

ARTICLE

# The new international restorative justice framework: reviewing three years of progress and efforts to promote access to services and cultural change

Ian D. Marder\*

## Abstract

*The years 2018-2020 saw a number of new international legal instruments and guidelines relating to restorative justice. In 2018, a landmark Recommendation adopted by the Council of Europe and a Resolution by the Organization of American States encouraged its use in their regions. In 2019, the Milquet Report proposed amending a European Union Directive to promote restorative justice as a diversion from court, while in 2020, the European Union adopted a new Victims' Strategy, and the United Nations published a revised Handbook on Restorative Justice Programmes. This article identifies and analyses the principal developments in this new international framework. It demonstrates the growing consensus on the potential applicability of restorative justice for all types of offences, and the emerging recognition that restorative justice should aim to satisfy the needs of all participants. It also explores statements endorsing the use of restorative justice beyond the criminal procedure and advising criminal justice institutions to utilise restorative principles to inform cultural change. The paper concludes that implementing international policies domestically requires justice reform advocates to build strong, trusting relationships, and organise inclusive partnerships, with all those who hold a stake in the development of restorative justice.*

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## 1 Introduction

Advocates of penal reform regularly refer to the policies, guidelines and legal frameworks produced by international governmental organisations (IGOs) in

\* Ian D. Marder is a Lecturer in Criminology at the Department of Law of the Maynooth University, Maynooth, Republic of Ireland.  
Contact author: Ian.Marder@mu.ie.

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support of their arguments. Those who lobby governments for progressive prison reform, for example, often frame their demands as in line with the 'Nelson Mandela' Minimum Rules for the Treatment of Prisoners, or the 'Bangkok' Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders, both of which the United Nations (UN) produced. Likewise, people working in Europe will quote from the Council of Europe's European Prison Rules or European Probation Rules when pursuing structural changes and operational improvements to prison or probation institutions. Authoritative documents like these represent vital policy-leveraging tools to help promote human rights and seek enhanced standards of criminal justice infrastructure and practice. Their influence also stems from the fact that policymakers might extract language directly from their texts when drafting legislation and national or institutional strategies or policies. In other words, these documents can help anchor domestic changes in accordance with research evidence and human rights principles.

International instruments have long existed in restorative justice. First came the Council of Europe Recommendation (1999) concerning mediation in penal matters. This promoted mediation as a 'generally available service' and influenced the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Economic and Social Council, 2002) and the first edition of the United Nations Office on Drugs and Crime's (UNODC) Handbook on Restorative Justice Programmes (UNODC, 2006). In 2001, the European Union (EU) adopted a Framework Decision on the standing of victims in criminal proceedings, arguing that judges should consider mediation outcomes in court. The EU Directive establishing minimum standards on the rights, support and protection of victims of crime replaced this in 2012. While binding on EU members, the Directive is criticised for its limited references to restorative justice: a victim need only be informed about restorative justice if the service already exists, and it outlines protections for participating victims but lacks safeguards for perpetrators.

This article analyses a series of recent developments that take the international restorative justice framework to new heights. The last three years have seen legal instruments and publications from the UN, EU, Council of Europe and Organization of American States (OAS) that reflect the growing consensus on the need to ensure that restorative justice is available for criminal cases and other conflicts in criminal justice. The Council of Europe took this the furthest, proposing a cultural shift that transcends the restorative versus criminal justice dichotomy by mainstreaming restorative principles throughout the criminal justice process and in the internal operations of criminal justice institutions. Implementing these policies and guidelines will require substantial, collective action, but they provide a basis for this by legitimising civil society's calls to change institutional cultures and to give citizens an opportunity to determine whether restorative justice is right for them.

The article highlights and examines the key elements of each instrument and posits that the manner in which they frame and promote restorative justice demonstrates a growing consensus on its applicability. It begins with the most progressive international legal instrument – the Council of Europe's Recommendation on restorative justice in criminal matters (2018) – and

considers its implications for the accessibility of restorative justice services and for restorative-informed culture change in criminal justice institutions. Next, the article moves to the global level and analyses the Resolution that mandated UNODC to publish a second edition of its Handbook and (using similar themes as before) the Handbook itself. The third section brings us back to Europe with the Milquet Report (2019) and the European Commission's response: a strategy on victims' rights, which does little to advance the EU's position on restorative justice. The fourth section then considers a 2018 OAS Resolution that similarly lacks detail. The article concludes with reflections on the collective and collaborative action required to translate these instruments into sustainable change.

## 2 Developments at the Council of Europe

In late 2018, the Council of Europe adopted Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters. According to its preamble, this 'builds on Recommendation No. R(99)19 concerning mediation in penal matters', the first international instrument to promote mediation in criminal cases. In reality, however, the new Recommendation incorporates all aspects of its predecessor and is a *de facto* replacement. Crucially, Council of Europe frameworks – unlike EU Directives – are not legally binding on its Member States, their influence correlating with the willingness of local policymakers to embrace their contents. Their variable impact is exemplified by the disparities between the European Prison Rules and real prison practices on the one hand (Cid & Andreu, 2017; Herzog-Evans, 2020), and the parallels between the European Probation Rules and certain newly established national probation frameworks on the other (Špero, 2015).

With this in mind, we can examine the Recommendation (Council of Europe, 2018a), which represents the most comprehensive and aspirational international legal instrument in the restorative justice field. Its stated goals (Council of Europe, 2018b: 2) are fourfold:

firstly, to enhance the awareness, development and use of restorative justice in relation to member States' criminal justice systems; secondly, to elaborate on standards for its use, thereby encouraging safe, effective and evidence-based practice, and a more balanced approach to the conceptualisation and development of restorative justice than is implied by the Victims' Directive; thirdly, to integrate a broader understanding of restorative justice and its principles into the (comparatively narrow) 1999 Recommendation; and, fourthly, to elaborate on the use of restorative justice by prison and probation services.

