

**International Scientific and Professional Advisory Council (ISPAC)
of the United Nations Crime Prevention and Criminal Justice Programme**

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November, 1999

Preface

In September, 1998 the Executive Committee of ISPAC established a working group of Resource Committee No. 1, Victims, and requested a draft report on Restorative Justice Issues. This report is a brief synopsis of the literature and materials that have come to the attention of the Committee. The materials are extensive and there are a significant number of individual scholars and practitioners, groups and organizations devoted to the advancement of Restorative Justice Principles. The entire content of this report is based on the works and materials supplied by these individuals and groups and is used freely. Without these materials, support and assistance, this synopsis would not be possible. We apologize in advance if some materials and issues are not included and are especially apologetic if some authors or programs are not mentioned by name.

Introduction

Topic 4 of the substantive topics to be included in the proposed provisional agenda of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders is "Offenders and victims: accountability and fairness in the justice process". This topic is of importance and consistent with the emphasis on victims and restorative justice in previously published United Nations documents including:

- 1) Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development of the New International Economic Order, Principle 28 which calls for exploration and encouragement of such alternatives to purely judicial interventions as mediation, arbitration and conciliation courts;
- 2) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 7 which calls for use of mediation, arbitration, customary justice, indigenous practices and other informal mechanisms where appropriate to facilitate conciliation and redress for victims;
- 3) ECOSOC resolution 1990/22 of 24 May 1990, "Victims of Crime and Abuse of

Power", which requests the Secretary-General, together with all the entities of the United Nation's system and other appropriate organizations, to develop and institute means of conflict resolution and mediation;

4) The Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders resolution: "Children as Victims and Perpetrators of Crime and the United Nations Criminal Justice Programme: From Standard Setting Towards Implementation and Action," which recommends that States ensure that structures, procedures and programmes are in place to encourage use of reparation, mediation, and restitution;

5)) The Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders resolution: "Recommendations on the Four Substantive Topics of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders," which urges States to develop alternative dispute resolution mechanisms in order to lower the level of violence in society;

6) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 200 which calls for training of law enforcement officials in peaceful settlement of conflicts and mediation with a view to limiting the use of force and firearms;

7) ECOSOC resolution 1995/9 of 24 July 1995, "Guidelines for Cooperation and Technical Assistance in the Field of Urban Crime Prevention," guideline 3(d) (ii) which calls for use of mediation as a means of reducing recidivism";

8) Commission on Crime Prevention and Criminal Justice Report on the Seventh Session, Economic and Social Council Official Records, 1999, Chapter B. IV, "Development and Implementation of Mediation and Restorative Justice" ¶5 which "Calls upon States to consider, within their legal systems, the development of procedures to serve as alternatives to formal criminal justice proceedings and to formulate mediation and restorative justice policies with a view to promoting a culture favorable to mediation and restorative justice among law enforcement, judicial and social authorities, as well as local communities, and to consider the provision of appropriate training for those involved in the implementation of such processes."

9) Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power submitted to the Commission on Crime Prevention and Criminal Justice pursuant to paragraph 10 of ECOSOC resolution 1997/31 of 21 July 1997 which states, in Part A:

#7 "Informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices should be utilized where appropriate to facilitate conciliation and redress for victims"

#8 "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include fair return of property or payment for the harm or loss suffered, reimbursement of expenses

incurred as a result of the victimization, the provisions of services and the restoration of rights,"

#9 "Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions."

10) United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), rule 1.2 which calls for greater community involvement in criminal justice and for promotion among offenders of responsibility toward society; rule 2.5 which provides for avoiding as far as possible resort to formal proceedings or trial by court, in accordance with legal safeguards and the rule of law; and rule 8.1 which provides that the interests of the victim be taken into account in sentencing, and further that the victim be consulted whenever appropriate;

11) Guidelines on Role of Prosecutors, guideline 18 which provides that prosecutors give due consideration to diverting criminal cases from the formal criminal justice system, with full respect for the rights of suspects and victims;

12) Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), rule 11 which calls for dealing wherever possible with juvenile offenders without resorting to formal trial;

13) Report of the Latin American and Caribbean Regional Preparatory Meeting for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ¶22 which states that "Member states should undertake to develop programmes that provide for the active involvement of the community in the design and implementation of crime prevention and control policies with the aim of strengthening values inherent in a culture of lawfulness and public-spiritedness";

14) Report of the Western Asian Regional Preparatory Meeting for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ¶49 which states that "Participants stressed the importance of procedural rules in ensuring accountability and fairness in the justice process and the need to strengthen efforts to follow existing standards and norms regarding offenders and victims and ¶51, art of which states " Participants drew special attention to the importance of the development and promotion of conflict settlement through non-custodial measures such as reconciliation";

15) Report of the Asian and Pacific Regional Preparatory Meeting for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ¶32 which states, " The scope of restorative justice measures, including mediation, reconciliation and redress to victims of crime, should be broadened to enable those measures to be applied at various levels, with or without recourse to the criminal justice system;

16) Report of the African Regional Preparatory Meeting for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ¶29 which states, "Increased use should be made of restorative justice measures and practices and the use of alternatives to criminal prosecution and incarceration. Such as victim compensation schemes, mediation ...compensation for damages,

awarding of suspended sentences, restitution and community service/labour";
and

17) Preliminary draft of the Vienna Declaration of May, 1999, ¶ 24 which states, "We commit ourselves to according priority to containing the growth and overcrowding of pre-trial and detention prison populations, as appropriate, by promoting safe and effective alternatives to incarceration.

18) Preliminary draft of the Vienna Declaration of May, 1999, ¶ 25 which states, "We decide to introduce, where appropriate, national, regional and international action plans in support of victims of crime, including mechanisms for mediation and restorative justice...."

19) Draft Resolution IV, adopted by the Commission on Crime Prevention and Criminal Justice in May, 1999, addresses development and implementation of mediation and restorative justice in criminal matters, calls on Member States to formulate policies on mediation and restorative justice which create a favorable culture to their use (¶ 5), and recommends that the Commission consider the desirability of developing standards for the use of mediation and restorative justice to insure fairness in how they are used (¶ 8).

