



**REVISED PROPOSAL REGARDING THE REPLACEMENT OF THE E.U. FRAMEWORK
DECISION 2001/220/JHA ON THE STANDING OF VICTIMS IN CRIMINAL
PROCEEDINGS BY A NEW VICTIM-RELATED DIRECTIVE**

Submitted by the European Forum for Restorative Justice

1. General Remarks

Restorative justice is making headway in Europe. Almost all E.U. Member States have passed legislation in this field and practice is growing. However, much remains to be done to allow restorative justice to grow to its full potential.

In recent years, international bodies other than the E.U. have produced important documents which emphasise the significance of restorative justice and strongly promote it. Most relevant texts include

the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters^{1/2}, the Council of Europe Recommendation (1999)19 concerning Mediation in Penal Matters, the Council of Europe Recommendation (2006)8 on Assistance to Crime Victims³, and the Council of Europe Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters⁴. The substance of these texts should be recognised and supported, and their implementation actively pursued by the E.U., which already has taken clear initiatives in the field of mediation in civil matters⁵. Quite a number of the rules provided in that 2008 directive⁶ could be an excellent starting point for an additional E.U. instrument on mediation and other restorative justice practices in criminal matters.⁷

With the existing Council Framework Decision 2001/220/JHA, a first piece of binding E.U. legislation was enacted which promotes the implementation of restorative justice in penal matters in the Member States. Due to a variety of different reasons that have been discussed in many commentaries and articles, both from the political and the research communities, the related article 10 of the existing framework decision is neither clear in its content and scope nor effective in its impact on Member States which so far have been rather restrictive in implementing sufficient options for restorative justice practices.⁸ As a result of such divergent national policies, restorative justice services are not equally accessible and often not available at all to victims of crime in several Member States. This is a situation that does not guarantee a high level of standard of restorative practice in all European countries, and that in particular can be dissatisfying for victims coming from explicitly restorative justice-'friendly' countries such as, e.g., Austria, Belgium, Germany or the UK when occasionally victimised outside their home country and in a restorative justice-'restrictive' Member State.

¹ ECOSOC Res. 2000/14 and ECOSOC Res. 2002/12.

² For further details on the concept of restorative justice, its principles, goals and the most important models of restorative practices, see also the U.N. Handbook on Restorative Justice Programmes, New York 2006.

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³ Section 13 therein.

⁴ Issued by the European Commission for the Efficiency of Justice (CEPEJ) in November 2007.

⁵ E.U. Directive 2008/52/EC on [...] Mediation in Civil and Commercial Matters.

⁶ See, e.g., recitals no. 5, 6, 13, 16, 17, 19, 25, 27 and artt. 1 (§1), 4, 5 (§1), 6 (§1), 7 (§1), 9, 10 of the Directive 2008/52/EC.

⁷ This anticipates the fact that the new victim-related directive envisaged is not the right instrument to provide more detailed regulations than those promoted in this paper. The European Forum for Restorative Justice suggests and supports the development of an additional, separate framework instrument on restorative justice practices in the E.U.

⁸ For a detailed comparative analysis, see D. Miers & I. Aertsen (eds.): *Regulating Restorative Justice. A comparative study of legislative provision in European Countries*, Frankfurt, Verlag für Polizeiwissenschaft, 2011 [forthcoming].

Victim-offender mediation and other restorative justice practices are an option that can be of great benefit in particular for victims of crime⁹. Restorative justice is a response to crime in which victims have an opportunity to express their needs and concerns and to actively participate in the proceedings. Restorative justice aims to repair, in so far as possible, the harm suffered and to bring offenders to understand the consequences of their behaviour and accept responsibility. Addressing the harm caused to crime victims is a primary concern of restorative justice; the acknowledgment by the offender of the harm caused by the crime and an agreement on making amends is a major part of the process at the heart of restorative justice approach¹⁰.

In its research report delivered to the E.U. Commission in 2008¹¹, the European Forum for Restorative Justice came to the conclusion that victim rights are one of the major points of reference for a Union-wide implementation of restorative justice. It can contribute to the political goal of achieving the common European area of freedom, justice and security. The promotion of a balanced justice that considers the needs of victims and the rights of offenders can also contribute to crime prevention.¹²

With regard to the aim of restorative justice, i.e., the restoration of the harm suffered from crime, all victims of crime in the European Union should have the possibility to profit from the potential benefits of restorative justice. It is this particular aspect that requires explicit provisions on restorative justice in the context of the victim-related directive envisaged.