These aims illustrate its ambition. It encourages policymakers and practitioners to be proactive in making restorative justice available and in increasing local knowledge about restorative justice. It outlines protections for the participants

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and notes the importance of giving all parties a chance to express their needs and to have these met. It is unequivocal that any offence could be suitable for restorative justice, at any stage of the criminal justice process. Finally, it explicates the restorative principles and outlines how these may help change institutional cultures. This section analyses the Recommendation, focusing on its implications for service accessibility and cultural change.

### ***2.1 A right of access? Individualised assessments and wider applications***

The Recommendation clearly states that restorative justice should be equally available to all who may benefit from participation. Rule 18 takes language from the 1999 Recommendation, asserting that restorative justice ‘should be a generally available service’. It builds on this, adding that one’s access should not be contingent on ‘the type, seriousness or geographical location of the offence’, as is currently the situation across Europe (Dünkel, Grzywa-Holten & Horsfield, 2015). Rule 19 specifies that victims and offenders should have access to restorative justice ‘at all stages of the criminal justice process’ and should receive ‘sufficient information to determine whether or not they wish to participate’. Rule 27 explains that the service ‘should be as inclusive as possible’, incorporating ‘a degree of flexibility’. This means that people who seek restorative justice should be assessed individually, with no automatic exclusions because of factors such as disability or age alone. The Recommendation is clear that participants must be capable of providing free, informed consent and of understanding the meaning of the restorative process for it to take place (Rule 26). Yet, services can take action to maximise their inclusiveness by simplifying information materials and appointing guardians for vulnerable participants (Council of Europe, 2018b: 8).

The general message behind the Recommendation is that governments and criminal justice agencies should not impose blanket bans on participation based on case or personal characteristics. Prospective participants should have access to an individualised assessment process in which an experienced practitioner supports them to make an informed decision about participation. Perhaps the strongest statement lies in the Commentary for Rules 18 and 19:

victims and offenders should, ideally, have the right to access restorative justice ... A presumption in favour of access would represent one of the most significant changes that a member State could introduce.

This would place the onus on justice agencies to facilitate citizens’ access to restorative justice services, rather than to act as gatekeepers who decide whether referral is appropriate in each case. Again, this does not negate the need for risk assessment. Rather, it means that this assessment should involve direct conversations between restorative justice facilitators and citizens who, when requesting restorative justice, should be denied only under exceptional circumstances.

The Recommendation underwent a multistage adoption process in which representatives from every European justice ministry agreed to its provisions on three separate occasions. As such, the strength of these statements is of likely

interest to those who worry that many governments are sceptical about restorative justice. Yet, the Recommendation's main limitation is its omission of a Rule providing for a right of access. Despite the above Commentary, the reluctance to include such a Rule – even though the document is non-binding – suggests that some ministries do not perceive a need to provide restorative justice to all their citizens.

The Recommendation also expands the reach of restorative justice by stating that it can be used 'within the criminal justice system, but outside of the criminal procedure' (Rule 60). Here, it points to 'conflict[s] between citizens and police officers, between prisoners and prison officers, between prisoners, or between probation workers and the offenders they supervise', and states that restorative justice can also be offered for 'conflict between staff'. It is a major breakthrough that European law recognises these long-standing practices, especially given the relationship, observed in other sectors, between internal use of restorative processes and cultural change (Hopkins, 2015).

In relation to public complaints against police officers, research finds that both parties may benefit from the opportunity to tell their side of the story, to listen to the other party and to play a role in determining outcomes (Clamp & Paterson, 2017; Young, Hoyle, Cooper & Hill, 2005). At the same time, restorative responses to police complaints must be transparent and fully subject to independent oversight and evaluation so that the less formal method is not administered unfairly or used to prioritise resolution over dialogue, meeting needs and repairing harm. Legal frameworks should therefore endorse and legitimise, but also regulate and monitor, this work.

Likewise, a punitive or neglectful response to prison conflict and discipline risks creating adversarial relationships between prison staff and those in their care, and inspires resistance among those who receive punishment, making prison more dangerous for both groups. Restorative justice can be used to intervene in prison conflicts before they escalate to violence, and can provide more legitimate and constructive responses to breaches of prison rules (Edgar, 2018). A study from three British prisons testing this approach concluded:

with commitment, leadership and clear lines of accountability, it is possible to use [restorative approaches] to deal, both formally and informally, with a wide variety of conflicts (Fair & Jacobsen, 2018: 25).

Others identify the benefits for staff well-being, skill building and violence reduction (Barabás, Fellegi & Windt, 2012; Pranis, 2007). It is this use of restorative justice processes for conflicts arising within criminal justice institutions that may help change institutional cultures, as the next section discusses.

The Recommendation envisages a wide application of restorative justice processes. It aims to reduce disparities between and within countries regarding service accessibility, and to promote practices outside of the criminal procedure that may be widespread at a low volume but are far from mainstream. By incorporating these more marginal practices, the Recommendation looks to the

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future and supports innovation in the field. Indeed, Rule 1 explains that the Recommendation ‘aims to encourage the development of innovative restorative approaches – which may fall outside of the criminal procedure’. It is perhaps the Recommendation’s appeal to transform institutional cultures along restorative lines, however, that best exemplifies its forward-looking nature.