The Concept of Restorative Justice

As stated in the Handbook on Justice for Victims on the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (E/CN.15/1998/CRP.4/add.1 17 April 1998), "Restorative justice is a new term for an old concept. Throughout the history of humankind restorative justice approaches have been used in order to solve conflicts between parties and to restore peace to communities." (p.52). The terms restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification are used within the literature. This indicates that the term "Restorative Justice" embraces concepts which do not necessarily have a common meaning, nor do existing programs and procedures in "Restorative Justice" necessarily give the same weight to all aspects involved.

The term Restorative Justice is an effort to create an over-arching concept employing assumptions and processes different than those in a retributive or rehabilitative criminal justice process. The retributive process is a process that focuses primarily on the offender and the State. The retributive criminal justice system focuses on *process* rather than *outcome*. It appears that the "overriding issue is whether fair procedures are followed, not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both the offender and victim belong." (McElrea, 1995:5). The rehabilitative criminal justice process concentrates on the needs of offenders to be rehabilitated.

The restorative process focuses on the victim and in some instances, the community. Restorative justice focuses mainly on restoring the health of the community, repairing the harm done, meeting victims' needs, and emphasizing that the offender must and can actively contribute to those repairs (Bazemore, 1996). Restorative justice condemns the criminal act, holds offenders accountable, involves the participants, and encourages repentant offenders to

work actively for their return into the good graces of society. Restorative justice considers crime an act against the individual and the community rather than against the State (Barry, 1995). While restorative justice programs all seem to concentrate on the concrete conflict between victims and offenders, the degree to which they directly address community needs, varies. In essence, by focusing on "conflict" restorative justice addresses the same social phenomenon for which the law uses the term crime.

According to The Law Commission of Canada (1999) the starting point of most restorative justice programs is the idea that conflicts that are called crimes should not be viewed just (or even primarily) as transgressions against the state; conflict represents the rupture of a relationship between two or more people. For this reason, the criminal justice system ought to focus on and address the harm that was caused by the wrongful act.

In its preface to Standards for Restorative Justice (1999) the Restorative Justice Consortium states:

Restorative Justice seeks to balance the concerns of the victim and the community with the need to reintegrate the offender into society. It seeks to assist the recovery of the victim and enable all parties with a stake in the justice process to participate fruitfully in it.

In this light, much of what is referred to as "traditional justice practices," with their emphasis on the preservation of the peace of the community clearly embody restorative principles. China has, for centuries, utilized community-based justice practices including *Bang Jiao*, which is the efforts of social groups, neighborhood organizations, schools, and workplaces to deal with deviant members of the community (Lu, 1999). The emergence of restorative justice practices is reflected in Weitekamp (1998a), who offers a comprehensive historical perspective. He traces restorative practices non-state, nomadic tribal and segmental societies up to recent developments such as family group conferences in New Zealand in the more conventional state-based justice system societies. In short, restorative justice takes place within the social context of empowering the State yet focuses on losses, repairs damage inflicted, seeks satisfied parties, and considers the victim as central to the process.

As a general principle, the administration of justice from a restorative perspective requires the involvement of all actors in the process: offender, victim and community. The Working Party on Restorative Justice of the Alliance of NGOs on Crime Prevention and Criminal Justice (New York) adopted in March, 1997 the following working definition:

"Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. (Tony F. Marshall, 1997)"

Parties with a stake in the outcome may include not only the victim and the offender but also the families of each and any other members of their respective communities who may be affected, or who may be able to contribute to the prevention of a reoccurrence of the offense. However, as a broad concept, not every aspect of restorative justice is necessarily found in all programs. There are programs in which the community does not play a central role. Community is, however, especially incorporated in family circle conferences such as those developed in New Zealand.

" Restorative justice theory seeks to address and balance the rights and responsibilities of victims, offender, communities and the government." (Van Ness and Strong, 1997:41). It is a "comprehensive understanding of the relationships affected by crime which recognizes that the criminal justice system must focus on the injuries, needs, and responsibilities of crime victims, offenders and community (Richardson and Preston, 1997).

In short, restorative justice

Involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance. Goals are restitution and healing for victims, healing the relationship between victim and offender, accountability and healing for offenders, and healing for community (Zehr, 1990).

Is all judicial or at least officially supervised initiatives which involve the offender *actively in* the restoration and in restitution of psychological, material, and/or social harm caused by the offense (Walgrave, 1995). If the social harm is to be restored and not the personal harm of victims, then the proponents of restorative justice speak of "symbolic restitution", which means that the community receive services or payments from the offender.

"Regardless of how it is practiced, restorative justice reflects a belief that justice should, to the greatest degree possible, do five things: 1) invite full participation and consensus; 2) Heal what has been broken; 3) Seek full and direct accountability; 4) Reunite what has been divided; and 5) Strengthen the community, to prevent further harms." (Sharpe, 1998, p.7.)

Restorative justice represents a paradigm shift from the retributive and/or rehabilitative approaches to crime which have generally stressed that:

- Offenders must be punished
- Victims and offenders must be treated as adversaries
- Victims want offenders to be punished
- Victims benefit from the punishment of offenders
- Satisfying the needs of victims is not central to the judicial process
- Judges decide what is best for the victim and offender

Restorative Justice is sometimes referred to as the Balanced and Restorative Justice Model which seeks to address the need for sanctioning based on accountability measures that attempt to restore victims and also clearly denounce and provide meaningful consequences for offensive behavior, offer rehabilitation and reintegration of offenders, and enhance community safety and security (Bazemore and Umbreit, 1995).

The framework of restorative justice is, therefore, a combined emphasis on three priorities:

Restoration: Concern for providing services and support to victims whether or not

there is an arrest. Restoration of community and social bonds is key to victim support as well as the prevention of future victimization. Restoration includes restoration or reparation of harm to the victim *and* restoration of offenders to community life through the acknowledgment of the harm done and the willingness to take accountability for their actions and their victims.

