An example of a Victim Offender Mediation session

The victim was a middle-aged woman: the offender, a 14-year-old neighbour of the victim, had broken into the victim’s home and stolen a video player.

The mediation session took place in the basement of the victim’s church. In the presence of a mediator, the victim and offender talked for 2 hours. At times, their conversation was heated and emotional. When they finished, the mediator felt that they had heard each other’s stories and learned something important about the impact of the crime and about each other.

The participants agreed that the offender would pay \$200 in restitution to cover the cost of damages to the victim’s home resulting from the break-in and would also reimburse the victim for the cost of the stolen video player (estimated at \$150). They also worked out a payment schedule.

During the session, the offender made several apologies to the victim and agreed to complete community service hours working in a food bank sponsored by the victim’s church. The victim said that she felt less angry and fearful after learning more about the offender and the details of the crime. She also thanked the mediator for allowing the session to be held at her church.⁶⁹

In Norway, the National Mediation Service, established in 1981, is a fully state-run service under the Civil Department of the Ministry of Justice, Civil. It operates as a separate directorate and has 22 regional offices throughout the country. There are currently some 600 local volunteers who are trained to facilitate VOM processes. Practitioners agree that the appropriateness of this volunteer system needs to be assessed according to certain criteria, including the respect and recognition the volunteers enjoy in the community, and their commitment to the restorative justice process. Volunteers also serve as an important means of raising community awareness and support for restorative justice.

3. CIRCLE SENTENCING

PEACEMAKING CIRCLES

RESTORATIVE CIRCLES

Circle sentencing derives from, “peacemaking circles”, traditional conflict resolution mechanisms practiced among indigenous people in Canada and the USA. They are based, “not only on the concept of mutual forgiveness but on the responsibility placed on every member of the community to forgive”.⁷⁰ The reintroduction of this ancient practice in the formal justice system stemmed from criticism of State ownership of dispute resolution. Critical voices pointed out that conventional justice processes remove the possibility of resolving crimes and of allowing the appropriate punishment to be decided upon by the community where the offence took place, and where the harm caused by the offence is felt.⁷¹

The practice of circle sentencing was reintroduced in 1991 by local judges and community justice committees in the Yukon Territory and other Northern Canadian communities,⁷² and sentencing was formally introduced into the Criminal Code in 1996. This development encouraged and prioritized community-based sentencing and restorative approaches to offending that focus on the responsibility of the offender and the reparation of the harm caused to the victim and the community.⁷³ The Canadian Youth Criminal Justice Act also incorporated alternative and extrajudicial measures, including restorative processes and sentencing, as a diversion option for child offenders. These restorative programmes include activities such as community service, restitution to the victim, life skills development and substance abuse or reconciliation programmes.⁷⁴ In 1996 circle sentencing was also adopted in the USA, through a pilot project established in Minnesota.⁷⁵

The modern version of circle sentencing is a hybrid of traditional justice rituals and formal criminal justice procedures. Participants commonly include the victim and the offender and their respective communities of support, the judge and court personnel, prosecutor, defence lawyers, police and any community members who have an interest in the case. The circle is facilitated and presided over by the court judge, who participates in the circle as an equal party.

Together, the circle participants devise an appropriate sentencing plan that meets the needs of all parties. This plan is then formally incorporated into a court sentence, and may include prison sentencing if this is deemed appropriate by the circle. Circles show consistent compliance rates, and an overwhelming majority of cases that are dealt with through circle conferencing reach an agreement.⁷⁶

Following the Yukon experience in Canada, circle sentencing was implemented in Saskatchewan, where the approach also incorporates other models, such as VOM and ancient indigenous peace-making circles. The idea is to create a safe space in which the “real issues and needs” can be discovered. These meetings are open to all those interested in observing and are facilitated by a judge, who leads the discussion but will not take an active role as a participant.

Circles have been used to address offences by both children and adults in urban and rural areas alike, and are used in the case of serious and violent offences as well as non-serious offences.⁷⁷ Not all cases are, however, suitable for circle sentencing. Suitability is established on the basis of the offender’s character and personality, including his or her resolve to participate and make amends.

Circles promote a holistic approach to offending, and aim to address the situation of the victim, offender and the community by considering both the offence itself and the needs of those affected

by it. The first step of the circle procedure involves the offender making an application to participate in the circle which, in itself, requires significant commitment on his or her part.

Typically, the participants of the circle include the victim and offender, their respective families and other supportive persons, relevant and affected members of the community, and justice and social service personnel. All participants have the opportunity to reflect on the offence and its consequences, with the aim of reaching a common understanding and developing a plan or agreement that meets the needs of all those concerned.

Circles are designed to strengthen the collective sense of community and empower the victim, the offender and community members through the constructive resolution of conflict.⁷⁸ The goal is to heal all those affected – including the offender - by means of this shared endeavour, and facilitate rehabilitation and prevent recidivism by mending the social relationship between the offender and the community.

Circle sentencing provides for a wide variety of options for restitution and punishment, since this is decided on by the participants in the circle. In most cases, the judge will accept original action plans: in Saskatchewan, an offender who caused the death of his father as a result of driving while intoxicated was sentenced to one year of lecturing at public meetings about the consequences of drunk driving.⁷⁹ The judge does, however, have the power to overrule such plans if they are considered to be in any way abusive or disproportionate to the offence.

Box 9. The circle sentencing procedure⁸⁰

- 1) The offender makes an application to participate in the circle process.
- 2) A healing circle is held for the victim.
- 3) A healing circle is held for the offender.
- 4) A sentencing circle is held to develop consensus on the elements of a sentencing plan. This plan will include commitments by the offender to repair the harm, but may also include commitments on the part of the judiciary, community and family of the offender.
- 5) Follow-up circles to monitor the progress of the offender.

In Caxias do Sul, Brazil, the Court of Justice and City Hall have initiated a pilot project that institutionalizes restorative justice in judicial public policy and social policy by providing, “an intertwining of judiciary policy of collectively generated solutions with a municipal public policy of restorative pacification”. The project has been implemented in the judiciary, City Hall, the university and a private foundation, and through three restorative pacification centres that aim to deal with a wide range of conflicts. Facilitators have been trained in a variety of fields including health, social services and education in order to be able to apply peacemaking circles in a range of settings. In addition to criminal offending, these circles have been used to deal with family disputes; conflicts in schools; conflicts in detention centres and the development of participatory correctional measures. This is a holistic approach to social pacification, whereby the community is given the tools to manage conflicts when and where they arise.⁸¹

Box 10. An example of a circle sentencing session

“The victim was a middle-aged man whose parked car had been badly damaged when the offender, a 16-year-old, crashed into it while joyriding in another vehicle. The offender had also damaged a police vehicle.

In the circle, the victim talked about the emotional shock of seeing what had happened to his car and the cost to repair it (he was uninsured). Then, an elder leader of the First Nations community where the circle sentencing session was being held (and an uncle of the offender) expressed his disappointment and anger with the boy. The elder observed that this incident, along with several prior offences by the boy, had brought shame to his family. The elder also noted that in the old days, the boy would have been required to pay the victim’s family substantial compensation as a result of such behavior. After the elder finished, a feather (the “talking piece”) was passed to the next person in the circle, a young man who spoke about the contributions the offender had made to the community, the kindness he had shown toward elders, and his willingness to help others with home repairs.

Having heard all this, the judge asked the Crown Council (Canadian prosecutor) and the public defender, who were also sitting in the circle, to make statements and then asked if anyone else in the circle wanted to speak. The Royal Canadian Mounted Police officer, whose vehicle had also been damaged, then took the feather and spoke on the offender’s behalf. The officer proposed to the judge that in lieu of statutorily required jail time for the offence, the offender be allowed to meet with him on a regular basis for counselling and community service. After asking the victim and the prosecutor if either had any objections, the judge accepted this proposal. The judge also ordered restitution to the victim and asked the young adult who had spoken on the offender’s behalf to serve as a mentor for the offender.

After a prayer in which the entire group held hands, the circle disbanded and everyone retreated to the kitchen area of the community center for refreshments.”⁸²

4. COMMUNITY REPARATIVE BOARDS

Community reparative boards are a form of community sanctioning that has been long-practiced in the USA. They are court ordered and primarily used for non-violent adult offenders, but they have also been used to address the situation of child offenders.

The boards are usually made up of a group of trained community members who conduct a public meeting with the offender to discuss the offence and the harm caused by it. Together with the offender, the board develops a time-bound sanction agreement. After the agreed time has passed, the board is responsible for following-up on the fulfilment of the agreement and subsequently submitting a report to the court concerning the offender’s compliance. Recently these reparative boards have also included victims in their meetings. The process aims to instill in the offender a sense of ownership of the agreement and the justice process, thereby fostering responsible citizenship.⁸³

A number of projects established in the United Kingdom draw on the community reparative board model, but these require further development to become wholly restorative. An example is a variant adopted in Scotland known as Children’s Hearing Panels, which incorporates aspects of victim offender mediation and conferencing. The process involves an informal meeting with the

child offender and his or her family, with the major difference being that the victim is not involved in this procedure, while the participation of the child offender is obligatory.

Box 11. An example of a community reparative board session

“The reparative board convened to consider the case of a 17-year-old who had been caught driving with an open can of beer in his father’s pickup truck. The youth had been sentenced by a judge to reparative probation, and it was the board’s responsibility to decide what form that probation should take. For about 30 minutes, the citizen members of the board asked the youth several simple, straightforward questions. The board members then went to another room to deliberate on an appropriate sanction for the youth. The youth awaited the board’s decision nervously, because he did not know whether to expect something tougher or much easier than regular probation.

When the board returned, the chairperson explained the four conditions of the offender’s probation contract: (1) begin work to pay off his traffic tickets, (2) complete a State police defensive driving course, (3) undergo an alcohol assessment, and (4) write a three-page paper on how alcohol had negatively affected his life. The youth signed the contract, and the chairperson adjourned the meeting.”⁸⁴

5. VICTIM IMPACT PANELS

Victim impact panels are panel forums where victims of certain offences meet with offenders of the same type of offence in order to give their account of the impact the offence has had on their lives and the lives of their families and friends. The victims speaking on the panel are not the victims of the offences committed by the offenders present.

These panels are commonly used as a form of diversion or as part of a probation sentence for children who have been found guilty of driving under the influence of drugs or alcohol. They have also been used in prisons.⁸⁵

3

PROMOTING RESTORATIVE JUSTICE FOR THE REALIZATION OF THE RIGHTS OF THE CHILD – KEY QUESTIONS

1. WHEN IS RESTORATIVE JUSTICE APPROPRIATE?

For the justice process to be truly restorative and address the needs of all those involved, there are a number of requirements that must be met and which determine the feasibility of a restorative approach.

First, there must be sufficient evidence to support the charge against the child (a *prima facie* case), and the alleged offence must fall within the scope of offences eligible for diversion as defined by the law.⁸⁶

The child offender must admit responsibility for the offence in question. It is imperative that the entire process be undertaken voluntarily and, consequently, a child's admission of responsibility must never be obtained through undue pressure or coercion.⁸⁷ This voluntary dimension also demonstrates an offender's willingness to participate in the process and make amends for the harm caused.