## ***2.2 Using restorative principles to inform cultural change***

Criminal justice cultures are the ‘complex ensembles of values, attitudes, symbols, rules, recipes, and practices’ (Reiner, 2010: 116) which can be identified in patterns of behaviour among criminal justice actors. These cultures differ between jurisdictions, institutions and occupations, and are characterised by more or less formality and discretion, by a stronger or weaker emphasis on welfare, punitiveness and managerialism, and by a greater or lesser reticence to embrace things like transparency, research and change, among other key features (Hamilton, 2019; Nelken, 2010). Activists have long targeted these national, institutional and occupational criminal justice cultures as sites of potential ‘change’, albeit usually finding that existing goals, rationales and routines are rather well embedded and difficult to shift (Chan, 1997; Goulding, Hall & Steels, 2008).

Some have identified the cultural aspects of modern criminal justice that act as barriers to developing restorative justice. These can include an emphasis on consistent rather than responsive outcomes, on efficient case closure over stakeholder participation (Barnes, 2015), on degradation over reintegration (Braithwaite & Mugford, 1994), on individual over collective responsibility and on compensation over dialogue (Shapland, Crawford, Gray & Burn, 2017), to name a few. Some countries and institutions exhibit cultural features that make them more conducive to restorative justice. For example, a culture of informalism may ‘enable the tailoring of solutions to specific problems and circumstances’, while a compassion-driven culture might find in restorative processes ‘the methods and the language [to achieve] mutually beneficial outcomes’ (Marder, 2019: 76). While some have sought to change institutional cultures to become more receptive to restorative justice, however, few criminal justice institutions have taken the next step to utilise the restorative framework to underpin cultural change. Academics increasingly seek to articulate what a restorative institutional culture might look like (see e.g. Burford, Braithwaite & Braithwaite, 2019; Goulding et al., 2008; Hopkins, 2015; Marder, 2020a), while some policymakers have considered (often, post-retirement) the potential for a restorative prison, police force or probation service. Seldom, however, do even the most progressive institutional restorative justice policies and strategies explicitly target this kind of fundamental shift.

The Recommendation’s unambiguous support of restorative institutional cultures is among its most important attributes. Immediately following the aims reproduced earlier, the Commentary states that it ‘goes further than the 1999 Recommendation in calling for a broader shift in criminal justice across Europe towards a more restorative culture and approach’ (Council of Europe, 2018b: 2). This is supported by Rule 2 in stating that the Recommendation

is addressed to all public and private agencies which operate in the domain of criminal justice, and which deliver or refer cases for restorative justice, *or which may otherwise be able to utilise restorative justice or to apply its principles to their work* (emphasis added).

That is, restorative justice is *both* an intervention *and* a series of principles that matter across all criminal justice work. The Recommendation goes on to delineate these principles and to promote widespread training in their application. It also explains how these principles might inform a range of interventions and help build relationships and prevent harm. Each of these points is now considered in turn.

The Recommendation depicts restorative justice in two ways. First, it is a process involving the active participation of those who are affected by, and responsible for, a crime (Rule 3), usually involving dialogue (Rule 4). Second, it is a framework combining two core principles (stakeholder participation and repairing harm) (Rule 13) and a number of supplementary principles (including voluntariness, procedural fairness and equal concern for the participants' needs) (Rule 14). These provisions aspired to synthesise the vast literature on restorative principles, identifying those that are both pertinent as safeguards for practice and which can be 'used as a framework with which to underpin broader reforms to criminal justice' (Rule 14). The main gap is the lack of a reference to relationship building, although this appears in Rule 61 (discussed later in this section).

It goes on to detail how criminal justice actors might gain knowledge about and use these principles. The 1999 Recommendation included some provisions about facilitator training that its successor incorporates and develops, while stressing that a wider range of actors may benefit from a greater understanding of restorative principles. Rules 42 and 44, respectively, provide that those who make referrals, and those who supervise restorative justice facilitators, should receive bespoke training in such activities. These provisions encompass a significant proportion of non-facilitating criminal justice professionals, as the Recommendation envisages that all practitioners (including police, prison and probation officers, prosecutors and judges) may refer cases to restorative justice services. Such training needs to convey the range of situations in which restorative justice might help, to reduce excessive risk aversion among the people who stand between citizens with limited knowledge of restorative justice and those services (Laxminarayan, 2014). Rule 44 recognises that all persons who line manage facilitators – whether they work for specialist restorative services or oversee facilitation practice within justice agencies – should understand why restorative processes must maintain close fidelity to restorative principles (Clamp & Paterson, 2013). For example, the police officer who facilitates restorative processes must be given sufficient time, space and support by their direct superior to prepare and follow up with participants, to include as many stakeholders as would benefit the process, and to ensure that outcomes are negotiated and implemented fairly.

These provisions relate to cultural change insofar as receiving training in making referrals or case supervision may aid in behavioural change – at least in

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relation to these activities, if not in one's wider work. The Recommendation takes this further, however, advocating to

raise the awareness of all staff and managers [about] the principles of conflict resolution and restorative justice, so that they understand these principles and are able to apply them in the course of their day-to-day work (Rule 57).

Its commentary contends that this training can help States 'reform their criminal justice system or to change the cultures of their judicial authorities or criminal justice agencies so that they are more restorative in nature' (Council of Europe, 2018b: 13), referring to the principles outlined before to describe what this approach may look like. This is mirrored in recent Council of Europe guidelines (2019) regarding the recruitment, selection, education, training and professional development of prison and probation staff, which list 'mediation, restorative justice and work with victims' among the 'core components' of training for those who deliver community sanctions (s.7.3). We must not conflate training with cultural change, which requires a wide-ranging set of activities informed by the implementation sciences (e.g. Miller & Miller, 2015; O'Connor, Bogue, Collins & O'Connor, 2019). Yet, practitioners cannot reflect on the extent to which their practice adheres to restorative principles, without first understanding and being able to articulate these principles.