Accountability: Restitution, community service, and victim-offender mediation create an awareness in offenders of the harmful consequences of their actions for victims, require offenders to take action to make amends to victims, and, in the case of symbolic restitution, to the community. Whenever possible, victims should be directly involved.

Community protection: Intermediate, community-based surveillance and sanctioning systems channel the offender's time and energy into productive activities. A positive objective of this process is to provide supervision and provide incentives for offenders to make self-improvements by becoming competent - gain work experience, develop skills, interact positively in society and publicly demonstrate productive, competent behavior.

The primary assumptions associated with the Restorative Justice Paradigm are:

- Offenders accept responsibility for their criminal behavior
- Offenders and Community unite in recognition of harm done to the victim
- Opportunity for reconciliation through direct interaction between victims and offenders
- Reparation for the offense is given to the victims by offenders
- Offenders are not punished, but supported to repair the harm done and to seek help for their problems

Research in the United States has suggested that victims want four basic things: a) hold the offender accountable; b) restitution; c) stop crime/recidivism; and d) more involvement in the process (Gorczyk and Perry, 1997). Research by Boers and Sessar (1991) in Germany shows that victims' primary concern is to have "redress," to have realistic and not idealistic and moralistic outcomes but merely to have property returned, repaired, or replaced. Healing, recovery, redress, and prevention of future victimization are the primary objectives of most crime victims (Fattah, 1997).

The Church Council on Justice and Corrections -Canada suggests that victims seek "justice" in response to crime and such justice includes:

- a) the shared sense of what is right and wrong;
- b) holding to account for wrongdoing;
- c) the affirming of the importance of the rights of the person injured;
- d) the prevention of other wrongdoing or harm;
- e) respect for the rights of the accused... and
- f) some sense of proportionality between the gravity of the misconduct and any legal coercion society may be entitled to exert in response (1996).

Restorative Justice is an effort to address these needs and expectations. It respects the basic needs of the victim, the offender, and the community.

Principles of Restorative Justice

Four major documents have been generated which propose basic principles or propositions of Restorative Justice. These are The International Network for Research on Restorative Justice for Juveniles, Declaration of Leuven (1997), Alliance of NGOs on Crime Prevention and Criminal Justice (New York), Restorative Justice Handbook (1998), and its draft Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (1999), and The Restorative Justice Consortium, Standards for Restorative Justice (1999).

The Declaration of Leuven, as part of its ten propositions, conceptually sets the ideological context of restorative justice by stating:

Crime should not be considered as a transgression of a public rule or as an infringement of an abstract juridico-moral order but should, in the first place, be dealt with as harm to victims, a threat to peace and safety in community and a challenge for public order in society.

Reactions to crime should contribute towards the decrease of this harm, threats and challenges. The purely retributive response to crime not only increases the total amount of suffering in society, but is also insufficient to meet victim's needs, promotes conflict in community and seldom promotes public safety.

In the Restorative Justice Handbook two ideological prefatory principles are stated:

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

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

Tables 1.1, 1.2 and 1.3 show the principles and standards of Restorative Justice as stated in their respective documents as those principles are seen to be reflected in how the process affects the criminal justice system and community, the victim and the accused. (The number in parenthesis is the principle number in the original text).

There is a high degree of agreement between these documents from three different groups. In short, they hold that the restorative process needs to be voluntary, function within a criminal justice system that maintains all of the rights afforded the accused and that the primary focus

needs to be to address the harm that is done to victims and communities while fostering attention on the remedial elements in the offenders' lives.

Party at stake: Community

Restorative Justice Consortium

A. C.J. System as a whole.

1. Assure that and restorative processes are in accord with adequate standards.
2. Processes/outcomes should be humanitarian, provide all parties with equal opportunity for participation, be as swift as is compatible with proper and just consideration of the issues involved, and relate to the particular context of each case.
3. Voluntary agreements should be subject to judicial oversight.
4. Opportunity to take part should not be dependent on choices of another party, i.e. offender given opportunity at reparation if victim refuses to participate and victim should be offered support if offender refuses.
5. Participation should always involve real choices.
6. RJ programs should not be subjected to single over-riding ends. E.g. diversion, speed, shaming, cost reduction or punishment limitation.
7. Negotiated agreements should be capable of being revisited.

B. C.J. agencies

1. All parties involved in a particular criminal event or series of events (including the accused, the victim(s), and other community members affected) should be offered the opportunity to participate in (or be consulted about) restorative processes in relation to that crime.
2. All those involved should be entitled to request restorative justice processes
3. Agents of criminal justice involved in formal action in a particular case should not normally act as impartial mediators or conference facilitators in the same case.
4. Criminal justice agents negotiating with individual parties should have training appropriate to such a task
5. Individuals who conduct negotiations, if not already employed as professional workers, should have their backgrounds checked.
6. All agencies involved should ensure that complaint systems are established. They should be easily accessed and well-publicized.
7. All agencies should take measures to protect the safety of any individuals working for them.
8. If, because of limited resources, there has to be selection of cases, clear criteria for admission should be decided upon and published.
9. Access to restorative justice should be non-discriminatory [in terms of age, race, gender etc].