For the restorative process to take place, it is also necessary to obtain the consent of the child's parent(s), guardian or responsible adult, as well as the consent of the victim to diversion to a restorative process. Likewise, the victim of the offence must voluntarily agree to participate in the process, again, without coercion or undue pressure.

A number of countries apply additional criteria to assess the feasibility of a restorative approach, requiring, for example, that the child is a first time offender, or ensuring that the child offender is committed to repairing the harm caused to the injured party.⁸⁸

If a case meets the requirements for restorative justice, this approach can be implemented at any stage in the legal process, from the moment of a child's arrest or apprehension to pre-trial procedures, trial and, if the child is convicted, while the child serves his or her sentence or subsequent to completing that sentence. In other words, restorative justice can be used to replace formal justice processes by means of diversion, or it can be used to complement them as part of a court proceeding, as a sentence, or as a dimension of the child's reintegration.

In accordance with the principles and provisions of the CRC, including those recognizing the right of the child to a prompt judicial decision and the right of the child to be heard in any judicial proceedings affecting him or her,⁸⁹ the South African Child Justice Act determines that cases concerning a child alleged to have committed a criminal offence should be processed within a prescribed time frame of 48 hours⁹⁰ (see Box 12). Under South African law, diversion is recognized at a preliminary stage of the judicial proceedings as a vital and primary response for children who have committed criminal offences.⁹¹

Box 12. Diversion under the South African Child Justice Act

In South Africa, when a child is arrested, the arresting officer is required to contact a probation officer - who is usually a social worker – in order to complete a preliminary inquiry. This preliminary inquiry is an informal pre-trial procedure⁹² which is “set-up to inquire into the matter and how the child may be assisted if he or she accepts responsibility”.⁹³ It is at this point that the parents or guardian of the child are contacted and requested to attend. One Stop Centres in South Africa use a family finder who assists in contacting the parents and bringing them to where the child is being held.⁹⁴ This is an important service in poor areas, where parents are often difficult to reach, and where temporary or informal housing means that few people have formal addresses.

The preliminary inquiry includes an interview with the child, to find out more about his or her perspective on the alleged offence, as well as his or her personal circumstances. The interview is conducted in a manner that is child-friendly and appropriate to the child’s age, maturity and level of understanding.⁹⁵ It is carried out in the presence of a parent, guardian, social worker or any other responsible and appropriate person appointed by the child.⁹⁶

The preliminary inquiry is conducted to establish whether diversion is appropriate before a plea and, this being the case, what kind of diversion is most suitable. The preliminary inquiry is also used to assess whether the child is in need of special care or protection and to ensure that all parties have been heard and that all views have been considered.

2. HOW DO RESTORATIVE JUSTICE PROCESSES PROTECT FROM DISCRIMINATION AND PROMOTE INCLUSION?

There is a significant body of experience from a range of national contexts that demonstrates the strong potential of restorative justice processes to address discrimination and gender- and power-inequalities in various settings, including the home, community and schools. Restorative justice processes create safe spaces where different actors can come together to engage in dialogue concerning negative behaviour and discuss the underlying reasons for this behaviour and the values contributing to it. This in turn helps to identify and address inequalities and prejudice in a constructive manner; as well as to break down discrimination and foster empathy and understanding among the parties concerned, and more widely, in the community.

For children who are marginalised or face discrimination on the basis of gender, disability, ethnic origin, socio-economic status or similar grounds, diversion and restorative justice offer the possibility of avoiding a formal justice system that may be insensitive to their situation and where they may be at risk of re-victimization.

In Australia, for example, a restorative justice conference led to an agreement between a boy who had committed a minor sexual assault and the girl victim to, “work together to confront a culture of exploitative masculinity in a school that unjustly characterised the girl as ‘getting what she asked for’”.⁹⁷ The conference allowed the parties involved to understand the offence in the wider context of an environment where girls consistently experienced discrimination and, consequently, enabled them to address both the specific offence and the underlying context.

Similarly, FGCs held with families affected by violence can have very positive effects, including increased family support and a reduction in levels of violence in the home.⁹⁸ Specifically, the Strengthening Families Programme in Northern Ireland has been designed to improve processes for family protection and resilience and reduce family risk. It incorporates separate sessions for parents and their children, as well as family interaction sessions for both parties. The parent sessions involve learning effective methods for communicating with their child regarding the expectations around behaviour, effective disciplinary methods, and managing strong emotions in connection with these issues. The child's sessions correspond with these, but also include topics such as resisting peer pressure and other personal and social skills.⁹⁹

There is, however, an important caveat to the use of restorative justice processes to secure protection from discrimination and violence. In cases involving family violence or sexual violence, these processes should only be used when appropriate. Particular care must be taken since the, "particular dynamics of family violence and sexual violence, including the power imbalances inherent to this type of offending can pose significant risks to the physical and emotional safety of the victim".¹⁰⁰

a) Assessing underlying factors

In order to design a holistic and sustainable restorative justice programme, the underlying causes and risk factors of child offending need to be assessed and each child's specific situation must be taken into account. As a starting point, the programme must recognise that children differ from adults in their physical and psychological development, as well as their emotional and educational needs. Thus, children must be treated differently from adults when they commit an offence.

New brain research shows that a person's self-control, planning and abstract thinking only fully develop in late adolescence. When a child experiences chaos, neglect, threats and violence their potential is stunted and distorted. This increases the risk of more self-absorbed, impulsive and anti-social behaviour which may, in turn, increase the likelihood of offending later in life.¹⁰¹ There are, in addition, personal risk factors associated with offending, including mental health conditions that can be caused by factors such as trauma and violence experienced in a child's early years.

Other risk factors include poverty and deprivation associated with an unstable family environment, homelessness, and exposure to community or gang violence. Individual and structural discrimination are also significant, as demonstrated by the continuous over-representation of ethnic and minority groups - including indigenous children - in the justice system. Male children also constitute one of the most over-represented groups: in the majority of countries reviewed for the development of this report, they make up over 95 per cent of children who become involved with the justice system.

The risks factors associated with juvenile offending should be addressed through appropriate policy responses, treatment and services. Studies suggest that restorative justice programmes that do not address the underlying reasons for offending or fail to encompass rehabilitative and preventive measures show a lower success rate in preventing recidivism.¹⁰²

In both South Africa and the Philippines, a lack of productive activities was identified as one of the important reasons for children engaging in offending.¹⁰³ The founder of the Umthombo NGO in Durban, South Africa, points out the importance of offering alternatives to children at risk that are as "fast paced and exciting" as life on the streets. In order to ensure their long-term commitment, raise self-esteem and prevent offending, the organisation has developed a programme in which children learn how to surf.

b) Girls and restorative justice

Around the world, girls constitute a particularly vulnerable group, due largely to the lower status they are assigned in society. Their offending is often closely related to various forms of discrimination and deprivation: in countries where girls live in poverty they may be easy targets for criminals engaged in sexual exploitation and drug dealing who manipulate or coerce them to commit crimes. In some countries girls are arrested and convicted for behaviour that would not constitute an offence for boys. Girls are at greater risk of being sexually exploited than boys and, at the same time, are also at risk of being arrested for prostitution or rounded up on the assumption that they are sex workers.¹⁰⁴

The United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women (and girl) Offenders (the Bangkok Rules)¹⁰⁵ address several forms of gender-based discrimination in the criminal justice system and cover the special treatment of girls and women, from admission all the way to aftercare and reintegration. The Rules call for gender-specific options for diversionary measures and the development of pre-trial and sentencing alternatives for this group within the legal systems of Member States, taking account of the history of victimization of many girls and women.¹⁰⁶

Restorative justice processes can create safe spaces in which girls can discuss values, perspectives and experiences with their family and community. Community-based restorative justice programmes can thus serve to promote community dialogue on gender inequality and address this inequality in a positive manner.

It is vital that girls who are arrested and undergo a restorative justice programme are protected in accordance with international standards, and that their particular vulnerabilities as girls are taken into consideration throughout the restorative process.

3. HOW ARE PROCEDURAL SAFEGUARDS FOR CHILDREN ENSURED IN THE RESTORATIVE JUSTICE PROCESS?

Restorative justice is most commonly used as a non-judicial measure, and, as such, restorative justice conferences traditionally do not include judicial professionals. A number of practices have, however, been developed to ensure procedural safeguards during restorative processes, while still maintaining the integrity of the process and those involved in it.

To ensure that the rights of the child are respected at all times and that the process is lawfully conducted, a competent authority, such as a child justice court, should have effective judicial oversight. In some countries, the agreement of the restorative process is equivalent to the outcome of a trial and bears the same legal weight. Judicial review in this instance strengthens the validity of the outcome and ensures that legal safeguards are respected. In Thailand, for example, the court has such a right to oversight, allowing it to intervene if it considers that the restorative justice conference and the elaboration of the agreement have not been conducted lawfully and in respect of the rights of the child.¹⁰⁷

In New Zealand, the conference facilitator is a specially trained, court-appointed social worker. Furthermore, all FGCs in which the offender is a child include a youth legal advocate to ensure that the rights of the child are protected throughout the restorative process.¹⁰⁸

In order to ensure that restorative justice processes provide the necessary safeguards and are conducted in a consistent manner, with an adequate level of competence on the part of the facilitator, guidelines and standard operating procedures for professionals must be developed.

In the Philippines, the Department of Social Welfare and Development has issued an administrative order entitled, "Guidelines in the Conduct of Diversion for Children in Conflict with the Law". These Guidelines are issued, "to ensure that diversion is appropriately conducted by social workers, law enforcement officers, prosecutors and other stakeholders" and, "to provide a standard procedure" for diversion, its implementation and supervision and monitoring.¹⁰⁹ Similar manuals are being developed for implementation of diversion and restorative justice processes at the Barangay level (the smallest administrative division), as well as in schools, where Child Protection Committees will set up Restorative Justice Panels if both parties in a conflict are still in school and have agreed to a restorative process.¹¹⁰

In Brazil, standard operating procedures have been developed to guide implementation of the restorative justice programme in São Caetano do Sul by the judiciary, the community and in schools. The procedures address a wide range of actors including judges, prosecutors, school principals, social workers working at the youth court, police officers, community health workers, lawyers, guardianship counsellors and various support groups for minorities.¹¹¹

Professionals and community facilitators dealing with children involved with the justice system must also receive adequate and continuous training and capacity building, as should those co-facilitating a restorative conference or otherwise assisting the process.

Training should cover issues such as conducting a mediation process or restorative conference and the possible outcomes, and running a mediation process in a manner that is sensitive to the needs of the child offender and the victim. This includes educating judicial officers and service providers on the content of relevant legislation concerning the implementation of diversionary measures and restorative processes. Likewise, police officers and all others who deal with children involved with the juvenile justice system, including informal justice systems, must receive training on the rights of the child in the administration of justice and on child-friendly approaches to working with children.

The success of restorative justice programmes for children also relies heavily on the continuous training and capacity building of community volunteers who promote active community support for these programmes. These same volunteers also help ensure an important degree of responsiveness and flexibility for restorative justice programmes, since they are well-positioned to pick up on significant social changes that should be considered when implementing community-based restorative justice programmes for children.