The European Forum for Restorative Justice is the only Europe-wide NGO which promotes restorative justice from a joint perspective which integrates the professional experience of restorative justice practitioners and services, policy makers, legal practitioners, and researchers. Besides its political activities, exchange of information, knowledge and experience, consultation and discussion concerning victim-offender mediation in the framework of a restorative approach of criminal justice are the Forum's core activities. Its services are offered to individuals, non-governmental and governmental organisations in Europe. Other European and international organisations working in the field of victim assistance and offender care are considered to be important partners in realising the Forum's objectives. Therefore, the Forum cooperates and exchanges information with, e.g., Victim Support Europe, the Conférence Permanente Européenne

⁹ For further details, see L.W. Sherman & H. Strang: Restorative Justice: The Evidence. London, The Smith Institute, 2007 (www.esmeefairbairn.org.uk/docs/RJ_full_report.pdf); I. Vanfraechem, I. Aertsen & J. Willemsens (eds.), Restorative Justice Realities. Empirical research in a European context, The Hague, Eleven International Publishers, 2010.

¹⁰ Cf. I. Aertsen, R. Mackay, C. Pelikan, J. Willemsens & M. Wright, Rebuilding community connections – mediation and restorative justice in Europe. Council of Europe Publishing, Strasbourg 2004.

¹¹ J. Willemsens, Restorative Justice: An Agenda for Europe. The Role of the European Union in the Further Development of Restorative Justice. Final Report of the AGIS project JLS/2006/AGIS/147. European Forum for Restorative Justice 2008.

¹² For more details, see Department of Juvenile Justice of the Italian Ministry of Justice (ed.), Restorative Justice and Crime Prevention. Presenting a theoretical exploration, an empirical analysis and the policy perspective, Rome, Ministry of Justice, 2010.

de la Probation, the American Victim Offender Mediation Association and Prison Fellowship International. Various national organisations are corporate members of the Forum which also has consultative status with the Council of Europe's Committee on Crime Problems.

In the light of its experience, the European Forum for Restorative Justice wishes to comment only on those elements of the existing Framework Decision that relate to restorative justice. Our comments and suggestions reflect the development in theory and practice of restorative justice in general and victim-offender mediation in particular.

Points of departure and reference of our comments are the following articles of the existing Framework Decision 2001/220/JHA:

“Article 1
Definitions

(e) ‘mediation in criminal cases’ shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.

Article 10

Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.”

2. Proposals and Comments

2.1. Regarding Article 1 para e) above, we propose the following wording:

“(e) ‘Mediation and other restorative justice practices in criminal matters’ shall be understood as the search, prior to or during or after all stages of criminal proceedings, for a voluntary agreement between the victim, the offender and eventually others involved regarding how the harm arising from the offence can be addressed, facilitated by a competent person with specific training for this task.”

Commentary:

The existing definition "mediation in criminal cases" does not correspond with the terminology used in other international documents such as, in particular, the Council of Europe Recommendation (99)19 on Mediation in Penal Matters and the Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters, as well as the U.N. resolutions relevant in this field which refer to 'criminal matters'. All documents avoid reference to 'cases'.

Furthermore, the proposed formulation (see article 10: Mediation and other Restorative Justice Practices in Criminal Matters) would be consistent with the terms used in the E.U. Directive 2008/52/EC on [...] Mediation in Civil and Commercial Matters. However, in deviating from the standards developed in civil and commercial law, mediation is only one of the models that should be referred to in the criminal sector. Here, additional instruments such as, e.g. family group conferencing, circle sentencing, and others, have proved to be important equivalents or supplements to victim-offender mediation. Moreover, the theoretical approach of restorative justice is significantly different from the other fields of mediation. The new directive should reflect this international development.

2.2. Regarding Article 10, we recommend that it be amended as follows:

"Article 10

Mediation and other Restorative Justice Practices in Criminal Matters

- 1. Each Member State shall ensure the availability of restorative justice practices such as for example victim-offender mediation, family group conferencing, etc., for the widest possible range of offences.**
- 2. Each Member State shall ensure that all victims have equal access to competent restorative justice practices.**
- 3. Each Member State shall ensure that all victims are well informed about the offer and nature of restorative justice practices so that victims are in a position to make informed choice and to give informed consent throughout the process.**
- 4. Participation in restorative justice processes should be totally voluntary from the side of the victim, which includes the possibility of withdrawing at any time. Appropriate support for the victim should be offered before, during and after the restorative justice process. Therefore, Member States should ensure that there are clear practice standards including appropriate training regarding the needs of victims so that the interests of the victims are fully considered throughout the process. Member States should further ensure that the services have access to sufficient funding.**
- 5. Each Member State shall ensure that any agreement reached in the course of restorative justice practices can be taken into account in the criminal proceedings in ways that coincide with national provisions on prosecution, sentencing and the execution of sentences. During this process, the interests of the victim shall be considered with respect and upheld."**

Commentary:

Ad 1.