Alliance of NGOs

A. C.J. System as a whole

1. Make restorative Programmes generally available at all stages. (6)
2. Ensure that processes are voluntary for all parties, including right to withdraw during restorative process. (7)

3. Restorative process should be used when all parties acknowledge the basic facts of the case. Participation should not be used as evidence of guilt in subsequent legal proceedings. (8)
4. Disparities in power, age, maturity or intellectual capacity of parties should be considered in referring and conducting restorative processes. Threats to safety should be considered as well. (9)
5. Agreements should include only reasonable and proportionate obligations. (7)
6. Where restorative processes cannot be used, officials should encourage responsibility of offender to victim and community and reintegration of victim and offender into the community. (10)
7. Judicial discharges based on restorative processes should have same status as judicial decisions or judgements and preclude subsequent prosecution for same facts. (14)
8. When no agreement can be reached, case should be returned to criminal justice authorities, and a decision on how to proceed should be made without delay. Lack of agreement may not be used to justify a more severe sentence. (15)
9. When the agreement is not implemented, case should be returned to either the restorative programme or criminal justice authorities, and a decision on how to proceed should be made without delay. Failure to implement is not justification for a more severe sentence. (16)
10. Should be regular consultation between criminal justice authorities and restorative practitioners. (21)
11. Should conduct research and evaluation of restorative programs, and encourage modification of Programmes when necessary. (22&23)

B. C.J. Agencies

1. Establish guidelines, with legislative authority if necessary, governing use of restorative justice Programmes, including: referral of cases, handling of cases, the qualifications, training and assessment of facilitators, administration of restorative programs and standards of competence and ethical rules governing restorative programs. (11)
2. Protect fundamental procedural safeguards of the parties, including: right to legal advice before and after the restorative process; right to translation/interpretation when necessary; right of minors to parental assistance; full information to parties concerning their rights, the process and the possible consequences of the process, before consent to participate is given; protection from inducement by unfair means. (12)
3. Discussions are confidential and should not be subsequently disclosed except with parties' consent. (13)
4. Facilitators should be recruited from all sections of society, should demonstrate sound judgement and interpersonal skills. (17)
5. Facilitators should receive initial and in-service training. (20)
6. Facilitators are responsible for providing a safe and appropriate environment for the restorative process, being sensitive to particular vulnerabilities of any party. (19)
6. Facilitators must perform their duties in an impartial manner, respecting the dignity of the parties and ensuring that the parties act with respect toward each other. (18)

* Based on draft Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

Declaration Leuven

Every public coercive intervention, whether or not it is aimed at restorative goals, should only be taken by a judicial instance, according to clear procedural rules. (71)

The main function of social reaction to crime is not to punish, but to contribute to conditions that promote restoration of harm caused by the offense. (21)

All kinds of harm are susceptible to restoration, including the material, physical, psychological, and relational injuries to individual victims, losses in the quality of relational and social life in the community and declines in the public order in society. (22)

The role of public authorities in the reaction to an offense needs to be limited to:

- Contributing to the conditions for restorative responses to crime.
- Safeguarding the correctness of procedures and the respect for individual legal rights
- Imposing judicial coercion in situations where voluntary restorative actions do not succeed and a response to crime is considered necessary
- Organizing judicial procedures in situations where the crime and public reactions to it are of such a nature that a purely informal voluntary regulation appears insufficient. (3)

The outcome of any restorative process should not transgress a maximum which should be in proportion to the seriousness of the harm that has been caused and to the responsibility and capabilities of the offender. (72)

Party at stake: Victim

Restorative Justice Consortium

1. Victim's participation has to be completely voluntary.
2. C.J. decisions should fully recognize the needs of victims, including vindication, compensation, relief of suffering and general welfare. They should seek to ensure the victim's needs are appropriately addressed by some means or another.
3. C.J. processes should allow adequate time for victims to decide to participate and, where appropriate, for mediation and restorative conferencing to take place. Mediation should be arranged at a time and place convenient to victims.
4. Prioritization of cases should favor those cases where there is a personal victim, where the harm is more serious, or the victim actively wants to participate. Considerations of the offender should not be the sole basis for prioritization.
5. In any restorative process, how the victim's needs can be met should be considered first, before attending to issues of offender rehabilitation.
6. Programs should take every step to ensure that agreements are complied with. (A failed agreement is equivalent to revictimization)
7. Offenders should be expected to respond to their victims, if the latter request it, provided that the restorative justice program considers the situation appropriate.
8. No victim is under obligation to accept any particular offer of reparation made by the offender.
9. RJ programs should be designed in consultation with representatives of victims who should be involved in the management and oversight of such programs.

Alliance of NGOs

1. Restorative process should be used only with free and voluntary consent of the victim. (7)
2. The views of the victim about the suitability of restorative processes or outcomes should be

given great deference. (9)

3. Power imbalances, age, maturity, intellectual capacity and other similar factors should be considered in referring victims to a restorative process. (9)

3. Even when restorative programs cannot be used, criminal justice officials should do all they can to encourage responsibility by the offender to the victim and affected communities, and reintegration of the victim into the community. (10)

4. Victims should have the right to legal advice before and after the restorative process, as well as the right to interpretation/translation. (12)

5. Victims should be fully informed of their rights, the nature of the process and the possible consequences before agreeing to participate. (12)

6. Victims should not be induced by unfair means to participate in restorative programs. (12)

7. Facilitators should receive training into the particular needs of victims. (20)

8. Evaluation should assess the extent to which restorative programs provide positive outcomes for victims. (22)

Declaration Leuven

The victim has the right to freely choose whether or not to participate in a restorative justice process. The possibility of such a process should always be offered to him or her in a realistic way. If the victim accepts, he or she should have the opportunity to express completely his or her grievances and to make the full account of any injuries and losses sustained. A refusal to cooperate should not hamper the victim's possibility for indemnity through judicial procedures. (41)

Party at stake: Accused

Restorative Justice Consortium

1. The offender should always have the right to decline to take part in any negotiation with the victim.

2. The offender has a right to be heard in legal proceedings in connection with any decision on their part not to participate.

3. Before being invited to participate in a restorative justice program an accused should have admitted guilt.

4. An accused should not be obliged to admit guilt to gain access to restorative justice.

5. Participation in RJ does not prejudice the presumption of innocence in any subsequent judicial proceeding in connection with the same crime.

6. C.J. decisions involving process or outcomes (e.g. whether to prosecute or what sentence to impose) should take into account any inability on the offender's part to make reparation and his/her willingness to make amends.

7. C.J. decisions should take into account any continuing problems leading the offender to crime, and propose appropriate action to deal with them.

8. Offenders have a right to make an offer of reparation voluntarily. Such an offer should be made to the victim through a neutral third party or in the course of formally mediated negotiation.

9. Insurance companies should not be considered to have the status of victim, unless an offense is committed directly against them.