In Rio Grande do Sul, Brazil, courses in restorative justice leadership and facilitation have been held at the Magistrate School since 2005. To date more than 4,000 individuals have completed these courses. This system of certification of community volunteers serves to empower volunteers and brings an important sense of legitimacy to their work, as well as ensuring the quality of the service they provide.¹¹²

To ensure "occupational proficiency"¹¹³ and a consistent quality among service providers and facilitators, centrally approved systems of accreditation can be put in place. In South Africa, such a national system of accreditation for diversion service providers was established under the 2008 Child Justice Act.¹¹⁴ At a minimum, a person's communication skills, conflict resolution skills and suitability to work with children should be considered.

Standardised assessment forms and interview protocols should be designed to take into consideration the child's age and development, as well as to validate the testimony given by the

child.¹¹⁵ The interviewee should be trained in child-friendly language, and the interview should be conducted in a child-friendly environment.¹¹⁶

In the Philippines, the Government has developed standardised assessment forms for interview and information gathering on children in line with the provisions of the Juvenile Justice and Welfare Act. These forms are used by relevant bodies including the Department of Social Welfare and Development, the National Police and local government units. The Department of Social Welfare and Development has also developed standardised forms to be used by social workers when assessing children who are alleged of or accused of having committed a criminal offence.¹¹⁷

4. HOW CAN DIVERSION AND RESTORATIVE JUSTICE PROGRAMMES BE USED FOR SERIOUS OFFENDERS AND CONVICTED CHILDREN?

Restorative justice programmes should offer flexible solutions that are responsive to the circumstances of each child and the requirements of each case. In many countries, restorative diversion programmes exclude serious offenders. Most nationally or regionally implemented restorative justice programmes have nonetheless diverted, that is, removed from criminal justice processing, cases of serious offending to restorative processes in light of the particular circumstances of the child and the case in question.

Studies show that effectiveness of restorative justice in reducing recidivism is particularly great among serious offenders accused of violent crimes. Researchers go so far as to suggest that restorative justice can have a deeper healing impact on serious offenders than non-serious offenders.¹¹⁸ Cases that involve serious forms of violence, such as murder or sexual assault, represent a much deeper conflict than, for instance, property-related crimes. Serious cases make reconciliation and rehabilitation more difficult, but all the more important, since the convicted child faces a long period of deprivation of liberty. In these cases, the stigma associated with the offence, as well as the anger toward the offender on the part of the community and the victim, will also be much more significant.

Following a formal sentencing, restorative justice conferences, where the offender and the victim can meet, give their accounts and express their feelings toward each other, may help both the victim and the offender's healing process. They also enable the child to understand the consequences of his or her actions and take responsibility for them, while also showing the victim the regret he or she feels. Conferences such as these can take place during the time that a child is serving a prison sentence, when diversion is not appropriate, or as a component of a probation programme.

In Oaxaca State, Mexico, the use of restorative justice for juveniles deprived of liberty has proved highly successful. In 2010, the programme, which includes access to psychological and health care services, vocational training and education, recorded no cases of recidivism. The extensive use of restorative justice programmes in pre-trial and post-trial settings meant that in 2010, the State's only detention facility housed as few as 35 children who had committed serious offences.¹¹⁹

In Norway, authorities have introduced diversion for children between the ages of 15 and 18 who have committed a serious crime and/or are repeat offenders. In such cases, a multidisciplinary follow-up team is established to follow the child closely for a specified period of time. Together

with the child, the team, whose members are drawn from the police, the mediation service and the child welfare and schools sectors, enters into an agreement regarding the specific duties the child will have to carry out. The child will also, if possible, join the victim in a victim-offender meeting. These interventions have proven to be very successful, in part because the teams are well-coordinated and have provided the children with the support they required. Offenders report having benefited from the intervention and indicate that they felt they were given more respect in the restorative justice process.¹²⁰

In the Philippines, the court is required to consider the option of diversion to restorative justice programmes for cases where a child is charged with a crime punishable by a sentence greater than six years imprisonment, but less than 12 years. When the penalty is less than six years, the police and the Barangay, with assistance from the social welfare officer, conduct mediation as a norm.¹²¹ This is an example of how the justice system can be designed to be flexible and take into consideration children who have committed a serious offence and who have been convicted by a court of law.

Justice departments in the United States, Canada, and Europe have started to note an increase in the number of victims of violent crime who actively seek mediation and dialogue with the offender. Requests of this kind may be received several years after the offender has been sentenced. In Texas, for example, there is a waiting list of more than 300 victims of serious violent crime who have requested meetings with the offender through the Victim Offender Mediation programme of the Victim Services Unit.¹²²

5. HOW IS RESTORATIVE JUSTICE LINKED TO THE FORMAL JUSTICE PROCESS?

As noted above, restorative justice was first introduced into law in New Zealand in 1989, and since then several other countries have incorporated restorative justice and its practices into legislation. In a number of countries restorative justice has been implemented as a core component of the juvenile justice system through a specialised juvenile justice act, such as the Philippines' Juvenile Justice and Welfare Act,¹²³ which was passed in 2006, and the South African Child Justice Act, adopted in 2008.¹²⁴ These Acts identify and integrate restorative justice as a governing principle.

In introducing a restorative justice dimension, most countries first establish pilot projects that draw from existing legislation in order to divert children from the formal justice system to restorative justice programmes.¹²⁵ These projects have largely relied on the expertise of NGOs and civil society organisations. Pilot projects allow States to see evidence of the programme's effectiveness in the domestic context (see Box 13 on the experience in Peru). In other cases, such as that of Montenegro, discussed in Box 14, the initial impetus for introducing a restorative justice component comes directly from Government.

Following the satisfactory implementation of a pilot project, practices are developed on a larger scale or incorporated into legislation and policy. In South Africa for example, One Stop centres were used to inform the development of procedures under the new legislation. This project structure was incorporated in its entirety into the Act and also served as a basis to inform other procedural aspects of the Act, for example through the establishment, as discussed above, of the specific time frame of 48 hours to process cases of children who are accused of or alleged of having committed a criminal offence.

Box 13. Implementation stages of restorative justice for children in Peru

In Peru, implementation of restorative justice for children began in 2005 in two pilot projects: one in El Agustino in Lima and the other in José Leonardo Ortiz in Chiclayo. The first phase was implemented in the light of existing legislation, the Children and Adolescents Code, which foresaw the possibility of referring juvenile offenders of minor offences to diversion and alternative measures.¹²⁶ The pilot projects were implemented by the Terre des Hommes Foundation and Encuentros Casa de la Juventud, in coordination with the Office of the Attorney General, the judiciary, the national police, the Ministry of Justice, the Ministry of Women and Social Development, the Ombudsman and local government districts. This pilot phase helped to validate the effectiveness of the initiative and generate information about its legal, economic and technical viability.¹²⁷

The second phase ran from 2007 to 2010, and focused on strengthening the implementation of the restorative juvenile justice model and developing the regulatory techniques necessary to facilitate the transfer of the programme to the State.

The third and final phase aims at gradually transferring the project to the State so that it can be implemented on a larger scale. Emphasis in this phase is on prevention and the application of restorative practices in non-judicial settings such as schools, families and the community, in an effort to encourage effective initiatives to prevent violence in communities.¹²⁸ Peru's new Children and Adolescents Code draws from the experiences of the pilot phase and will incorporate procedural provisions in order to secure the restorative processing of children who become involved in the justice system, through the law.¹²⁹

Box 14. Building professional capacity in Montenegro

Montenegro has made significant developments in recent years with respect to strengthening the protection of the rights of children who become involved with the juvenile justice system.

In 2004, the Government initiated a project entitled "Children's Chance for Change", that has seen the enactment of a new juvenile justice act¹³⁰ and the development of a capacity building programme that has reached over 200 professionals from all sectors, including judges, prosecutors, social workers, correctional staff and police officers. The Ministry of Justice, in cooperation with the Mediation Centre of Montenegro,¹³¹ organized a series of working sessions for a smaller group of professionals (drawn from judges, prosecutors, police and the social sector) at the municipal level in order to provide a forum in which to discuss challenges, obstacles and concerns regarding the implementation of innovative justice solutions. This was an important process in terms of breaking down barriers and making a critical examination of existing practices. It resulted in improved communication, partnership and increased efficiency, and contributed to positive results for alternative diversion measures, including victim offender mediation.¹³²

Another important aspect of the overall juvenile justice system reform in Montenegro is the ongoing process of establishing professional support services for Montenegro's judiciary. These services are designed to ensure stronger linkages between the judiciary and the social sector, with special focus on supporting and facilitating implementation of alternative measures or educational orders. These services will be established at three locations in Montenegro and will employ social workers, pedagogues and psychologists, whose role will be to provide assistance to judges and prosecutors at all stages of children's involvement in the juvenile justice system, be they offenders, victims or witnesses of crime.¹³³

6. HOW IS RESTORATIVE JUSTICE FOR CHILDREN IMPLEMENTED IN INFORMAL JUSTICE SYSTEMS?

Worldwide, the great majority of disputes are dealt with at the local level and in informal justice systems. Until now, engagement with informal justice systems has not been a part of development interventions in justice systems,¹³⁴ but there is growing consensus that these mechanisms need to be identified and researched to assess the impact they have on children's rights.

As of today, there is still no universally agreed definition of informal justice systems. The working definition used in a recent study by UNDP, UNICEF and UN Women defines informal justice as the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.¹³⁵ The study distinguishes among different informal mechanisms anchored in customary and tribal/clan social structures, religious authorities, local administrative authorities, specially constituted state customary courts and community forums specially trained in conflict resolution, including mediation.¹³⁶

The expert consultation in Bali highlighted the many positive dimensions of informal justice systems (see Box 15 for an example of an informal justice system in Indonesia). These include easier and better access to justice for children and their families, the use of more accessible language, a greater potential for healing, and a less costly and more direct involvement of the offender and victim, as well as their families and the community.

Box 15. Informal justice for children and young people in Maluku society, Indonesia¹³⁷

The cultural diversity of Indonesia is reflected in a vast range of customary justice systems. To take one example, in Maluku society and, in particular, in the village of Makariki, situated on Ceram Island, Maluku Province, all problems that arise within the community, be they public or private in nature, are brought to the village leaders at the *baileu* or community centre.

With respect to offences committed by children and young people, the village leaders have an agreement with the local police to set aside all formal legal action, such as investigation or arrest, until *Adat* or customary law has been implemented. Only if no equitable solution is found under *Adat* law is the case handed to the police.

The village leaders summon the perpetrator and the victim of the offence, together with their parents, clan members and the villagers to a hearing at the *baileu*. Generally, the parents of the offender are instructed that the offence must not be repeated and are called on to provide compensation requested by the victim and the family of the victim. If all parties agree to this arrangement, the village leaders will declare the matter resolved and the case closed.

One of the disadvantages associated with informal justice systems concerns the different ages of criminal responsibility under statutory law and customary or religious law. In many traditional societies the age of maturity is considered to be 10 years or even younger, leading to the real risk of children being treated as adults. Informal justice systems may also involve sanctions that do not have a restorative outcome, and that may amount to inhuman and degrading punishment. In several countries, diversion may also involve arbitrary actions by victims and their families, who sometimes ask for disproportionate and unreasonable amounts of compensation from the child's family.