Changing culture requires a shift in organisational routines and operational practices. The Recommendation has three Rules that speak to this. Firstly, Rule 59 provides a non-exhaustive list of 'innovative approaches to reparation, victim recovery and offender reintegration' which 'do not involve dialogue between the victim and offender'. This includes such interventions as reparation boards, victim awareness courses and problem-solving courts (for people who have caused harm), and support circles and restitution (for people who have been harmed). Again, these are widespread in Europe at a low volume, but are not universally available in any country.

The Recommendation also recognises that these interventions are not inherently restorative in nature but are restorative if 'undertaken in accordance with basic restorative justice principles' (Rule 59). Contrast court-mandated community service that is punitive, stigmatising and precludes stakeholder involvement in decision-making, with community reparation that the perpetrators and affected parties determine voluntarily and collectively, is dignified, relevant to the harm done, and involves relationship building and reintegration. Essentially, the more the restorative principles are visible within a process or intervention, the more restorative it is. Similarly, Rule 58 asks probation services to reimagine the sentence planning process. Probation officers can always make decisions without obtaining input from other stakeholders – or they could use restorative justice alongside sentence planning. This would enable the incorporation of outcomes agreed through stakeholder dialogue into community sentences (Marder, 2020a). Thus, these Rules provide a basis from which agencies can conceive, select and deliver a range of interventions differently.



Finally, Rule 61 introduces a fundamental aspect of a restorative institutional culture: the proactive application of restorative principles to ‘build and maintain relationships [and] build trust, respect and social capital’. This Rule mirrors the wider concept of restorative practices, insofar as it looks beyond dialogic *responses* to crime, harm and conflict, and towards relational approaches to their *prevention*. Rule 61 proposes building relationships ‘between police officers and members of the community; among prisoners; between prisoners and their families; or between prisoners and prison officers’. This corresponds with a definition of restorative practices as the study of how to ‘strengthen relationships between individuals as well as social connections within communities’ (International Institute for Restorative Practices, 2020). It also matches a description of restorative policing as a novel policing objective: to ‘promote beneficial forms of *social capital*’ (Clamp & Paterson, 2017: 119, emphasis in original). This Rule brings us much closer to a ‘systemic reform’ approach to restorative justice, as opposed to a more limited ‘programmatic reform’ approach that sees it mostly as a ‘tool’ for use in casework (Bazemore & Griffiths, 2003: 340).

Rule 61’s commentary mentions the circle process as a method with which to ‘build social capital and enable participatory decision-making’ that can be used ‘in any situation where there is an issue to be discussed or a question to be asked’ (Council of Europe, 2018b: 14). The circle is a way of structuring dialogue that typically operates sequentially: participants sit in a circle and the right to speak goes around the group in order, using a ‘talking piece’ to indicate when each person has the floor and, likewise, when one is required to listen to others.

The benefits of the circle are that it enables people to feel heard and respected, to listen to and reflect deeply on others’ perspectives, and to feel connected and supported, while preventing conversations from being dominated by certain participants (Greenwood, 2005). The Commentary suggests various applications of circle processes. For example, prisons may use circles to support the goal of ‘enhancing relationships among prisoners and staff’ or help ‘devis[e] standards for the prison community’. Here, the Recommendation provides a mechanism for achieving certain goals, but also counsels to prioritise goals that reflect the restorative principles (such as building positive relationships and enabling stakeholder participation in decisions). Rule 61 and its commentary also promote staff participation in the workplace, suggesting to use the circle ‘when making managerial decisions and consulting staff, and in other areas of staff management and organisational decision-making’. This further illustrates the level of change envisaged by the Recommendation. The prison is an authoritarian environment in which autonomy is limited and time is seldom spent on building relationships (Liebling, Price & Shefer, 2012). Prisons are also among the criminal justice agencies that operate hierarchically (Dias & Vaughn, 2006) and that usually do not give practitioners a voice in policy or practice development, despite change being unlikely to succeed or be sustained without staff participation and buy-in (O’Connor et al., 2019).

Despite a head start in the late 20th century, criminal justice has fallen behind the education and social work sectors in embedding restorative principles

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and practices in organisational cultures (Burford et al., 2019). Cultural change requires practitioners and managers to adopt new ways of working with each other and with the citizens for whom they are responsible; the Recommendation delineates how to do this restoratively and has begun to influence guidance elsewhere.

### 3 Developments at the United Nations

As mentioned, the UN published two important documents – the Basic Principles and the first edition of the Handbook on Restorative Justice Programmes – in 2002 and 2006 respectively. In 2017, UNODC convened an expert group who concluded that the Handbook should be revised. The following May, UNODC received a mandate to do this work from a Resolution adopted at the Commission on Crime Prevention and Criminal Justice in 2018 (see Economic and Social Council, 2018). In 2017, UNODC also published an international survey drawing attention to relevant legal provisions and restorative programmes in Algeria, Guatemala, Egypt, Mali, Mexico, Mongolia and Tunisia, *inter alia*, which the literature had hitherto scandalously overlooked. Academics will doubtlessly benefit from studying this report, considering the generally Western-centric nature of our field's research and writings (Blagg & Anthony, 2019).

Amid much diplomatic wrangling, the 2018 Resolution (27/6 on Restorative Justice) was moderate in its promotion of restorative justice. One can observe this by contrasting its language with that of other Resolutions that year. For example, whereas Resolution 27/5 on International Cooperation against Trafficking in Cultural Property 'welcomes' a relevant publication (Economic and Social Council, 2018: 24), Resolution 27/6 on Restorative Justice only 'notes' (28) and 'takes note' (29) of the convening of an expert group and its report respectively. Similarly, Resolution 27/5 'urges' Member States to launch legal and operational measures and 'request and provide the widest possible international cooperation' (25-26) in combating trafficking in cultural property, but Resolution 27/6 merely 'encourages [States] to consider' restorative justice (29) and 'invit[es]' them 'to consider providing technical assistance' to each other. These differences are subtle, but intentional and pointed. A diverse group of UN States – Canada, Colombia, Costa Rica, Finland, Honduras, Mexico and Norway – sponsored Resolution 27/6 on Restorative Justice. Yet, its mild wording exposes a certain scepticism in some parts of the world. Resistance to stronger language emerged as some delegations – including, paradoxically, from countries with long histories of non-adversarial customary justice mechanisms and mediation pathways in their modern criminal justice systems – seemed to approach restorative justice as a culturally contingent justice ideal with which they should not be required to engage.