10. Involvement in RJ processes should not be a cruel, demeaning or degrading experience for offenders. In particular, programs should not attempt to induce artificial expressions of shame.

They should always have regard for the need of the offender to regain self-esteem and to be reintegrated into the community.

11. The amount and duration of any reparation should not be excessive in proportion to the harm caused.

Alliance of NGOs

1. Restorative process should be used only with free and voluntary consent of the offender. (7)
2. The views of the offender about the suitability of restorative processes or outcomes should be given great deference. (9)
3. Power imbalances, age, maturity, intellectual capacity and other similar factors should be considered in referring offenders to a restorative process. (9)
4. Even when restorative programs cannot be used, criminal justice officials should do all they can to encourage responsibility by the offender to the victim and affected communities, and reintegration of the victim into the community. (10)
5. Offenders should have the right to legal advice before and after the restorative process, as well as the right to interpretation/translation. (12)
6. Offenders should be fully informed of their rights, the nature of the process and the possible consequences before agreeing to participate. (12)
7. Offenders should not be induced by unfair means to participate in restorative programs. (12)
8. Facilitators should receive training into the particular needs of offenders. (20)
9. Evaluation should assess the extent to which restorative programs provide positive outcomes for offenders. (22)
10. Agreements reached in restorative programs should be reasonable and proportionate. (7)
11. Offenders should normally acknowledge the basic facts of a case as a basis for participation in a restorative program. Participation should not be used as evidence of admission of guilt in subsequent legal proceedings. (8)
12. Discussions in restorative programs should be confidential (13)
13. Judicial discharges based on agreements arising out of restorative programs should have the same status as judicial decisions or judgements and preclude prosecution in relation to the same facts. (14)
14. When there is no agreement or the agreement is not implemented, the case should be referred to criminal justice officials for disposition without delay. Failure to agree or to implement an agreement may not be used to justify a more severe sentence in subsequent criminal justice proceedings. (15&16)

Declaration Leuven

Reactions to crime should consider the full accountability of the offender, including his obligation to contribute to the restoration of the harm and peace, and his entitlement to enjoy all rights to which members of the society are entitled. A purely rehabilitative response is often not advisable as it can circumvent the possible accountability of the offender and it may not offer an adequate framework for legal safeguards. It is therefore important that the rehabilitative approach to offenders is voluntary and not judicially enforced. (13)

The offender cannot be involved in any restorative process unless he or she freely accepts the accountability for the harm caused by the offense. (42)

If the victim refuses to cooperate the offender should be involved in some form of restorative process, such as contributions to victim-funds and/or community service. (43)

The realization of a restorative process with a particular victim may not complete the restorative reaction, if the community itself is a party concerned. The offender may be obliged to complete a community service, functioning as a symbolic or actual restoration of the harm done to community. (44)

Within the rules of due process and proportionality and in so far as it does not obstruct the restorative response itself, the actions towards young offenders should maximally contribute to competency building and reintegration. (51)

The implementation of a restorative process, whether from within or without the judicial system, should not limit the availability of voluntary treatment, assistance and support to the juvenile offender and/or his family from agencies operating outside the judicial system. (52)

If concerns for public safety are judged to necessitate the incapacitation of an offender, the offender should nevertheless be stimulated to undertake restorative actions from within his/her place of confinement. These actions can take the form of offering apologies, participating in a mediation program and/or accomplishing services to benefit the victim, a victim fund or the community. (6)

Types of Restorative Justice Programs

Restorative Justice is not any one program; it is a set of values and beliefs about the concept of justice which permeate and translate themselves into a variety of possible programs, but it is not limited to these. As noted, many traditional systems work on the basis of restorative justice and use a number of different models. New Zealand has a system which most clearly and explicitly applies restorative justice principles. Nearly 30 per cent of all juveniles cases in New Zealand are handled through family group conferences. The tendency is to increase the number handled in this manner. Austria and perhaps the UK also demonstrate a systematic, wholesale victim-offender mediation approach.

The goals and values of restorative justice have tended to be expressed within the following structures (OJJDP, 1998; Sharpe, 1998):

- **Apology**

An apology is a written or verbal communication to the crime victim and the community in which the offender accurately describes the behavior and accepts full responsibility for the actions.

- **Community/Family or Group Conferencing**

Group conferencing involves the community of people most affected by the crime - the victim and the offender; and the family, friends, and key supporters of both - in deciding the resolution of a criminal incident. These affected parties are brought together by a trained facilitator to discuss how they and others have been harmed by the offense and how that harm might be repaired. To participate, the offender must admit to the offense.

- **Community/neighborhood/ Victim Impact statements**

A Victim Impact Statement (VIS) is a victim's description of how the crime affected his/her life and the lives of their loved ones. Such statements are also

possible from communities and or neighborhoods. The VIS is usually a statement when there is an identified victim and the Community Impact statement is used in crimes generally thought of as victimless, such as drug offenses.

The VIS provides the court and paroling authorities with vital information relevant to the short- and long-term psychological, physical, and financial effects of a crime on the victim and on others around them. The VIS can be delivered by victims orally (by "allocution"), in writing, or in audiotape or videotape formats. VIS are commonly used by courts as part of pre-sentence investigations and at sentencing, and by paroling authorities as part of pre-parole investigations, parole release, and revocations

- Community Restorative Board

A community restorative board typically is composed of a small group of citizens, prepared for this function by intensive training, who conduct public, face-to-face meetings with offenders sentenced by the court to participate in the process. During a meeting, board members discuss with the offender the nature of the offense and its negative consequences. Then board members develop a set of proposed sanctions which they discuss with the offender, until they reach agreement on the specific actions the offender will take within a given time period to make reparation for the crime. Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement. After the stipulated period of time has passed, the board submits a report to the court on the offender's compliance with the agreed upon sanctions

- Community Sentencing/Peacemaking Circles

A sentencing circle is a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties. Sentencing circles - sometimes called peacemaking circles - are open, public processes that deal primarily with serious cases and use traditional circle ritual and structure to involve the victim, the offender, families, judge and court personnel, prosecutor, defense counsel, police, and all interested community members. Within the circle, people can speak from the heart in a shared search for understanding of the event, and together identify the steps necessary to assist in healing all affected parties and prevent future crimes.