Informal systems may be accessible, but it is crucial that they also protect the rights of the child and restore the harm that has been caused. It is essential that resorting to those instances does not jeopardize children's rights or preclude their right to access the formal justice system. In Bali, the experts underscored five imperatives to strengthen informal justice processes. First, the need for a legislative basis for customary law that is in line with international human rights standards, as well as the recognition that, when a case cannot be resolved one can resort to the formal system. Second, a range of appropriate alternatives for the child's rehabilitation and reintegration must be available. Third, there must be a proper assessment of the processes and procedures used, including an assessment of power relations, such as who selects the individuals to sit on the mediation panel. Fourth, capacity and knowledge relating to children's rights and child development and national legislation, including juvenile justice laws and procedures, must be continuously ensured. Lastly, the right to appeal must be guaranteed so that there is oversight by the formal system.

4

THE BENEFITS OF RESTORATIVE JUSTICE

1. THE BENEFITS OF RESTORATIVE JUSTICE FOR CHILDREN

a) Taking responsibility and changing behaviour

Holistic, multidisciplinary restorative justice programmes show promising results when it comes to reducing adverse effects of anti-social behaviour among children. Children involved in such programmes show fewer tendencies towards violence, both in the community and the home.

Children who have benefitted from such programmes also demonstrate significantly lower rates of recidivism compared to other groups. Conventional forms of criminal justice that focus on punishment rather than restoring the harm caused have had little success in reforming children's attitudes toward offending.¹³⁸

Children who have experienced a restorative justice process are also more likely to stay away from gang life and, consequently, they are less likely to become victims of armed or gang-related violence. In many countries this is a matter of life or death.

Children are also less likely to become victims of domestic violence, as parents who have assisted their child through a restorative justice conference show less inclination to resort to violence as a form of discipline.

Real change calls for real incentives. Since offences represent a rupture in social relations - between the victim and the offender, as well as the offender and the community - a key aspect of reducing recidivism rates is to ensure that children understand the consequences of the harm they have caused and actively take responsibility for that harm. The participatory dimension of restorative justice provides children with the opportunity to fully grasp the extent of the harm done and to be part of a constructive response. When the conference agreement is respected and the provisions are upheld, a case will most likely be closed by the court.

Restorative justice programmes show very positive results with respect to compliance rates among those who have completed such programmes. In the USA, studies found that 80 per cent of offenders complied with the restitution agreement of restorative processes, whereas only 58 per cent of those assigned restitution through other processes complied with what was required of them.¹³⁹ In Brazil, of all the child offenders diverted through restorative circles, 90 per cent successfully completed their restorative agreements. Of the victims, 95 per cent reported being satisfied with the procedure and the outcome, and reported feeling "greater accountability" from the offender after having had the opportunity to communicate their experience of the violation.

In Australia, the University of Canberra conducted an extensive study on the impact of "restorative policing" on offenders' perception of the justice process and on their behaviour following the restorative programme. The study included data on offences ranging from drunk-

driving to property related crimes and violent crime by children and youth up to the age of 29. Offenders reported greater procedural justice – that is, fair and respectful treatment - in conferencing than in court, as well as a greater opportunity to repair the harm caused, and an increased respect for the police and the law.¹⁴⁰

Open and semi-open rehabilitative environments more effectively prepare youth for reintegration into society than closed environments or prison. They also contribute to a reduced tendency toward violence, an increased likelihood that the child will return to education, and improved job prospects on completion of the programme. Rates of recidivism are significantly lower than among children who have gone through rehabilitative measures in a closed environment or prison. Restorative justice programming therefore reduces future costs that would have been incurred as a result of re-offending.¹⁴¹ In a study from South Africa, children indicated that they would be more encouraged to reform if they were given a second chance through non-custodial measures.¹⁴²

b) Feeling respected and being heard during the restorative justice process

Restorative justice is based on the requirement that both offender and victim recognize their part in the offence and agree to engage in a restorative process in which each party is treated with respect. The philosophical underpinning of the restorative process requires that all parties are heard, and that understanding comes from listening to others as well as having the opportunity to express oneself. In this way, restorative justice offers both the offender and the victim the opportunity to be heard and to participate in developing a solution to the conflict. Researchers have found that these processes generate very positive results in terms of offenders' sense of fairness and justice during the process.

The formal justice system and the courtroom setting are extremely intimidating for children.¹⁴³ Restorative justice provides children with the opportunity to express themselves in a safe environment, surrounded by a supportive network, such as parents, caregivers or another person identified by the child. Specially trained facilitators prepare the meeting in such a way as to ensure that all parties are heard and participants respect the process. The child is encouraged to communicate in his or her own words, in a manner in which he or she feels comfortable. Any difficulties a child might have in communicating will be taken into consideration when preparing the meeting.

In Brazil, 90 per cent of young offenders reported that they were satisfied with the process, indicating that they considered that they had been, "treated with more respect and fairness". Of those that finished the programme, only 23 per cent re-entered the criminal justice system, compared to 56 per cent of the control group. Of the children referred through restorative processes to socio-educative care, 97 per cent felt they understood what was going on during the process, and 83 per cent had a clear understanding of what would happen following the agreement.¹⁴⁴

Based on findings from Brazil, Canada, Peru, the Philippines, South Africa and the USA, restorative justice programmes show very positive results in terms of victim, offender, family and community satisfaction. The parties involved, including child offenders, recognize that restorative justice practices provide them with a greater opportunity to be heard and to participate in the outcome of the process, as well as a greater sense of control over this process. This is an important factor for the effective implementation of community-based restorative justice programmes, since victims and children who have become involved with the criminal justice system identify these programmes as being more responsive to their needs and rights than the conventional system.

In Thailand, experts similarly identified that FCGC, “provided a venue for a child and his or her parents to openly discuss the problem at hand, created a better understanding within the family, and gave the victims the right to speak.”¹⁴⁵

Furthermore, restorative justice programmes make use of existing community resources, such as schools, rehabilitation centres and civil society organisations, to facilitate reinsertion. Children who have passed through restorative justice programmes reintegrate into society more easily, and are also less prone to use violence in the community and within the family, reducing the costs that would otherwise be associated with such violence.

c) Avoiding the harmful effects of deprivation of liberty

The UN Study and the joint thematic report on *Prevention of and Responses to Violence against Children within the Juvenile Justice System*¹⁴⁶ issued by the SRSG, UNODC and OHCHR, both identify the harmful effects of detention on children, and the serious risk of violence to children who are incarcerated.¹⁴⁷ The CRC calls for the establishment of alternative measures to detention for children, and the Committee on the Rights of the Child acknowledges in its General Comment No. 10¹⁴⁸ that “[t]he best interest of the child means [...] that the traditional objectives of criminal justice, such as repression/retribution, must give way, to rehabilitation and restorative justice objectives.”¹⁴⁹

Findings from work conducted in Brazil, Peru,¹⁵⁰ the Philippines,¹⁵¹ South Africa¹⁵² and Thailand,¹⁵³ among others, identify a widespread overreliance on the incarceration of children who become involved with the justice system, most of whom are held in pre-trial detention for minor offences.¹⁵⁴ The vast majority of children who are found guilty of committing a minor offence do not reoffend.¹⁵⁵ These children pose no threat to the community or to the safety of others, and the harm caused to them by incarceration will far exceed the harm caused by their offence. Furthermore, research in Canada has demonstrated that the incarceration of children has no deterring effect on other children.¹⁵⁶

There are a number of other significant findings from Canada: it has been found, for example, that children with a criminal record are at greater risk of incarceration for minor offences such as minor theft.¹⁵⁷ It was also found that children who offend are disproportionately affected by poverty and possess less power and resources than other children. This suggests that those children who become involved in the juvenile justice system and face the prospect of incarceration are the children “least able to cope”.¹⁵⁸

Restorative justice processes and programmes provide a means by which child offending can be addressed and children can be held accountable for their actions, while shielding them from the harmful effects of involvement in the criminal justice system. Restorative justice offers an important means of preventing children’s incarceration and, in turn, of protecting them from violence, abuse and exploitation. For example, implementation of restorative circle practices in Saskatchewan, Canada, has resulted in a reduction in the number of prison sentences being imposed on children.¹⁵⁹ This is due in part to the innovative forms of sentencing that the circles generate, intended to restore the harm caused and make amends with the community.¹⁶⁰

d) Freedom from stigma

The UN Study on Violence against Children indicates that children who become involved with the justice system experience the social stigma that offending provokes in most communities.

Advocates of restorative justice point to the philosophical difference between adversarial or retributive forms of justice on the one hand, and restorative justice on the other, and to the different impact these distinct approaches have on the future of those who have offended. As noted, retributive justice focuses on shaming the person, whereas restorative justice focuses on the offence itself.¹⁶¹ In the retributive system, therefore, the stigma associated with a criminal offence can be indelible, whereas in a restorative process, characterised by “repentance and forgiveness” this stigma can be removed. In most legislative systems that have integrated restorative justice as diversionary or alternative measure,¹⁶² the successful completion of a restorative agreement will see the closure of the formal case by the court that oversees the agreement. This means that the child will be burdened neither by a criminal record, nor by the shame and humiliation of the offence.

In Peru, Terre des Hommes and its partners found that children who have become involved with the justice system are also at greater risk of becoming victims of violence at the hands of their parents, who wish to punish them for their behaviour.¹⁶³ Thus, even children who have committed minor offences but receive a criminal record are at risk of being victimised as a result.

Children are also likely to suffer from the long-term consequences of having a criminal record.¹⁶⁴ This includes difficulty in obtaining employment¹⁶⁵ and engaging in community activities such as sports. They must also live with social stigma; something that can have a profound effect upon their self-esteem and feeling of self-worth.

2. THE BENEFITS OF RESTORATIVE JUSTICE IN NON-JUDICIAL SETTINGS

As noted in the report of the SRSG on *Tackling Violence in Schools: A global perspective*,¹⁶⁶ schools can be an ideal environment to promote the development and dissemination of values of non-violence, cooperation, tolerance and respect among pupils and staff, and also beyond, in the wider community. Schools can help prevent the use of violence among and against children as well as children’s involvement in criminal activities.

In recent decades, countless schools worldwide have developed restorative justice practices to prevent and address bullying and fighting in the playground, incidents of violence through social media, and sometimes also serious offences such as rape, gang violence and assault with weapons.

Mediation, conferencing and circles in schools have the potential to prevent violence and crimes both inside and outside the school gates. School models may involve teaching conflict resolution, promoting peace studies as part of the curriculum, training student mediators to resolve conflicts among their peers and, in some cases, bringing parents and teachers together to play a supportive role in the mediation process.

For instance, in the USA, peer-mediation is used in elementary, middle and high schools throughout the country.¹⁶⁷ Students in conflict are given the opportunity to reach a mutual understanding in a confidential and private setting that is separate from the pressure of peers and

family members. This helps them to address the issues at the root of their disputes and build their resolution skills.¹⁶⁸

At times, classroom dynamics can become intimidating and hostile. These situations disrupt learning and may damage the relationships among peers or between students and the teacher. Classroom Conferences explore the harm caused in the classroom by inappropriate behaviour. The students responsible are held accountable to their classmates and, as in most restorative processes, a plan is developed by the whole class to address the issue.¹⁶⁹ Another example of the potential of restorative justice in school comes from South Africa's Western Cape and is discussed in Box 16.