Nonetheless, over the course of a week, the delegations passed a Resolution on restorative justice, giving UNODC a mandate to seek funding to update the Handbook, to 'offer training and other capacity-building opportunities' (Economic and Social Council, 2018: 30), and to undertake other activities and

provide support to Member States on the development of restorative justice. In May 2020, following the convening of an expert group to review a draft one year prior, UNODC published its second, significantly revised edition of the Handbook (UNODC, 2020). It is beyond the scope of this paper to review the Handbook entirely.<sup>1</sup> Instead, it again uses the themes of access to restorative justice and cultural change to explore some of the Handbook's key features.

### **3.1 Accessibility, serious offences and non-crime conflicts**

Like the Recommendation, the Handbook suggests that member States build the capacity of restorative justice services. Perhaps the most significant development in relation to accessibility, however, regards serious offences. The first edition alluded to serious crimes, citing programmes and customs from Austria, Belgium, New Zealand and the Democratic Republic of the Congo, and asserting that 'there is little basis for the view that restorative programmes are only appropriate for less serious offences or first-time offenders' (UNODC, 2006: 45). The second edition progresses this perspective, dedicating a full new chapter to 'restorative justice responses to serious crimes' (UNODC, 2020: 67-79). Its introduction ends with a clear statement regarding such offences:

While the controversy continues over the appropriateness of, and the risks associated with, restorative justice in situations involving serious crime, enough progress has been made to conclude that restorative justice can be blended with conventional criminal justice responses to address some of the gaps left by mainstream justice responses and be more responsive to the needs of victims (68).

It proceeds to detail how practitioners can manage issues around safety, support, trauma and power imbalances, before contextualising these safeguards in different serious offences (including sexual offending, intimate partner violence and hate crime), and citing research and guidance that aim to ensure restorative justice is applied appropriately, with minimal risk, in serious cases. As recently as 2014, a UN Handbook on prosecuting violence against women focused overwhelmingly on the dangers of restorative justice in these cases (UNODC, 2014: 129-132). That the restorative justice Handbook prioritises practical guidance rather than debating its merits further signifies a growing acceptance of its general applicability.

A later section in the Handbook also mirrors the Recommendation in discussing the use of restorative justice with respect to 'grievances, conflicts and misconducts within the criminal justice system' (UNODC, 2020: 38). It quotes the corresponding Rule in the Recommendation and speaks about mediation for complaints against the police and conflicts between criminal justice staff and in prisons. The Handbook builds on the Recommendation, pointing to research and examples from countries where this is used, and providing more detail on

1 See also Lee and Dandurand, this issue.

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important considerations, including the need for cases involving police complaints to be facilitated independently.

Ministries and justice agencies often waste resources by drafting guidelines from scratch and requiring their researchers to search for relevant materials on open databases. The Handbook not only provides practical guidance but also – unlike the more concise Recommendation – collates examples and other information. Its chapter on serious offending epitomises the role of a universal manual: policymakers who aim, for example, to publish guidance on restorative justice and sexual violence, can find references to existing national policies and research from several countries in a single location. This should result in increasingly sophisticated national guidance as jurisdictions build upon each other's work. The influence of the Recommendation, moreover, is obvious here – although it was perhaps less influential on the Handbook's approach to cultural change.

### ***3.2 Cultural change for/through restorative justice?***

The Handbook stops somewhat short of proclaiming that its goal is to institute widespread cultural change in criminal justice, and lacks a section specifically on that topic. Despite this gap, the Handbook helps consolidate the narrative that restorative-informed cultural change is possible, bringing this idea to the global stage. For example, it points to non-dialogic (or 'quasi-restorative') interventions and predicts that experience of using restorative justice may lead to other changes.

The new Handbook departs from the first edition by distinguishing between interventions that do and do not involve victims. Whereas the earlier version included 'reparative probation and community boards and panels' alongside mediation and conferencing (UNODC, 2006: 14-15), the recent version categorises community panels, Circles of Support and Accountability, and surrogate victim schemes as 'quasi-restorative processes'. This distinction allows the Handbook to recognise both the particular benefits and dynamics of victim-offender dialogue, and the potential to provide a range of restorative-informed interventions that apply when one party does not wish to participate or cannot do so safely. Differentiating between dialogic and non-dialogic practices tallies with the Recommendation and helps ensure that research supporting the former is not used to promote the latter, but that both can be encouraged, developed and defined as restorative – to the extent that it is accurate, and in a manner that is precise and appropriate, to do so.

The Handbook also explores the cultural change required for restorative justice services to be accessible. This includes removing the practical and attitudinal obstacles to victim participation so that, for example, they can enter a prison if necessary to meet the person who harmed them. The solution, it contends, lies in raising practitioners' awareness of restorative justice and establishing 'champions' among staff, although it notes that 'every level of the organization must be clear about the objectives' (UNODC, 2020: 94). For sustainable implementation, the Handbook continues:

Change is required in organizational values, including a focus on peacemaking, conflict resolution and community building [and] forgiveness and healing [that] may be relatively foreign (95).