- Community Service

Community service is work performed by an offender for the benefit of the community as a formal or informal sanction. Community service offers one way an offender can be held accountable to repair some of the harm caused by his or her criminal actions.

- Compensation Programs

Such programs exist in many member nations of the UN. Compensation programs address the *obligation of the state* to compensate the damages done to victims; they usually reimburse for costs incurred for medical treatment and psychological

treatment; they provide financial remuneration for bills already paid by the victim or, in some instances, provide monthly support payments to disabled victims. While restitution programs seek to establish payments by the offender, the benefits for victims in compensation schemes come from the state, not from the offender (who usually is liable then to the state).

- Diversion

Diversion is a process which empowers authorities to exercise discretion in removing offenders from the formal criminal justice process and is commonly used in conjunction with youth crime. The advantages to this approach are considerable as the early intervention diverts offenders before a criminal pattern has been established.

- Financial Restitution to Victims

Restitution is a process by which offenders are held accountable for the financial losses they have caused to the victims of their crimes. The restitution payment is the sum of money paid by the offender to the victim through the court or independent service to balance this monetary debt. The amount is generally set by the court considering an Impact Statement from the victim.

- Personal Services to Victims

Personal services to victims are services provided directly to victims such as house repairs, lawn work, and seasonal chores. Personal services can strongly reinforce personal accountability for offenders by making them responsible directly to victims.

- Victim/Community Impact Panel

Victim impact panels provide a forum for crime victims to tell a group of offenders about the impact of the crime on their lives and on the lives of their families, friends, and neighbors. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgmental, non-blaming manner. The victims are not telling their stories directly to those who victimized them, they are addressing other offenders how they were impacted by having been victimized in order to impress upon the offenders present how their behaviors harm people.. While some time is usually dedicated to questions and answers, the purpose of the panel is for the victims to speak, rather than for the victims and offenders to engage in a dialogue.

- Victim empathy groups or classes

The victim empathy class is an educational program designed to teach offenders about the human consequences of crime. Offenders are taught how crime affects victims, how it also affects them and their own families and communities.

- Victim-Offender Mediation

Victim offender mediation is a process that provides interested victims an opportunity to meet their offender, in a safe and structured setting, and engage in a mediated discussion of the crime. With the assistance of a trained mediator, the victim is able to tell the offender about the crime's physical, emotional, and financial impact; to receive answers to lingering questions about the crime and the offender; and to be directly involved in developing a restitution plan for the offender to pay back his or her financial debt.

Use of Restorative Justice Programs

Variations of the above programs are found world-wide. Some focus primarily on juvenile offenders (like the *Aussergerichtliche Tatausgleich* in Austria) while others have designed programs applicable to adults. There are programs that address both juvenile and adult cases. In Spain, mediation in juvenile programs focuses on the education offenders while in adult programs the focus is on restitution to the victims.

When programs first develop in a country they are often restricted to petty offenses and/or juveniles. Yet, experience has demonstrated that the programs can be used in serious offense situations as well. The historical application of reparative justice has not been limited to petty offenses. Current thinking tends to conceptualize programs for minor crimes, but Weitekamp (1998b) suggests this might be merely a function of the inability to calculate the amount to be restored when the offense is serious and especially if it is violent. He suggests, however, it is possible to do. In Saskatchewan, Canada, Sentencing Circles are specifically focused on adult offenders facing serious charges and/or lengthy periods of custody. Umbreit and Vos (2000) have documented its use with death-row inmates and the families of victims. Fifteen percent of mediations during the first six months with juveniles in Sweden involved violent offenses, mainly assaults (BRÅ, 1999b).

Restorative interventions are used at every phase of the criminal justice process, from apprehension of a suspect to post-sentencing supervision. Thames Valley police use conferencing as a form of cautioning; the Halt scheme in the Netherlands is a diversionary response for use by prosecutors; German judges are authorized to dismiss cases during the course of proceedings; in Queensland, Australia, the court may divert the case after conviction. (Van Ness and Nolan, 1998). In some instances these approaches have explicit statutory authority; in others they draw from existing authority vested in the criminal justice official involved. (Van Ness and Nolan, 1998).

One of the more common restorative justice programs is Victim-Offender Mediation Programs. The Church Council on Justice and Corrections-Canada (1996:39) indicated that as of that date such programs could be found in Australia, Austria, Belgium, Canada, England, Finland, France, Germany, New Zealand, Norway, South Africa, Scotland and the United States. In Austria, New Zealand and Norway the programs are available in all jurisdictions. Since that time Victim-Offender Mediation programs are known to function in Albania, Bulgaria, China, Columbia, Czech Republic, Denmark, Ireland, Italy, Luxembourg, Mexico, Netherlands, Poland, Russia, Spain, Sweden, and the Ukraine. It is estimated that there are about 700 projects in Europe alone. In 1999 the Council of Europe approved a recommendation on the use of mediation.

Evaluation of Restorative Justice Programs

Empirical data on the effectiveness of restorative justice programs is relatively scarce and usually restricted to individual programs without wide-spread generalizability. There are five critical issues to be addressed: 1) Do victims experience justice; 2) Do offenders experience justice; 3) Is the victim-offender relationship addressed; 4) Are community concerns being taken into account; and 5) Is the future addressed? (Zehr, 1990). In most cases, only the levels of participation and satisfaction have been measured.

Available research indicates a high degree of acceptance of victim-offender mediation processes by both parties. The research also shows that justice officials assume victims to be more punitive than they actually tend to be (Weitekamp, 1999). Heinz and Karstetter (1989) reported that the victims in their study did not demand the maximum penalty. Hudson and Galaway (1974 and Henderson and Gitchoff (1981) noted that crime victims who were aware that their involvement could lead to shortened or no prison sentences were willing to accept this. Neither did Shapland, Willmore, and Duff (1985) find victims to be especially punitive before or after sentencing. In Germany, Kerner, Marks, and Schreckling (1992) reported that only 28% of crime victims who participated in a victim-offender mediation program in Cologne felt that the treatment of the offender in their case was too lenient.