Box 16. Usiko's community-based restorative justice programmes

Usiko is a non-governmental organization based in Stellenbosch, South Africa, which deals with youth at risk and young people in conflict with the law. Usiko offers community-based restorative justice programmes outside the formal justice system for children who are at risk of arrest. Recently Usiko has also begun to provide restorative justice interventions in schools to children who have committed an offence on school grounds that would otherwise warrant arrest. The cases include minor and serious offences such as drug possession, malicious injury to property, sexual assault and assault involving the infliction of grievous bodily harm, falling under South Africa's Child Justice Act. Usiko's diversion programme is a, "multi-model, structured programme including interpersonal and social skill development and targets multiple settings (schools, family, peer group, community and the environment)."¹⁷⁰

These and other studies have shown that restorative justice contributes to a significantly improved school environment. However, the impact that restorative justice in schools has in terms of preventing immediate and later offending among students and, subsequently, beyond the school setting, needs to be further evaluated, researched and shared among countries.

Studies conducted on the effects of holding restorative justice training in residential care settings in the United Kingdom also indicate that, by giving both children and staff the tools to address conflict in a constructive manner, positive results can be achieved. Direct effects include lowering the incidence of violence among child residents; reducing the number of incidents where staff use violence to restrain children; and reducing the number of times that staff call the police to handle disputes that arise. As a result, children become less prone to using violence, less likely to become victims of violence and, consequently, less likely to become involved with the formal juvenile justice system.

These findings indicate the clear potential of restorative justice approaches to prevent the criminalisation of children in schools, in residential care and other non-judicial settings and to support the development of positive behaviour among both children and staff.¹⁷¹

3. THE BENEFITS OF RESTORATIVE JUSTICE FOR OTHER PARTIES

As noted, research consistently demonstrates overwhelmingly positive results for restorative processes in terms of satisfying the need for fairness and justice among all parties involved.

Most importantly, victims systematically indicate that their views are better respected in restorative justice processes than in court. For example, in Queensland, Australia, an analysis of data collected by the Department of Justice showed that, of 351 offenders, parents and victims interviewed, 98 per cent said the restorative process was fair, and 97 to 99 per cent said they were satisfied with the agreement reached in the conference.¹⁷² A study conducted in Western Australia found near identical results in terms of perceptions of fairness and justice among offenders, victims, and families. In addition, 90 to 92 per cent also indicated that they were satisfied with the way the juvenile justice team dealt with their case.¹⁷³ The South Australian Juvenile Justice Project on Conferencing found that, “for victims who attended conferences there is an increasing positive orientation toward the offender over time”.¹⁷⁴ Similarly, FGC facilitators have noted that victims’ fear is reduced following the FGC process.¹⁷⁵

In Canada’s Yukon territory, circle sentencing practices have led to agreements being successfully reached in 99 per cent of all cases. Compliance rates are also reported to be between 70 and 100 per cent where agreements include the payment of restitution to the victim or other types of restitution. Studies also suggest that compliance rates are higher, “for restitution obligations that are reached in the course of mediated agreements, than for those that are imposed by the courts (81 per cent and 58 per cent respectively)”.¹⁷⁶

Restorative justice processes are characterised by a greater involvement of the victim, who is given the opportunity to put questions to the offender. This opportunity is not afforded in conventional justice processes, where the action is directed from State to offender.¹⁷⁷ Victims and restorative justice practitioners point to the increased control that restorative justice processes afford victims, and how this has a positive effect on the offender’s sense of justice following the process. Victims are also more likely to receive an apology from the offender following a restorative process rather than a court-based procedure.¹⁷⁸ Evaluations also indicate that victims identify symbolic restitutions as more important than material restitution.¹⁷⁹

4. THE BENEFITS OF RESTORATIVE JUSTICE FOR SOCIETY

There are high personal costs incurred by children who become involved with the justice system. The costs to society are also high. Many of these costs are direct and easily measurable, such as the cost of judicial proceedings and the cost of keeping children in detention facilities. Indirect costs, such as the cost of a child lost to a life of crime, are more difficult to measure as this has long-term ripple effects on the social fabric of communities. One estimate puts the cost to society of losing a single youth to a life-long cycle of crime and drug abuse at between US\$ 1.7 and 2.3 million.¹⁸⁰

Lowering recidivism among child offenders generates secondary benefits by reducing future costs associated with reoffending. More importantly, children who complete community-based

restorative justice programmes are more likely to return to school and so increase their chances of becoming productive members of society.^{181,182,183,184}

The UN Study found that institutionalization creates an unnecessary financial drain on budgets and that reducing reliance on institutional care through strengthening community-based alternatives is an essential factor in improving justice systems for children, while reducing immediate¹⁸⁵ and long-term costs.¹⁸⁶ The Study also found that institutionalization in a closed environment can be as much as 12 times the per-capita cost of community-based care options.¹⁸⁷

In Norway it has been calculated that a restorative justice intervention incurs a cost of some 6,000 krone (US\$ 1,000), while treatment in an institutional environment or in a prison incurs a cost of around 4 million krone (US\$665,500) per year.¹⁸⁸ This significant difference is due to a number of factors: community-based programmes make use of existing community networks and services; the programme length of community-based alternatives is often significantly shorter; costs incurred by formal judicial proceedings are avoided; courts' case loads are reduced; and the costs associated with closed institutional environments are avoided since children remain in their communities.¹⁸⁹

Box 17. Peru: costs and benefits of different forms of juvenile justice

An extensive study of the costs and benefits of restorative juvenile justice programming was conducted in Peru. This study examined different forms of detention and sentencing and their associated direct and indirect costs. These included costs associated with: offences committed by juveniles; domestic violence; drug use; recidivism and the loss of productivity implied by interrupted schooling and unemployment.¹⁹⁰

The issue of drug use and drug addiction is particularly significant in Peru, where 87 per cent of young people in the juvenile justice system report having used, or are using, any type of drug. Costs related to drug use include the increased probability of committing a crime¹⁹¹ and of using violence, as well as rehabilitation costs, loss in productivity and direct drug costs. Drug use is linked to anti-social behaviour and facilitates and perpetuates a culture of violence.¹⁹² Restorative measures must therefore include special measures to meet the needs of children who suffer from drug addiction. The study notes that drug use decreases when a child completes a holistic rehabilitative programme in an open environment such as a restorative justice programme.¹⁹³

Higher school dropout rates also correspond to an increase in crime, as children are no longer occupied by an educational or productive activity. Low levels of education tend to reinforce dropout rates in a community and entail the disruption of a child's social and cognitive development. Furthermore, when there is an atmosphere of violence in the immediate environment, students tend to stop attending school. At the same time, dropout levels decrease among children who have gone through rehabilitative measures in an open environment.

The Peruvian study also found that, on average, children are held in closed rehabilitative and corrective environments for a period of two years, compared to an average stay of one year in semi-open facilities and only seven months in restorative justice programmes in an open environment. In Peru, it was found that restorative justice programmes in an open environment incurred costs of US\$115 per month per adolescent, whereas State-run closed detention facilities incurred monthly costs of US\$417 per adolescent. One of the principal reasons for this discrepancy is that open environment restorative justice programmes avoid the costs associated with a child passing through formal judicial proceedings. In El Augustino, the judicial system case load was reduced by 44.2 per cent as a result of implementing restorative justice programmes. In addition, restorative justice makes use of existing community resources, such as school rehabilitation centres and civil society organisations, to facilitate reinsertion.

Programmes that use open and semi-open rehabilitative environments more effectively prepare children and young people for reintegration into society, decrease their tendency to resort to violence, increase the likelihood of their returning to school, and improve their job prospects.

5

OVERCOMING CHALLENGES IN DEVELOPING AND IMPLEMENTING RESTORATIVE JUSTICE FOR CHILDREN

1. ADDRESSING NEGATIVE SOCIAL PERCEPTIONS

In recent years, marked by economic crisis and rapidly changing social landscapes, many countries have seen an increase in crime. This has often been accompanied by a perception that juvenile delinquency is on the rise, and has seen children labeled as criminals, irrespective of whether they have, in fact, been engaged in criminal activity. Socially excluded children - frequently perceived as a threat to community security and easily stigmatized - are particularly affected by these developments.

In most cases, the social perception of children as a security threat has no basis in data. In Peru, for example, child offences account for only 4.3 per cent of the total number of criminal offences committed on an annual basis.¹⁹⁴ Around the world, the vast majority of offences for which children are convicted are minor property-related offences.¹⁹⁵ Moreover, the majority of children who become involved with the justice system are found innocent or have the charges against them dropped. Nonetheless, the negative social perception of children involved with the justice system represents a significant challenge to the development of appropriate legislation and policies, or to the implementation of successful restorative justice programmes in countries where legislation is already in place. Governments face pressure to “get tough on crime” and, consequently, political support for child-sensitive alternative measures, such as diversion to restorative justice programmes, is seriously undermined.

Negative stereotyping of children involved with the justice system is also reinforced by the media. In South Africa, high-profile media cases concerning children alleged to have committed serious crimes have provoked intense political debate. Advocates working to promote diversion and restorative justice have identified negative portrayals in the media as one of the main hurdles to implementing South Africa’s 2008 Child Justice Act.¹⁹⁶ Widespread misquotations and misinterpretations of the law in the media have fuelled a belief that the law is lax on offenders and have resulted in public outcry.¹⁹⁷

To overcome these challenges there is an urgent need for effective advocacy and awareness-raising among the general public to address misconceptions about children involved in the justice system, to reassure society of the effectiveness of restorative justice programmes and to disseminate information about the significant benefits of this approach, for children, their families and society in general.

2. ENSURING A SOUND LEGAL FRAMEWORK

Sound legislation is essential to prevent the criminalization of children and their exposure to violence. It is, likewise, indispensable for safeguarding the protection of children's rights in the juvenile justice system and ensuring the use of restorative justice whenever appropriate. Legislation lays the foundation for a culture of respect for children's rights, and makes an important contribution to overcoming negative social perceptions towards children involved with the juvenile justice system.

Many countries have succeeded in introducing promising practices in the field of restorative justice prior to introducing adequate legislation to support this process. The lack of a legal basis, however, creates risks for the safeguard of children's rights, and introduces an element of insecurity as regards the implementation and sustainability of these programmes. Without the framework provided by the law, there may be irregular or inconsistent application of restorative processes, or even the complete abandonment of these processes as a result of changing political or social perceptions. Firm and clear legislation is crucial for instituting and legitimizing viable restorative justice programmes.