It also notes that change can emerge from exposure to the idea and incidence of restorative justice. It predicts that, as restorative justice becomes normalised in prisons, ‘an understanding of its wider significance can emerge among both staff and inmates’ (44). Similarly, it states that the police may seek to ‘apply the principles of restorative justice to develop sustainable collaborative partnerships with the community’ (46) as they learn more about the concept by facilitating cases.

The Handbook discusses cultural change as both a prerequisite of implementing restorative justice and a consequence of exposure to it. This contrasts with the Recommendation’s description of cultural change as a shift in ways of working that requires proactive applications of restorative principles and practices. The idea that institutions are more open to such work after implementing restorative justice is not without foundation; as the Handbook notes, some police forces introduce restorative community engagement projects after training their officers to use conferencing in their day-to-day work (e.g. Payne, Hobson, Lynch & Hyde, 2016).

However, this exposes the limitations of the Handbook’s approach. If restorative justice is mostly seen as a tool for practitioners, its transformative potential is limited. Proactive applications must exist alongside – and even scaffold – restorative justice implementation. Research suggests that, far from transforming institutional cultures, restorative justice processes, if institutionalised, are shaped by existing institutional goals, rationales and ways of working. This can create risks for participants and entrench problematic assumptions into institutional psyches (Blad, 2006; Marder, 2020b). Successes in other sectors demonstrate that human services should introduce restorative practices alongside restorative justice, so that their staff are primed to understand its core purposes, identify alternative goals to their work, and relate differently to citizens and colleagues (e.g. Hopkins, 2015; Mason, 2017). The Handbook affirms that justice agencies can use circles, for example, to ‘build better relationships ... within prisons’ (30) or create ‘a forum for dialogue [around hate crime to] lessen fears, understand causes and counteract stereotyping’ (77). Yet, it still lacks a section that helps criminal justice learn from other sectors by articulating what a restorative institutional culture looks like and how justice agencies might create and sustain this type of organisational change. If the UN is serious about restorative justice, it should publish evidence-based guidance which helps criminal justice agencies to develop a more restorative institutional culture.

In any event, the Handbook, like the Recommendation, does not place legal obligations on countries to act. Keeping in mind that EU Directives are legally binding, it remains to be seen how much the EU might learn from these documents, and how far it will go to promote the accessibility of restorative justice services and restorative-informed cultural change.

#### 4 Developments at the European Union

The EU Victims' Directive (2012) represented a sea change in the European approach to supporting victims of crime. It established strong minimum standards around respectful treatment, a right to information about procedures and outcomes, and rights to support services, compensation and a voice in the proceedings (Van Dijk & Groenhuijsen, 2018). Yet, many countries missed the 2015 deadline for implementation, and even those that did make the required legal changes in time, mostly did not follow up with the budgets, human resources and training needed to enable agencies to operationalise the new provisions (Van Dijk & Groenhuijsen, 2018). Europe's experience with the Directive is indicative of the many barriers to encouraging countries to implement (even legally binding) international agreements, particularly when necessitating a change in something as static as criminal justice institutional cultures. Nonetheless, the Directive provided considerable leverage and momentum for victims' advocates and services, and many countries made a range of legal and operational changes to their work with, and engagement of, victims as a result.

Lauwaert (2013) succinctly outlines the gaps in the European Union Victims' Directive as regards restorative justice. She notes that the Directive recognises the benefits of restorative justice and provides an open definition and a series of important safeguards for participating victims. Still, it falls some way short of ensuring equal access to restorative justice. While it provides for victims to be informed about restorative justice, its 'escape routes' include that this information need only be given where restorative justice services already exist and that, in any case, practitioners retain the discretion to determine, on a case-by-case basis, the precise information to which victims are entitled. These limitations have been transposed into domestic legal frameworks. For example, the Criminal Justice (Victims of Crime) Act 2017 in Ireland mirrors these 'escape routes' by giving the police full discretion about what information to give victims and when. Restorative justice need only be part of this information if these services are available and, for many parts of the country and types of offence, they remain effectively unavailable (Marder, 2019). Another recent European Commission Report (2020b: 7) on the implementation of the Directive notes that many countries have not transposed all the required safeguards for victims, while others 'have no specific measures in place' to facilitate the referral of people to restorative justice services. The Council of Europe Recommendation also recognised the Directive's shortcomings, the Commentary observing that it 'stops short of creating a right of access to restorative justice' and fails to incorporate protections for suspects and offenders (2018b: 2).

The EU might still strengthen requirements on Member States to provide restorative justice. The Milquet Report (2019: 7) recently surveyed 'the main problems that victims of crime currently face when claiming compensation in [the] European Union', while aiming to 'take a holistic view to compensation'. Among its suggestions lies the recommendation to include, potentially within a revised EU Directive, provisions that promote 'the use of a pre-trial mediation/

restorative justice as part of a compensation to the victim' (Milquet, 2019: 56). Milquet continues:

reconciliation between the victim and the offender and cash or in-kind payment of compensation prior to the trial may have mitigating effects and lead to conditional discontinuance of proceedings in less severe offences (for example those punishable by less than 5 years custody sentence). This ... would ensure higher level of support to victims in seeking restorative justice corresponding to their needs.

This is significant for several reasons. Firstly, its language – a 'holistic' view on compensation 'is not limited to the pecuniary aspects', in a report subtitled 'From Compensation to Reparation' – approximately aligns with restorative values. Monetary compensation might be given in restorative justice, but practitioners and scholars relate more easily to the wider concept of 'reparation' when considering how to repair harm. This term includes symbolic reparation (apologies and assurances of future behaviour) that is among the 'gifts' to give in restorative justice (Braithwaite, 2002: 571), and that victims often experience to be as or more important to healing as monetary compensation (Hansen & Umbreit, 2018). 'Reparation' is also preferable because it encourages creativity around making amends. We must use language indicating that outcomes should respond to parties' unique needs – whether monetary or otherwise – as some criminal justice agencies exhibit a bias towards material agreements in restorative justice (Shapland et al., 2017). As per the Recommendation's Rule 51: 'agreements do not have to include tangible outcomes. The parties are free to agree that the dialogue sufficiently satisfied their needs and interests'.