Although still not so widely used in many E.U. Member States, there is strong evidence that restorative justice can be applied successfully at all stages of the criminal justice process. Research and practice further indicate that it can be applied in a wide range of offences. Also victims of the most serious types of offences – who have often the most persistent questions towards the offender

– can benefit from at least some sort of restorative justice practice such as, e.g., post conviction programmes. Empirical evidence consistently suggests that victims benefit from face-to-face restorative justice conferences, by reducing post-traumatic stress symptoms. Furthermore, meta-analysis shows that restorative justice seems to reduce crime more effectively with more, rather than less, serious crimes.¹³

Comparative analyses of national legislation show that several Member States have made restorative justice available without providing any restriction regarding the nature or gravity of the criminal act. This is in line with the contents of Council of Europe Recommendation R(99)19 on mediation in penal matters.¹⁴ Equal access (availability) requires, from a victim's point of view, the absence of explicit offence- or offender-related restrictions of eligibility. Otherwise, the opportunity of the individual victim to benefit from restorative justice advantages might appear uni-sided or even arbitrary, i.e., depending on occasional factors manipulated by the offender such as, e.g., type of crime committed, age (youth or adult), number of prior records or other traditional offender-related criminal justice categories.

Ad 2.

In light of the potential benefits of restorative justice for victims of crime, it is a *conditio sine qua non* that all victims who wish to participate in such a process must have the opportunity to do so. This should even include an option for both, victims and offenders, to initiate a self-referral independently from official decision-making. With regard to the basic right of equal treatment it is essential that victims have equal access to all restorative justice services offered in their country. This *right to access* has to be seen independently from the question whether, and to what extent, a successfully completed restorative justice process should be considered by the criminal justice authorities in respect to the further treatment of the offender (see below, 5.)

Ad 3.

Informed consent from the side of the victim, without experiencing any form of pressure or obligation, is crucial in restorative justice processes. Victims and other interested persons should not only be informed about the existence of restorative justice services, but also of the nature, the characteristics, possible benefits and risks of participation in restorative justice practices. Thus, informing victims requires well conceived methods of doing so, and criminal justice authorities and other public bodies should ensure that this information is given in an appropriate way to all victims.

With regard to the initiation procedure itself we are explicitly not in favour of a binding rule according to which victims should be approached first, i.e., before the offender. There is no common

¹³ R. Letschert, I. Staiger & A. Pemberton (eds.), *Victims of Terrorism: Towards European Standards for Assistance*, Dordrecht, Springer, 2010 (originally delivered to the E.U. Commission as research report edited by the European Forum for Restorative Justice, Leuven, 2008); L.W. Sherman and H. Strang, *Restorative Justice: the evidence*, London, The Smith Institute, 2007.

¹⁴ Cf., e.g., the country reports on Belgium and Germany and the comparative analysis in: D. Miers & I. Aertsen (eds.): *Regulating Restorative Justice. A comparative study of legislative provision in European Countries*, Frankfurt, Verlag für Polizeiwissenschaft, 2011 [forthcoming].

practice in Europe. However, there are good reasons to argue that to the contrary, the offender should be approached first. The most important one suggests that a refusal by an offender towards a victim who on beforehand has declared his or her willingness to participate may frustrate victim expectations and therefore has the potential to contribute to secondary victimisation.

Ad 4.

Restorative justice practices entail a highly skilled intervention and require specific training. It is essential that the risks of secondary victimisation and other victimological issues are an integral part of the training of the mediators or other facilitators. Likewise they have to be reflected in the practice standards. It is highly recommended that restorative justice practices and standards are developed in the framework of an ongoing cooperation with victim support organisations.

Ad 5.

National legal provision should make it possible that agreements reached in the course of restorative justice practices are taken into account in further decision making in relation to criminal proceedings. This should be done in such a way that it protects and, where appropriate, reinforces the interests of the victims.

3. Conclusion

We urgently hold the view that, for all the reasons referred to above, our proposal provides the minimum set of rules that should be an essential part of the new victim-related directive envisaged. Without such rules, the obligation of the Member States to provide assured space for restorative justice practices in their national systems, would disappear once the new directive will become effective.

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