Many countries offer a limited range of alternative measures to deprivation of liberty, both in legislation and in practice. Police, judiciary and social workers who come into contact with children alleged to have committed an offence should have a range of practicable options available to them so as to be able to properly practice the use of arrest, detention or imprisonment as a measure of last resort. At times, appropriate legislation is in place but there is a persistent difficulty in translating legislative requirements into practice due to insufficient experience or a lack of practicable models that can easily be replicated at the local level.¹⁹⁸

In some countries, legislation fails to incorporate the requirement of consent to diversion or restorative justice, or the requirement of "compelling evidence"¹⁹⁹ in order to substantiate the criminal charges against a child before determining the suitability of diversion to a restorative justice process. In such cases, children are put at risk of being diverted to restorative justice programmes under an assumption of guilt, when they may very well be innocent.

The establishment of restorative justice practices does not automatically promote restorative values or the rights of the child. Manipulation of or violence toward children who participate in a restorative justice process is a risk that must be prevented and effectively addressed. In such instances, children's access to justice and protection is of the essence. Child sensitive counselling and complaint mechanisms play a critical role in this regard. Unfortunately, these mechanisms are often unavailable, as is information about what the child can do in these circumstances and how he or she should proceed.

The standards established under the CRC, including the obligation to ensure child sensitive and non-punitive approaches and secure children's legal safeguards, apply equally in countries with plural legal systems, where national legislation exists alongside customary and religious law, and where informal justice systems may be used to resolve conflicts. In some countries, however, the interplay and tension between these different systems can sometimes undermine international standards on child development, participation and protection. To avoid potential conflicts in interpretation and implementation, it is important to explicitly acknowledge in the law the supremacy of legislation aligned with international human rights standards.

3. ENHANCING CAPACITY-BUILDING FOR ALL RELEVANT STAKEHOLDERS

Studies show that the actors in the juvenile justice system do not always possess the knowledge and skills (including child-sensitive attitudes) necessary to ensure successful implementation of the law. For example, the first crucial contact between the child and the juvenile justice system often takes place in the presence of police officers; this is also a point at which children commonly face the risk of becoming victims of violence. Police practices are not always informed by specialized capacity building on the rights of the child, nor are they always in line with the ideals of restorative justice and the best interest of the child,²⁰⁰ even where there is legislation to support these practices.²⁰¹

Several qualitative case studies have demonstrated that even when diversion to restorative justice conferences has been used as an alternative to formal judicial proceedings, the practice of administering diversion is not necessarily reflected in a greater level of protection for children.²⁰² Studies have observed the use of threats to obtain compliance with a restorative agreement; referral to a diversion programme without the prior consent of the victim or the offender; testimony of a child or an admission of responsibility obtained by undue means and/or in the absence of the child's parents or guardian; the use of rushed mediation sessions; referral to public mediation sessions, where the right to confidentiality is violated; and the referral of cases to restorative justice conferencing without any preliminary inquiry or any compelling evidence.

These shortcomings are most often the result of a combination of factors, including a lack of commitment on the part of judicial bodies and law enforcement officials, a lack of training on how to administer diversion and how to facilitate a restorative conference, and inconsistent administration of diversion. A key to overcoming this challenge is continuous training, together with standard operating procedures supported by centrally developed guidelines to facilitate preliminary assessments, information collection and evidence gathering.

In the informal justice systems, mechanisms such as religious authorities, traditional leaders, customary courts, tribal/clan social structures and community forums all have a critical role to play in aligning traditional conflict resolution practices with child-sensitive restorative justice. Training on children's rights, child development and relevant legislation, and development of guidance and necessary skills is indispensable in order to achieve restorative outcomes and protect the best interest of the child.

4. PROMOTING COORDINATION AMONG ALL RESTORATIVE JUSTICE SERVICE PROVIDERS AND JUSTICE ACTORS

Most children who go through a restorative justice process will also require services and, sometimes, treatment for substance abuse or mental health issues, in order to fully rehabilitate and reintegrate. Important factors for successful recovery and reintegration include helping children and their families to build nurturing relationships and pro-social coping strategies, and ensuring children's engagement in constructive alternative activities during reintegration and after the conclusion of the programme. These include formal education, vocational training, sports, peer support groups and other constructive leisure activities. The lack of such activities increases

the risk of a child returning to his or her former peer group and consequently falling back into behavioural patterns that lead to reoffending.

Effective coordination of actors and service providers in different sectors - including, among others, the police, social welfare, schools, NGOs, local mediators and community volunteers - is essential to ensure holistic and effective restorative justice programmes for children. This entails the engagement of a local management team that can coordinate the preliminary assessment and also ensure implementation of the restorative outcome, together with agreed upon services, at the community level. The engagement of local government is vital for the continued application of these practices.

5. ASSIGNING HUMAN AND FINANCIAL RESOURCES

In many countries there is an acute shortage of specialized service providers and professionals, including probation officers to complete preliminary assessments, social workers and psychosocial support, and evaluation staff. It is therefore essential to implement long-term plans to fill these gaps and, at the same time, to utilize local resources and structures. This includes associating non-state actors such as civil society organizations, local traditional leaders and community volunteers to support the process.

Furthermore, many restorative justice programmes face a serious shortage of financial resources due to insufficient central state funding or a lack of continuous funding to implementing partners. Inconsistent funding often leads to disruption in service provision and the ongoing training of staff, community volunteers and peer educators. Securing continuous State funding to support State-run projects and the crucial work of civil society organizations associated with this process is fundamental to sustain programmes and services over time.

6. CONSOLIDATING DATA, RESEARCH AND EVALUATION

The lack of centralized disaggregated data on children who enter the juvenile justice system remains a challenge across regions, and compromises monitoring and evaluation of policies and programmes on diversion and restorative justice.

Collection, analysis and integration of child-related data across all justice actors and service providers is lacking, and research on and evaluation of restorative justice programmes and their impact on children's rights and their effectiveness in protecting children from violence is scarce.

Overall, this kind of information is rarely systematized, and the background and vulnerabilities of the children concerned, as well as the specific details of how the restorative justice process has been undertaken, generally remain undocumented.²⁰³ Yet sound evidence, supported by data gathering, analysis and dissemination can help dissipate social misconceptions around children's involvement in serious crime, and mobilize support to prevent children's stigmatization and victimization, as well as strengthened investment in child-sensitive justice approaches and restorative justice programmes.

6

RECOMMENDATIONS

Restorative justice represents a paradigm shift in how justice for children and young people is perceived in the majority of societies around the world.

In moving from a retributive to a restorative model, there is a genuine opportunity to safeguard and strengthen the realization of children's rights. Restorative justice promotes not only the rights of the child directly associated with the administration of justice, including the right to liberty and security of person, but also other fundamental rights that deprivation of liberty, when lawful and truly a measure of last resort, may put in jeopardy. These include the right to education, to play and recreation, to the highest attainable standard of health, and to freedom from violence.

Anchored in the inalienable rights of the child and respect for the rights of others, restorative justice represents a non-adversarial and voluntary process, based on dialogue, negotiation and problem solving.

At a time when public opinion expresses concern at the perceived threat posed to society by juvenile delinquency, and States around the world contemplate reductions in the minimum age of criminal responsibility and longer sentences of imprisonment, the importance of building on the potential of restorative justice is all the greater.

Restorative justice is not only good for children who have committed an offence. It also benefits the victim, the families involved, and society at large. In the restorative model, children are not understood as criminal elements or a threat to social order. They are, instead, acknowledged as members of a community, and that community assumes responsibility for them, just as they, the children, assume responsibility for the offences they have committed and pledge to restore the harm they may have caused.

This report builds upon valuable experiences drawn from many parts of the world. It highlights significant lessons and recognizes pressing challenges and shortcomings associated with the use of restorative justice programmes for children. Across regions, the decisive contribution of restorative justice programmes to uphold justice and the rule of law, to prevent recidivism, avoid stigma and foster the child's sense of dignity and worth is clear. In addition, these programmes help to strengthen social accountability for the protection of children, while avoiding a significant financial drain on national resources. These gains can be effectively diverted to build strong and cohesive societies where children can develop to their full potential, free from fear, violence and discrimination.

This is a process where tangible progress is within reach. Building upon the important experiences addressed in this report, the recommendations below highlight crucial steps to achieve this goal.

1. Legislation

- States should undertake a comprehensive legislative review to align relevant domestic legislation, whether in statutory, customary or religious laws, with human rights standards. In countries with plural legal systems, the supremacy of legislation aligned with international human rights standards should be explicitly recognized in law to avert potential conflicts in legal interpretation and implementation.
- Legislation should decriminalize status offences and survival behaviour and include legal safeguards to protect the child's best interests and the child's right to freedom from violence and discrimination, to free and safe participation in proceedings throughout the restorative justice process, as well as to legal and other relevant assistance.
- Legislation should provide law enforcement, prosecutors and the judiciary with options for diverting children away from the criminal justice system and promoting restorative justice processes at all stages of the proceedings; it should include alternative and educative measures such as warning, probation, judicial supervision and community work, to be applied in combination with restorative justice processes or when restorative justice is not appropriate. Children's right to recovery, rehabilitation and reintegration should be firmly expressed in legislation.
- Legislation should recognize that restorative justice and informal justice or conflict resolution mechanisms, while being accessible at the local and community levels and playing an important role in the protection and reintegration of children, should never jeopardize children's rights or preclude children from accessing the formal justice system.

2. Training and guidance

- Effective training should be assured to all relevant law enforcement and justice actors, including the police, prosecutors, the judiciary, probation officers, lawyers, social workers, facilitators and mediators. It should provide child-sensitive skills to promote dialogue and manage emotions and conflict, in addition to securing the safety of child participants.
- Training should also address the rights of the child and relevant legislation, as well as diversion, restorative justice processes and other alternative non-custodial measures.
- Guidelines and standard operating procedures should be developed for professionals involved in this process.

3. Coordination and resources

- Coordination between restorative justice service providers and justice actors should be institutionalized at the national and local levels, and close cooperation should be encouraged between relevant stakeholders, including those involved with informal justice systems.
- Availability of a sufficient number of well-trained professionals in the area of restorative justice should be ensured.
- Adequate financial resources should be made available at all levels to support and sustain restorative justice programmes, and to secure periodic capacity building for justice actors and service providers, as well as community volunteers and peer educators.
- Through bilateral, regional and international cooperation, States and other stakeholders should support the development and implementation of legislation and programmes on restorative justice for children and promote the sharing of information on restorative justice models, promising practices and data and research initiatives.

4. Data and research

- Data, research and evaluation of restorative justice programmes for children should be promoted as a key dimension of this process, to safeguard the best interests of the child at all times, promote the child's reintegration and prevent violence and recidivism.
- Building sound evidence, supported by data gathering, analysis and dissemination, is crucial to scale up positive experiences and refine policy and law, as well as to strengthen implementation. It is equally important in helping to dissipate social misconceptions around children's involvement with serious crime and in preventing children's stigmatization and re-victimization.

5. Awareness-raising and social mobilization

- Awareness-raising campaigns should be undertaken at the national and local levels with relevant stakeholders, including local authorities, traditional and religious leaders and the media. These should be conducted with a view to enhancing understanding of restorative justice and promoting child-friendly attitudes among justice professionals and service providers, and to sensitizing communities and the public at large to the importance and use of restorative justice processes.
- The role of civil society organizations in the implementation of restorative justice programmes should be supported; furthermore, mapping and the mobilization of local resources and community volunteers should be encouraged to ensure successful implementation at the community level.