Secondly, by promoting restorative justice as a diversion from court, the Milquet Report recognises the role diversion can play in access to justice for victims. Lengthy procedural delays and court backlogs represented a global problem, even before COVID-19 caused widespread court closures (Fair Trials International, 2020). We typically discuss the problems caused by such delays in relation either to costs and inefficiencies, or to the human rights issues arising for suspects and convicted people who are on remand and/or awaiting trial or sentencing. Likewise, people usually promote alternatives to prosecution as ways to save public finances or ensure access to justice for perpetrators. It is significant, therefore, that Milquet proposes diversionary restorative justice to help ensure access to justice for victims. A victim's denial of justice emerges not only from delays to conviction or sentencing, as many victims find the courts to be unjust and even traumatising and revictimising (Christie, 1977; Strang, 2002). Rather, the victim's access to justice is limited as the court process, delayed or otherwise, inhibits their participation, voice, validation and vindication (Daly, 2017). Milquet further said that 'in addition to acting as a form of compensation [restorative justice may] bring extra benefits such as enhancing the victim's re-adaptation into society' (2019: 26). This recognition – that victims' and offenders' interests may be aligned, and their justice needs may be met, via non-adversarial

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alternatives – corresponds with the argument that criminal justice need not be a zero-sum game, and that diversion can therefore benefit victims.

The Council of the European Union also recently mentioned the potential for restorative justice to support victims while operating as an alternative to detention. It encouraged EU countries ‘to consider the scope for and benefits of using restorative justice’ and ‘provide training for legal practitioners’ on the new Council of Europe Recommendation (Council of the European Union, 2019: 3). It further suggested that the European Commission should support and cooperate closer with the European Forum for Restorative Justice (EFRJ). Shortly thereafter, the EFRJ published a submission to the Commission. The purpose of this submission was to inform a forthcoming EU victims’ strategy. In this document, the EFRJ outlined research on restorative justice with different victims and concluded that the EU should develop a ‘comprehensive act’ or a ‘uniform policy’ on restorative justice (EFRJ, 2020: 8), albeit without specifying what this should include.

In early 2020, the European Commission published its new Strategy on victims’ rights for the period 2020-2025 (European Commission, 2020a). Alas, this Strategy makes scant reference to restorative justice. It has some positive comments about restorative justice, stating (in a footnote) that restorative justice is ‘important’ for victim empowerment (p. 3). It also reiterates the need for safeguards for victims and recognises that victims and professionals have limited knowledge about restorative justice, and that its ‘potential benefits ... depend on the availability, accessibility and quality of restorative justice services in the Member States’ (p. 6). Yet, its only relevant action is to fund victim support and community-based organisations ‘to promote restorative justice services’ (p. 7). Despite the recognition that the benefits of restorative justice are contingent on the service being available and accessible, it does not encourage Member States to develop a greater capacity to deliver restorative justice, ultimately failing to move us on from the EU Directive.

The Strategy is further proof that a dedicated EU restorative justice policy is sorely needed. As the EU has recognised, despite the benefits to participating victims and offenders, most Member States still lack the capacity to offer and deliver restorative justice for most victims and offenders. As such, it would be beneficial if EU Member States came under a positive obligation to establish a comprehensive, accessible restorative justice service. Whether this takes the form of a restorative justice Directive – for which there would be a need to illustrate the cross-border nature of the issue – or some other form of European policy, is a question that cannot be answered here. Yet, the lack of a general policy has left the EU without a space to promote the development of services, much less to define the broader themes and innovations apparent in modern restorative justice.

There is another critical advantage to a dedicated EU restorative justice policy: this would remove restorative justice from the arena of victim policy, enabling its reframing as a service that is ‘for’ all participants equally. The Victims’ Directive and the Strategy necessarily focus on victim recovery and protection. Yet, developments in some European countries have illustrated the



risks of including restorative justice in victim policy. Where populist punitiveness influences criminal justice, marketing restorative justice as a service for victims may make it more politically palatable (Acton, 2015), but research indicates that this can result in its interpretation and delivery in ways that deny perpetrators safeguards and opportunities to have their needs met (Delattre & Willms, 2020; Marder, 2020b). The safety and effectiveness of restorative processes stems from their ability to balance the needs and interests of all the stakeholders (Chapman, 2012). Practices that promote one party at the expense of the other echo the false dichotomies that criminal law and justice impose on citizens, while individualising crime in isolation of its wider social context. The risks of serving regressive goals exist not only because individual practitioners might facilitate cases imperfectly, but also because the concept itself may be framed and understood in a manner that negates its core safeguards.

The Council of Europe Recommendation resists this, seeking a 'more balanced approach to the conceptualisation and development of restorative justice than is implied by the Victims' Directive' (Council of Europe, 2018b: 2) by encouraging 'process neutrality':

Restorative justice should not be designed or delivered to promote the interests of either the victim or offender ahead of the other. Rather, it provides a neutral space where all parties are encouraged and supported to express their needs and to have these satisfied as far as possible (Rule 15).

The goal of equality of care may be hindered by locating restorative justice mostly or exclusively within victim- or offender-focused policies. As such, the EU requires a distinct restorative justice policy, framing the process in a way that domestic policymakers and practitioners understand this principle. Christie cautioned that 'victim power amplified with state power would indeed become a strong driving force towards a more punitive society' (2010: 118). If restorative justice is to transform criminal justice cultures, it must transcend the notion that some people are 'victims' and others are 'offenders', and that we cannot help all parties simultaneously. The Recommendation exemplifies the language that may help the EU achieve this goal.