In general, victims show high levels of approval and satisfaction with the restorative justice experience. However, there have been some mixed findings. Maxwell and Morris (1993) reported for family group conferences that in the early years in New Zealand only 51% of the victims were satisfied with the attendance of the conference compared to 84% of the offenders, 91% of the police officers, and 85% of the other participants. Significantly, 25% reported that they felt even worse after attending a family group conference, a result which was supported by Daly (1996) and Strang and Sherman (1997).

The rate of satisfaction of offenders in the restorative justice process can also be considered high. The levels of satisfaction range between 80 and 95% per cent (Umbreit 1992, 1998; Mc Cold and Stahr 1996; Coates and Gehm 1985, 1989, Dignan 1990). Juveniles who participated in mediation programs in Sweden generally looked on the process as being fair (BRÅ, 1999a). The Swedish study also showed, through interviews, that when offenders met with individual victims their negative, contemptuous attitudes were reduced as a result of mediation. Attitudes toward representatives of businesses, however, were only marginally changed.

The impact of the process on recidivism is less well documented. Walgrave (1993) pointed out in this context that even if one uses a broad definition of restorative justice programs none show an increase in the recidivism rate, a conclusion supported by Pate (1990), Nugent and Paddock (1995), and Wynne (1996) who found a lower recidivism rate among offenders who participated in victim-offender mediation. Maxwell and Morris (1996) in an early study were under the impression that family group conferences in New Zealand showed, at least, no higher rates of recidivism. There might, however, be a selection process operating. Forsythe (1995) concluded for Wagga Wagga, Australia, that lower recidivism rates for restorative justice participants were likely due to more serious cases going to court. The same selection effect is also raised for family conferencing in Singapore where 2% of the conference participants reoffended in contrast with 30% of offenders going to court during the same period. (Chan, 1996).

Another empirical question is the impact on communities. Morris et. al. (1996) report that the extended family and community can be involved, even in very difficult cases. Pennell and Burford (1995) found very high levels of satisfaction in their study of family group conferences

for family violence in Canada. Similar results were reported by Clairmont (1994), Hsien (1996), and Braithwaite (1999).

The following charts identify a sample of published research as they address these questions. The list is not considered comprehensive, but illustrative.

| Author/Date | Country | Program Type | Primary Conclusions |
|---------------------------------------|----------------|--|---|
| Do victims experience justice? | | | |
| McCold, 1999 | Diverse | Mediation/ Conference | Between 57% and 88% of victims were satisfied in Mediation programs . Between 90% and 100% of victims were satisfied in conferences |
| Fattah & Peters. 1998 | UK | Northamptonshire Adult Reparation Bureau | Sample of 45 corporate victims & 45 individuals 71% and 62% respectively expressed satisfaction Nearly 1 in 4 (10) expressed dissatisfaction |
| Fattah & Peters. 1998 | UK | Leeds Mediation & Reparation Service | 82% said the experience had been valuable, relieving worries and reforming offender. 40% felt compensation would be sufficient sentence 10% felt offender should go to prison |
| Hayes, Prenzler, Wortley, 1998 | Australia | Community Conferencing | 96.7 to 100% of young people, parents /caregivers and victims were satisfied with conferencing agreements |
| McCold. 1998 | US | Police Facilitated Conferencing | 96% say they are satisfied with the process 96% say that the process was fair |
| Fercello & Umbreit, 1998 | US | Family Group Conferencing | 95% of victims felt negotiated restitution was fair and were satisfied with the outcome of the conference |
| Stang & Sherman. 1997 | AUS | Conferences | 60% of victims felt "quite" or "very" angry at the beginning and only 30% afterwards. |
| Umbreit & Fercello. 1997 | US | Community Conferencing | Victims were pleased with conference and police effort Few victims were dissatisfied because the offender's attitude did not change |
| Umbreit & Roberts. 1996 | US/UK | Victim/Offender Programs | Victim satisfaction rates are higher in America than UK: connected to higher rates of direct mediation |
| Goodes. 1995 | AUS | Family group conferences | 88% of victims were satisfied with outcome and 90% found the process helpful |
| Birchall et.al. 1993 | AUS | Victim/Offender Meetings | 27% of victims felt worse after meeting offender |
| Maxwell & Morris. 1993 | NZ | Conferences | 51% of victims satisfied with attendance at the conference (Early years of the project) |

| | | | |
|------------------------|----|---------------------|---|
| Dignan. 1992 | UK | Reparation Programs | 71% satisfaction among corporate victims and 61% satisfaction among individual victims in adult offender reparation program. |
| Umbreit & Coates. 1992 | US | Mediation | 79% victims satisfaction with program compared to 57% of those who did not participate and victim fear reduced from 25% to 10%. |

Do offenders experience justice?

| | | | |
|---------------------------|--------|---------------------------------|---|
| McCold, 1999 | US/CDN | Mediation/Conferences | Between 29% and 92% of offenders in Mediation programs were satisfied. Between 93 and 100% of offenders were satisfied in Conferences. |
| Fercello & Umbreit. 1998 | US | Family Conferencing | 89% of offenders felt the negotiated restitution agreement was fair to them |
| McCold. 1998 | US | Police Facilitated Conferencing | 97% say they were satisfied with the process 97% said that the process was fair |
| Umbreit & Fercello. 1997 | US | Conferencing | Offenders expressed overall satisfaction, pleased with process, with the police, and manner the conferences was conducted. |
| Umbreit et. al. 1994 | US | Mediation | 90% say they are satisfied with the process Perception of fairness exceeds 80% |
| Dignan. 1990 | UK | Mediation | 96% of offenders were either satisfied or very satisfied with the process. |
| Coates & Gehm. 1985, 1989 | US | Victim-Offender Reconciliation | 83% offender satisfaction with the reconciliation experience. |
| Blagg & Derricourt. 1985 | UK | Mediation | 10 out of 13 offenders satisfied with mediation and felt that it helped alter their behavior. |