ANNEX I

International standards: a framework for restorative justice

A specialised juvenile justice system²⁰⁴

The CRC calls for States to establish a separate juvenile justice system.²⁰⁵ Any child who is alleged as, accused of or recognized as having committed a criminal offence should be treated in a manner that promotes the child's sense of dignity and worth, reinforcing the child's respect for the human rights and fundamental freedoms of others, and that takes into account the age of the child and his or her social reintegration, and the child's possibility of assuming a constructive role in society.²⁰⁶

It is equally important to ensure respect for the general principles of the CRC. The fundamental principle of the best interests of the child should be a primary consideration in all actions concerning children, including in the administration of justice by public or private authorities, in formal or informal justice systems.²⁰⁷

The protection of the child's right to freedom from all forms of discrimination²⁰⁸ is vital in light of the fact that, in many countries, particularly disadvantaged children, as well as children from minorities or indigenous populations, are overrepresented in the criminal justice system. The State also has the obligation to fulfil the child's right to life, survival and development to the maximum extent possible,²⁰⁹ as well as the child's right to be heard in all matters that affect him or her,²¹⁰ including administrative and judicial proceedings, in a manner appropriate to the child's age and maturity, and respectful of the child's evolving capacity.

Procedural safeguards²¹¹

Children are entitled to the same procedural rights and safeguards in all criminal proceedings as adults, but the CRC and other international standards also recognize additional safeguards for children, for instance, to receive prompt access to legal and other appropriate assistance; to be informed promptly of the charges against them; and to have the matter determined without delay.

Every child deprived of his or her liberty has the right to challenge the legality of this deprivation of liberty before a court or other competent, independent and impartial authority. The right of the child to be heard in any judicial or administrative proceeding affecting the child should be fully respected and implemented through every stage of the juvenile justice process.

Deprivation of liberty as a measure of last resort²¹²

In view of the negative effects that the deprivation of liberty has on children, international standards stress the use of deprivation of liberty, either through arrest, detention or imprisonment, as a measure of last resort and for the shortest appropriate time.²¹³ Deprivation of liberty includes the use of pre-trial detention and closed treatment facilities or institutions.

Diversion and alternative measures²¹⁴

The CRC requires States to provide alternative measures for dealing with children without resorting to formal judicial proceedings,²¹⁵ ensuring that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.²¹⁶ The Committee of the Rights of the Child recommends that diversion from formal judicial proceedings should be a, "well established practice that can and should be used in most cases."²¹⁷ These measures are not limited to children found to have committed minor offences,

but can also be applied, where appropriate, to children having committed serious offences.²¹⁸ The Committee also recognizes that diversion to non-judicial measures, including different forms of restorative justice measures,²¹⁹ protects children from stigmatization, is cost effective and is in the interest of public safety.²²⁰ Diversion as an alternative to a formal judicial process is not limited to the pre-trial stage, rather, it is the responsibility of the competent authority to continuously explore the option of diversion, at all stages of the judicial proceedings.²²¹

In order to protect the rights of the child, diversion should only be used when there is, “compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding.”²²² This may also include requiring the consent of the parents or guardian of the child, when the child is below the age of 16.²²³ Upon full compliance with the issued diversionary measures, these measures will be struck from the child’s criminal record, as such compliance will formally close the case.²²⁴

Community-based measures

International standards encourage the development of community-based diversion and prevention measures that facilitate the, “successful socialisation and integration of all children”, especially family oriented measures and measures that attend to the needs of the offender, the victim and the community equally.²²⁵ The law must provide a variety of alternatives to the deprivation of liberty, offering the competent authority the option of diversion and other alternative measures, throughout the criminal proceedings.²²⁶

The Tokyo Rules emphasise that community based non-custodial measures, where community volunteering and engagement is encouraged, is conducive to strengthening and repairing the relationship between the offender and the family as well as the community,²²⁷ and in facilitating reintegration into society. International standards further recognise the important role of families in socialising children and the harmful effects separation from family and home environment has on children who become involved with the criminal justice system.²²⁸

Restorative justice

The UN Economic and Social Council has long recognised the benefits of mediation and restorative justice processes and programmes as an alternative to formal criminal justice mechanisms in settling a variety of disputes, and providing for an appropriate response to the needs, rights and interests of victims, offenders, communities and all parties.²²⁹ The Economic and Social Council encourages the development of such policies, procedures and programmes, where appropriate, as part of a comprehensive justice system, as well as an element of a crime and violence prevention programme.

The *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*²³⁰ establish a set of procedural safeguards that should be assured to all participants in restorative processes, including special safeguards for children. Both the victim and the offender should have the right to legal counsel throughout the restorative process.²³¹ In addition, children have the right to the assistance of a parent or guardian.²³² The parties have the right to be informed about the process, their rights during the process and the possible consequences of their decision, before agreeing to participate.²³³ The restorative justice programme should be a process undertaken freely and voluntarily, and consent can be withdrawn by either party at any time in the process.²³⁴

Children participating in restorative processes may need further support and additional safeguards to ensure that they are fully informed and that their consent is validly given. Consent given to participate in a restorative programme should not be taken as evidence of admission of

guilt in subsequent legal proceedings.²³⁵ All agreements should also be reached voluntarily, without coercion or unfair means.²³⁶ They should also be reasonable and proportionate to the offence.²³⁷

The confidentiality of the proceedings should be ensured; a principle protected under various human rights instruments, including the CRC. Where appropriate, restorative processes should be judicially supervised, and in such cases the agreements should have the same status as a judicial decision or judgement.²³⁸ If the parties fail to reach an agreement through the restorative process, the case will be referred back to formal criminal justice proceedings. This situation shall not be used against any of the parties in subsequent criminal justice proceedings.²³⁹ Similarly, the failure to uphold an agreement reached through a restorative process should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.²⁴⁰ The *Basic Principles* also encourage States to establish guidelines, standards and, where necessary, a normative framework to guide restorative justice programmes and ensure the aforementioned procedural safeguards.²⁴¹

Restorative justice as an effective crime prevention policy

The “Riyadh Guidelines” encourage States to develop programmes for the prevention of juvenile delinquency that aim to engage children in lawful, socially useful activities and support children to develop positive attitudes toward society and life, thereby discouraging them from developing attitudes likely to cause criminal behaviour.²⁴² These prevention programmes must be designed to avoid stigmatizing children by criminalizing and penalizing them for behaviour that does not cause damage.²⁴³ Instead, such programmes should serve as a supportive framework for safeguarding the personal development of all young persons, particularly those at risk and in need of special care.²⁴⁴ Consideration should also be given to youthful behaviour that may be deemed as anti-social according to social norms and values, but that tends to disappear upon a young person reaching adulthood.²⁴⁵ States should therefore avoid penalizing offenses that, in the case of adults, would not constitute an offence in accordance with the law. Offences of this kind are known as “status offences”.²⁴⁶

Children’s protection from violence in the justice system

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* recognize the obligation of States to uphold the rights and safety, and promote the physical well-being of juveniles involved with the criminal justice system.²⁴⁷ Article 37 of the CRC recognises the obligation of States to protect children from torture or other cruel, inhuman and degrading treatment or punishment. The same article also prohibits the imposition of the death penalty or life imprisonment for individuals under the age of 18 years:²⁴⁸ in other words, a person having committed a crime whilst still under the age of 18, cannot be sentenced to death for that crime.²⁴⁹

According to article 19 of the CRC, States have the obligation to protect children from all forms of violence. This includes children who become involved with the justice system, and throughout all stages of the judicial procedure, including restorative processes, alternative measures and diversion.²⁵⁰ The *UN Study on Violence against Children* provides strategic recommendations to prevent and address all forms of violence against children in the justice system, a topic the joint report on *Prevention of and responses to violence against children within the juvenile justice system* has further advanced.²⁵¹

Special measures for women and girls

*The United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women (and girls) Offenders (the Bangkok Rules)*²⁵² address several forms of gender-based discrimination in the criminal justice system and cover the special treatment of girls and women from admission all the way to aftercare and reintegration. The Rules aim at providing maximum protection for girls and women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment through a number of measures, including training and development and implementation of clear policies and regulations on the conduct of prison staff.

The Rules emphasize that institutionalization of girls in conflict with the law must be avoided to the maximum extent possible and that gender-based vulnerability of juvenile female offenders shall be taken into account in decision-making.²⁵³ Gender-specific options for diversionary measures and pre-trial and sentencing alternatives should be developed within Member States' legal systems, taking account of the history of victimization of many girl and women offenders and their caregiving responsibilities.²⁵⁴

Girls and women offenders must not be separated from their families and communities without due consideration being given to their backgrounds and family ties, and appropriate resources must be made available to devise suitable alternatives for women offenders to address the problems leading to women's contact with the criminal justice system.²⁵⁵

ANNEX II

Regional standards: the African, European and Inter-American human rights systems

The African human rights system

The African Charter on the Rights and Welfare of the Child came into force in 1999, and is monitored by a Committee of Experts. The African Charter provides for child justice, based on a vision of social rehabilitation, reformation and reintegration of the child into the family.²⁵⁶ The Charter thus provides a basis for restorative practices, even though it does not elaborate on the implementation of these values.

The Kampala Declaration on Prison Conditions in Africa was adopted at a meeting of 40 African States, judges, prison commissioners and non-governmental organizations in Kampala, Uganda, in 1996. The Declaration addresses the need to improve conditions in African prisons, recognizing the “inhuman” conditions of many prisons where, “there is a lack of hygiene, insufficient or poor food, difficult access to medical care, a lack of physical activities or education, as well as an inability to maintain family ties”.²⁵⁷ The Declaration recognizes the importance of minimizing the use of incarceration²⁵⁸ and encourages the use of non-custodial sentencing and alternatives, including the use of customary practices²⁵⁹ and restorative practices.²⁶⁰

The Munyonyo Declaration on Child Justice in Africa was adopted in 2011, also in Kampala, Uganda. The Declaration emphasizes that all children involved with the justice system should enjoy their rights, and asserts that deprivation of liberty should be used as a measure of last resort. The Munyonyo Declaration recognizes the implementation of children’s rights in both the formal and informal justice systems.²⁶¹

The European human rights system

Building on the principles of the *European Convention on Human Rights* (ECHR) and other general human rights treaties, including the CRC, the *European Convention on the Exercise of Children’s Rights* (ECECR) and the standards set forth in the *European Rules on Community Sanctions and Measures* and the *European Prison Rules from the Perspective of Children who come into Conflict with the Law*, the Council of Europe has adopted the *European Rules on Sanctions and Measures* (the European Rules). The ECECR recognizes that children involved with the justice system have a set of procedural rights, including the right to be informed,²⁶² the right to legal representation,²⁶³ the right to legal aid and advice,²⁶⁴ the right to be heard,²⁶⁵ and the right to a speedy procedure.²⁶⁶ Article 13 encourages, “the provision of mediation or other processes to resolve disputes”, so as to, “avoid proceedings before a judicial authority” in cases that involve children.