## 5 Developments at the Organization of American States

The final instrument to consider is a recent Resolution from the Organization of American States (2018) on advancing security. This follows significant, recent developments in law, policy and the capacity to deliver restorative justice in OAS Member States, including Brazil, Jamaica, the USA, Mexico and Costa Rica (Inter-American Commission on Human Rights, 2018; UNODC, 2017). In Colombia, one of several OAS countries to sponsor the aforementioned UN resolution, there is even a Deputy Ministerial position in Criminal Policy and Restorative Justice – although a historical and social context in Colombia helps explain the salience of this term in recent years.

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In the Resolution's subsection on justice, penitentiary and prison systems, three paragraphs focus on reintegrating formerly incarcerated persons, prison management and administration, and alternatives to imprisonment, before a fourth paragraph requests:

the Secretariat for Multidimensional Security to promote, as part of the Prison Strategy being implemented by the Department of Public Security, the development and use of restorative justice programs in appropriate cases with due safeguards for victim protection, within formal criminal justice processes, as well as the development of innovative approaches to restorative justice – which may or may not be in the context of formal criminal proceedings (OAS, 2018: 124).

The influence of the Council of Europe Recommendation – drafts of which were exchanged with OAS officials – is visible from the language on restorative justice outside of criminal proceedings. More detail is needed to give regional activists the tools they need to effect change. At the time of writing, however, the Prison Strategy proposed in the Resolution is yet to be advanced.

The region has made progress in some areas in recent years (de Andrade, 2018; Rosenblatt & Bolivar, 2015), and the Resolution can support this work. In 2014, the Chief Justice of Trinidad and Tobago remarked that the OAS already 'contributed to a greater acceptance of and inclination to embrace alternatives to incarceration and wider forms of restorative justice' (OAS, 2014: 10). Yet, its use in much of the region remains limited. A recent report on children's rights noted that young persons are often imprisoned because of the lack of alternative programmes, and 'enactment alone of legal provisions by States has stopped short of developing and effectively implementing restorative justice' (Inter-American Commission on Human Rights, 2016: 215). Many countries in the hemisphere suffer high rates of violence, face lengthy court backlogs, lack functional victim support services and have dreadful prison conditions. Evidence- and rights-based criminal justice reform is more vital here than anywhere else. The OAS must build the momentum that permits it and its Member States to prioritise this work. This requires an exercise in coalition building that is also a key task for penal reformers everywhere.

## **6 Conclusion: building relationships and coalitions with stakeholders**

Restorative justice advocates must familiarise themselves with relevant international legal frameworks and guidelines. This will enable them to draw from their contents and legitimacy when negotiating, supporting or agitating for change. From strong statements in favour of accessible and comprehensive services, to appeals for cultural change and the outlining of methods through which this can be achieved, the international restorative justice framework incorporates a range of actions and innovations that can be implemented domestically. Advocates can use these documents to help articulate the benefits

and applications of restorative justice, to strengthen proposals for investment in alternative responses to a range of conflicts and harms, and to support those who use restorative justice to maximise the effectiveness and minimise the risks of their practice. Likewise, the recent adoption of these instruments creates an opportunity to request that abandoned pilots are revisited, and that small-scale projects and services are rolled out nation- and system-wide.

To succeed, however, each of these activities requires strategic engagement. EU Directives aside, no instrument mentioned in this paper obliges any action. Yet, achieving the level of change envisioned by the Council of Europe or the UN requires people working across criminal justice to think, behave and relate to citizens and colleagues differently. A plethora of ministry officials and policymakers, managers, practitioners and administrators in criminal justice agencies, NGOs and other public services, are stakeholders in the development of restorative justice. The international framework will not be implemented unless they are convinced that it is worth expending their time and resources (including their social and political capital in their organisations) on this task.

Criminal justice reform requires both the communication and the implementation of good ideas. Yet, seldom do restorative justice advocates engage with literature on change management or implementation sciences. We must obtain a broader education in these fields in order to support organisations to develop restorative justice in an effective, sustainable manner. We might consider ourselves fortunate that a core learning from this research is the need for organisational change to incorporate greater stakeholder engagement and participation (e.g. Fuchs & Prouska, 2014; Lines, 2004; O'Brien, 2002). The change process must be seen to be fair and legitimate in order to obtain buy-in from actors with the discretion to choose between old and new ways of working. As already noted, and as the Recommendation provides, restorative practices give us the tools to build positive relationships and include staff in the decisions that will affect them. A restorative approach would help criminal justice institutions to negotiate, rather than impose, new cultures and programmes.

This is the logic behind *Restorative Justice: Strategies for Change*, an ongoing project with partners in ten European jurisdictions. The goal of the project is to implement the Recommendation by bringing together as many stakeholders as possible in each jurisdiction and facilitating them to determine collectively the best ways to proceed. Early indications are that it is possible to organise valuable collaborations between restorative justice advocates and those who work in the criminal justice sector, whether they support the idea in principle, or are uncertain or even actively hostile. Knowledge about recent advances in research and the international legal framework can empower and motivate those within the system who support restorative justice to be more proactive, creating momentum behind its development and ensuring that it is kept on the agenda. Moreover, project partners have been able to engage with those who are neutral or resistant to restorative justice by building relationships, listening deeply to their needs and including their views in proceedings.

Recent events show that both adversarial (Noor, 2020) and collaborative (Grawert & Lau, 2019) approaches have a role in achieving criminal justice

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reform. The role of restorative practices in deliberating, determining and implementing penal change is only beginning to be explored.

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