Is the victim-offender relationship addressed?

| | | | |
|-----------------------|--------|---------------------------------|--|
| BRÅ. 1999 | Sweden | Mediation | The conflicting attitudes between juveniles and individual victims were reduced, but the change was not as evident when business representatives were involved. |
| McCold. 1998 | US | Police Facilitated Conferencing | 96% of the victims were fair to offender 97% of the offenders were fair to victim |
| Fattah & Peters. 1998 | UK | Reparation | Over 80% of compensation agreements were successfully enforced. Mediation was very positive once authentic and respectful communication was established between offender and victim. |

| | | | |
|---|----|---------------------|--|
| Are community concerns being taken into account? | | | |
| Fercello & Umbreit, 1998 | us | Family Conferencing | 90% of victims felt that the offender was adequately held accountable |
| Is the future addressed? | | | |
| Wynne. 1996 | UK | Mediation | 78% had no further conviction after 1 year and 58% had no convictions after 2 years. |
| Schneider. 1996 | US | Restitution | 32% lower recidivism after 1 year with 38% who did not participate |
| Stutz. 1994 | US | Victim Awareness | 9% recidivism rate for those who completed program 37% recidivism rate for those who did not |
| Umbreit. 1994 | US | Mediation | 18% recidivism across four mediation sites and 27% for comparable non-mediation cases at those sites |
| Roy. 1993 | US | Restitution | 42% of repeat offenders recidivated during follow up period, after their successful exit from programs |

Use of Restorative Justice Programs

Some general themes are evident in the restorative justice literature. There appears to be some consensus that:

- Restorative justice programs should be generally available **at all stages** of the criminal justice process.
- Restorative processes should be employed only with the free and voluntary consent of all parties. The parties should be free to withdraw from the process at any point in time and the decision not to participate should never be interpreted as being uncooperative.
- Where restorative processes and/or outcomes are not possible, criminal justice officials should do all they can to encourage responsibility of the offender toward the victim.
- The process should adhere to the core values of restorative justice and be directed at violations of legal standards, not moral, ethical standards *per se*.
- The restorative process must maintain a **balanced perspective** between victim, offender and community needs.
- Restorative justice is appropriate for both serious and less serious offenses and for juveniles as well as adults.
- The restorative process should preserve the independence and integrity of the judicial

process and assure that only programs adhering to the core values of restorative justice be identified and acknowledged as restorative processes.

- The development of and agreement on guidelines and standards is imperative.

A question still exists the extent to which such programs should be housed with the police. Research in Sweden suggests that a well-developed collaboration with the police is essential for functional and continuous mediation (BRÅ, 1999b)

Conclusion

Philosophically and culturally Restorative Justice has intuitive meaning and has long-standing roots. The tenets of restorative justice meet with very few objections. It is also quite evident that the retributive model of justice has been less than adequate as a process of either impacting the extent of crime and harm done in society or facilitating the reparation of harm done to the victims of those crimes. Proponents of restorative justice vehemently argue that a major change in the way offenders and victims are treated is needed and that adopting a restorative process is both realistic and effective.

While there is some empirical evidence to support levels of satisfaction with the process and some evidence from juvenile programs that recidivism can be reduced, programs have not been adequately evaluated and more information is needed. Research has addressed the issues of victim and offender satisfaction but it has not adequately addressed the victim-offender relationship or whether community concerns are being adequately being taken into account.

The impact of restorative processes on recidivism is still an open-ended issue. Crime is a complex phenomenon and re-involvement in crime by offenders is impacted more by social structural and social psychological factors surrounding the criminal event than by the society's response to it. The ultimate question may not be the impact on recidivism as much as its impact on the victim and community's sense of justice.

Evaluations of restorative justice programs need to include both objective and subjective measures of impact keeping in mind that a restorative justice process is consistent with its purposes when it (Sharpe, 1998:49):

- Holds victim involvement as central
- Ensures preparation and safety for all participants
- Facilitates dialogue among the persons involved
- Strives for reintegration along with accountability
- Ensures adequate resources for reparation and reintegration

- Addresses systemic pressures toward crime

The process of restorative justice is not a substitute for the legal system. As in China, the *Bang Jiao* system involves the entire community in support of the legal values of the society and, theoretically, acts at the earliest stages of intervention to best prevent crime. Other countries like Australia, Canada, New Zealand and South Africa have indigenous processes that offer examples of the effective use of neighborhood and community within the anonymity and formalism of that urban, industrial society. As the manual produced by the Edmonton Victim Offender Mediation Society states:

There is an essential role for formal courtroom trials, which do things that a restorative process does not. But that does not mean that justice must be retributive. Justice, in any kind of system, should be the highest possible expression of accountability balanced with care. Restorative justice programs ... can achieve what a courtroom trial does not (Sharpe, 1998: 13).

Restorative justice is not a type of program or mechanized, new procedure. Unfortunately, many programs are developing somewhat spontaneously without regulation. **Guidelines and standards are desperately needed.** There is a danger that programs that are initially restorative in outlook recreate the courtroom process and, in turn, undermine rather than cultivate restoration. There is also the danger that the legal basis for initiating the process can get lost. And there is a third danger that the etiological factors producing crime - poverty, racism, cultural/social values, individualism will not be addressed as they are uncovered in the process.

The focus of restorative justice is on "justice," a concept marked by certain qualities of humaneness, integrity and responsibility. It is seen to be an integrative rather than an isolating process of interaction. Restorative justice is a way of thinking about crime and our responsibilities in its development and manifestation. It is neither "soft" nor does it proffer excuses. In fact, it holds offenders concretely accountable to their victims rather than abstractly culpable for violations against the State.

Societal reactions to crime will always be guided by emotionally charged moral values; the ultimate question is what values will explicitly serve as the guide. To restorative justice proponents, society and all involved are better served by reparation than retribution. Restorative justice offers civility to civil society.

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