The European Rules call for “priority to be given” to restorative responses,²⁶⁷ through the use of, “mediation or other restorative measures [...] at all stages of dealing with juveniles”.²⁶⁸ This requires a holistic strategy, achieved through the implementation of a multi-disciplinary and multi-agency approach, in order to establish a continuity of care for children who become involved with the justice system.^{269,270} The juvenile justice system is seen as a, “component in a broader community-based strategy for preventing juvenile delinquency, which takes the wider family, school, neighbourhood and peer group context into account”.²⁷¹

In 2010, the Committee of Ministers adopted the *Guidelines of the Council of Europe on child-friendly justice*,²⁷² providing guidance on the implementation of a child-friendly justice system at all stages of the judicial processing of children, including pre-judicial and post-judicial stages. The

Guidelines encourage the settlement of disputes involving children by means of mediation, diversion or restorative justice. They identify such practices as positive developments, “providing that they are not used as an obstacle to the child’s access to justice”.²⁷³

Other significant standards promoted by the Committee of Ministers include their recommendations concerning: mediation in penal matters (1999); “New ways of dealing with juvenile delinquency and the role of juvenile justice” (2003); the rights of children living in institutions (2005); and assistance to crime victims (2006).²⁷⁴

The Inter-American human rights system

The Inter-American regional standards pertaining to children involved with the justice system and the use of non-custodial measures, including restorative justice, rest on the foundations of the internationally accepted standards mentioned above. The Inter-American regional standards derive from the general provisions of *the American Convention on Human Rights* (the American Convention) and the *American Declaration of the Rights and Duties of Man* (The American Declaration), and are further defined by the jurisprudence and advisory opinions of the *Inter-American Court of Human Rights* (The Court) as well as the *Inter-American Commission on Human Rights* (IACHR).

Article 19 of the American Convention declares that, “[e]very minor has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.”²⁷⁵ This provides for a specialized approach to the issue of children who come into conflict with the law that includes the recognition of a child as a rights holder,^{276,277} and affording every child the “free and full exercise”²⁷⁸ of the rights and freedoms provided by the American Convention.

The Inter-American Court elaborates on this specialized approach by stating that, “[t]hese fundamental values include safeguarding children, both because they are human beings with their inherent dignity, and due to their special situation. Given their immaturity and vulnerability they require protection to ensure exercise of their rights within the family, in society and with respect to the State.”²⁷⁹

In accordance with the principle of specialization, the Inter-American Court recognizes the obligation incumbent upon States to implement specialized jurisdictional bodies to deal with children who are accused of having violated the criminal law^{280,281} and enumerates a set of recognized procedural safeguards for children in this situation. It is the obligation of each State to, “take whatever measures they can to minimize children’s contact with the juvenile justice system”.²⁸²

Emphasizing the harmful effects that the deprivation of liberty has on children, the IACHR encourages States to comply with internationally accepted principles on the use of alternatives to adjudication and custodial measures.²⁸³ The implementation of any diversion, alternative measures or restorative justice measures must uphold the child’s right to the due process of law, as well as internationally recognized judicial guarantees and safeguards. The IACHR therefore recommends that, “States amend their laws to make it mandatory to apply, as a first option, a wide range of non-custodial measures as alternatives to custodial measures.”²⁸⁴

It is also relevant to recall the Brasilia Regulations Regarding Access to Justice for Vulnerable People,²⁸⁵ which promote alternative means of conflict-resolution in cases where it is appropriate, both before the start of the process and during the process itself. The Rules emphasize that, “mediation, reconciliation, arbitration and other means that do not require the resolution of the conflict in a court can contribute to improving the conditions of access to justice for certain groups of vulnerable people, as well as to decongest the operation of the formal services of the justice system”.²⁸⁶

ANNEX III

List of participants, International Expert Consultation on Restorative Justice for Children, Bali, 26-28 June, 2013

NAME	POSITION / INSTITUTION
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Linda Pratiwi	DGHR
Marta Santos Pais,	UN Special Representative of the Secretary General on Violence against Children (SRSG)
Mayda Ramos	Representative from the Ombudsperson's Office, Peru.
Miguel Caldeira	Communications specialist, Office of the SRSG
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Mulya Jonie	Ministry of Social Affairs, Indonesia
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Novte Doegiharti	Directorate General of Human Rights, Ministry of Justice and Human Rights, Indonesia
Rahmat Sori	Attorney General, Indonesia
Reza fikri febriansyah SH.MH	Directorate General of Legislation, MOLAHR, Indonesia
Rika Aprianti	Correctional Services, Indonesia
Dr. Rita Figueroa	National Coordinator of the Restorative Justice Program, Office of the General Attorney, Peru
Ambassador Stig Traavik	Royal Norwegian Embassy in Jakarta
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- ²¹¹ *Ibid.* Art. 12, Art 37(d), 40(2(a)), 40(2(b(i-vii))), CRC/C/GC/10, para. 12, 40-67, Beijing Rules, Rule 7.1, 15.1-2.
- ²¹² CRC Art. 37(b), CRC/C/GC/10, para. 28-29, 70-77, Beijing Rules, rule 17.1-4, 18.1-2, 19.1, Riyadh Guidelines, para. 46.
- ²¹³ CRC, Art. 37(b) and *World Report on Violence against Children*, p. 205.
- ²¹⁴ CRC Art 40((3)b) and 40(4), CRC/C/GC/10, para. 22-27, Beijing Rules, rule 11(1-3).
- ²¹⁵ CRC Art. 40((3)b) and 40(4).
- ²¹⁶ CRC Art. 40(4).
- ²¹⁷ CRC/C/GC/10, para. 24.
- ²¹⁸ *Ibid.* para. 25.
- ²¹⁹ *Ibid.* para. 27.
- ²²⁰ *Ibid.* para. 25 and 26.
- ²²¹ *Ibid.* para. 68.
- ²²² *Ibid.* para. 27 (2).
- ²²³ *Ibid.* para. 27 (3).
- ²²⁴ *Ibid.*
- ²²⁵ *Ibid.* para. 18 and The United Nations Standard Minimum Rules for Non-Custodial Measures, “the Tokyo Rules” GA res. 45/110, annex 45 UN GAOR (No. 49A) at 197 UN Doc. A/45/49, 1990.
- ²²⁶ CRC Art 40(4) and CRC/C/GC/10, para. 4, 27 and 70.
- ²²⁷ Tokyo Rules, Rule 17.1.
- ²²⁸ Riyadh Guidelines, para. 11-19, Beijing Rules, rule 18.1.
- ²²⁹ ECOSOC Resolution 1999/26, *Development and implementation and restorative justice measures in criminal justice*, ECOSOC Resolution 1997/33 of 21 July 1997, ECOSOC Resolution 1998/23 of 28 July 1998.
- ²³⁰ ECOSOC Resolution 2002/12, *Basic principles on the use of restorative justice programmes in criminal matters*, adopted in 2002.
- ²³¹ *Ibid.* 12 (a).
- ²³² *Ibid.*

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- ²³³ Ibid. Art. 13 (b).
²³⁴ Ibid. Art. 7.
²³⁵ Ibid. Art. 8.
²³⁶ Ibid. Art.13 (c).
²³⁷ Ibid. Art. 7.
²³⁸ Ibid. Art.15.
²³⁹ Ibid. Art.16.
²⁴⁰ Ibid. Art.17.
²⁴¹ Ibid. Art. 12.
²⁴² Riyadh Guidelines.
²⁴³ Ibid. para. 5 and 56.
²⁴⁴ Ibid. para. 5 (a).
²⁴⁵ Ibid. para. 5 (e).
²⁴⁶ Ibid. para. 56 and CRC/C/GC/10 para. 8.
²⁴⁷ The Havana Rules.
²⁴⁸ CRC Art. 37(a) and the ICCPR article 6(5) and CRC/C/GC/10 para. 71.
²⁴⁹ Ibid.
²⁵⁰ CRC Art.19, CRC/C/GC/10 and Committee on the Rights of the Child, General Comment no 13 The right of the child to freedom from all forms of violence, CRC/C/GC/13, Geneva 18 April 2011.
²⁵¹ Ibid.
²⁵² A/RES/65/229.
²⁵³ Ibid. rule 65.
²⁵⁴ Ibid. rule 57.
²⁵⁵ Ibid. rule 58,60 and 62.
²⁵⁶ African Charter on the Rights and Welfare of the Child, Art. 17 (3).
²⁵⁷ The Kampala Declaration.
²⁵⁸ Ibid. rec. 5.
²⁵⁹ “Alternative sentencing”.
²⁶⁰ Ibid.
²⁶¹ The Munyonyo Declaration on Child Justice in Africa, adopted November 2011, retrieved 15 October 2013 from <http://srsrg.violenceagainstchildren.org/sites/default/files/documents/docs/Munyonyo_Declaration.pdf>.
²⁶² ECECR Art 3.
²⁶³ Ibid. Art 4.
²⁶⁴ Ibid. Art 14.
²⁶⁵ Ibid. Art 6.
²⁶⁶ Ibid. Art 7.
²⁶⁷ Ibid Art 23.2.
²⁶⁸ Ibid. Art 12.
²⁶⁹ Ibid. Art 15.
²⁷⁰ For procedural rights in mediation see Recommendation No.R(99)19 Section IV.
²⁷¹ Rec(2003)20, Section II, Art. 2.
²⁷² Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted 17 November 2010.
²⁷³ Ibid. para. 81.
²⁷⁴ Moreno, Elda, Head of Department of Gender Equality and Human Dignity, the Council of Europe, Presentation at the International Expert Consultation on Restorative Justice for children, Bali Indonesia, 26 June 2013.
²⁷⁵ Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, retrieved 15 October 2013 from <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm, Article 19>.
²⁷⁶ Ibid. Art. 3.
²⁷⁷ See also Declaration number 1, Inter-American Court of Human Rights Advisory Opinion on Juridical Condition and Human Rights of the Child, OC-17/02, 28 August 2002, retrieved 15 October 2013 from <<http://corteidh.or.cr/index.php/advisory-opinions>>.
²⁷⁸ American Convention, art. 1.
²⁷⁹ Inter-American Court of Human Rights *Advisory Opinion on Juridical Condition and Human Rights of the Child*, OC-17/02, , 28 August 2002, para. 93, retrieved 15 October 2013 from <<http://corteidh.or.cr/index.php/advisory-opinions>>
²⁸⁰ Advisory Opinion on Juridical Conditions and Human Rights of the Child, para. 109 and American Convention art. 5(5).
²⁸¹ Corresponding to the Article 40(3) CRC and Article 5(5) of the American Convention.
²⁸² IACHR Juvenile Justice and Human Rights in the Americas , OEA/Ser.L/V/II.

Doc. 78, , 13 July 2011, para. 80, retrieved 15 October 2013 from
<<http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>>.

²⁸³ Ibid., para. 227-228.

²⁸⁴ Ibid., para. 328.

²⁸⁵ The Brasilia Regulations Regarding Access to Justice for Vulnerable People were approved by the XIV Ibero-American Judicial Summit, held in Brasilia on March 4 to 6, 2008, retrieved 15 October 2013 from
<<http://justicia.programaueosocial.eu/datos/documentos/noticias/1217852883.pdf>>.

²⁸⁶ Ibid, section 5, para. 1 (43).