RESTORATIVE JUSTICE FOR VICTIMS IN THE EU

REVIIJ
Reparation to the victim in the European Juvenile Justice Systems:
Comparative analysis and transfer of best practices.
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¹ Adapted from the Special Representative of the Secretary-General on Violence against Children (2013) Report: Promoting Restorative Justice for Children
I. Introduction

The International Juvenile Justice Observatory works for the defense of children’s rights, focusing on the issues faced by those who are in conflict with the law, caught in the cycles of violence and crime or particularly at risk of social exclusion. Involved in a wide range of activities, the Observatory has tackled the theme of restorative justice from different perspectives: promoting in depth research on the evolution of the practice at national level, and advocating the implementation of its constitutive principles.

In the course of the last four decades, the phenomenon of restorative practices’ diffusion has considerably influenced the evolution of justice systems, and juvenile justice especially. Even more noteworthy is the transversal nature of this expansion, which has taken place, albeit with different characters, in different continents and across different justice systems. Measures such as victim-offender mediation services or conferencing have officially become an option in the course of criminal proceedings, they have been increasingly regulated and gained easier access, as they acquired an increasingly important role in justice reforms.

Such development has drawn considerable attention on restorative approaches, from academics, policy-makers and international organisations, who examined strengths and weaknesses of the emerging services. As part of those measures that allow offenders to be diverted from the traditional criminal system, restorative practices are often analysed in terms of the benefits they could provide to young offenders, who are particularly vulnerable when in contact with the justice system. Nonetheless, the consideration of the victim’s perspective is another crucial aspect when investigating restorative justice.

If the advantages of recurring to restorative practices may be more evident from the point of view of the offender, especially when compared to a criminal trial or a custodial sentence, they are equally considerable when taking into account the position of the victim. While the criminal proceeding, and the phase of the trial especially, are built on an opposition between the State and the offender, and therefore assume the crime as a violation of the system of law and order, restorative justice puts the personal damage suffered by the victim right back at the

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3 See the results of the UN (2006) Study on violence against children
core of the process. The participation of the victim, his or her suffering, and his or her right to see it recognised and healed are therefore substantial components of a restorative approach.

In this light, the present article aims to determine what beneficial elements the restorative process can provide to a victim of crime, and at what conditions they are better ensured. In order to do so, it proposes a threefold analysis with a regional scope on the European Union. First of all, an overview of international and regional standards will address and define three key aspects: the rights of the victims; the minimum standards to guarantee a fair restorative process; and the particular binding framework determined by European legislation. A second part of the article will analyse the diffusion and the character of the restorative justice developments in the European Union. This section will focus on the definition and the expansion of restorative measures; their core principles and their distinctions from a punitive approach; as well as the degree and typologies of their implementation. Finally, the conclusion will outline how certain aspects of restorative processes are particularly indicated to fulfil the rights of the victims.

II. International Framework: Standards and Recommendations

A. Safeguards for Victims in Criminal Proceedings

A.1 Standards on Victims’ Protection

The limited role of the victim in the traditional criminal justice proceedings has attracted increasing attention in the last decades. As a result, human rights’ standards, conventions, and recommendations of International and Regional bodies have progressively specified the rights of victims of crime, and the safeguards that they should be guaranteed in the course of criminal investigations and trials.

The relevance of the topic is testified by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which, already in 1985, provided for a list of fundamental rights of victims of crime, such as access to justice and fair treatment, retribution, compensation and assistance⁴.

Subsequent international Treaties have built on such fundamental provisions, further specifying their scope and content and reinforcing their binding character. The United Nations Convention against Transnational organized Crime and the Protocols Thereto, for instance, specifies the role of victim’s compensation in the disposal of confiscated property⁵; enlarges

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the right to assistance to the obligation of providing appropriate protection\textsuperscript{6}, highlights the importance of specific training to provide adequate assistance and protection to victims\textsuperscript{7}. The Rome Statute\textsuperscript{8}, on the other hand, establishes the role and guarantees of victims and witnesses in the International Criminal Court proceedings, providing for consistent safeguards.

The 2010 Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power\textsuperscript{9} further strengthens the safeguards of victims, by reiterating the fundamental procedural rights, but also focusing on their actual implementation and on the effectiveness of the justice mechanisms, which shall be: ‘expeditious, fair, inexpensive and accessible’\textsuperscript{10}. Moreover, art. 4 highlights the importance of a specific preventive action to reduce victimization, and devotes particular attention to the risks of secondary victimization, and to policies to tackle directly vulnerability factors that affect certain groups in particular. Another element that is progressively underlined is the notion of meaningful access to justice proceedings, whether criminal or administrative, and to legal aid\textsuperscript{11}, described as a right of victims and witnesses, as much as it is for accused and suspects.

In the same direction but on a regional level, in 2006 the Council of Europe adopts the Recommendation on assistance to crime victims\textsuperscript{12}, which incorporates the UN and European standards and replaces the old Recommendation on the assistance to victims and the prevention of victimisation of 1987. The various safeguards established by the Recommendation emphasize, in particular, the need to prevent repeated victimization and the obligations of the States not only to deal with the offenders but also provide assistance to victims.

**A.2 Standards on Child Victims**

An important category of international standards that protect the rights of victims concerns specifically children victims. The underlying principle of these measures is the one that establishes the best interest of the child as the paramount consideration of any legislation, social protection scheme and court of law that have an influence on children. Moreover, such norms have developed according to the specific needs of this group, especially in the context of criminal proceedings: ‘children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity

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\textsuperscript{6} Art. 25, United Nations (2000) Convention against Transnational organized Crime and the Protocols Thereto  
\textsuperscript{7} Art. 29, United Nations (2000) Convention against Transnational organized Crime and the Protocols Thereto  
\textsuperscript{10} Art. 5.1, United Nations (2010) DRAFT UN Convention on Justice and Support for Victims of Crime and Abuse of Power  
\textsuperscript{11} See also Principle 10, Economic and Social Council (2012) United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems  
\textsuperscript{12} Council of Europe (2006) Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims
and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process.\footnote{13}

In this line, the United Nations Convention on the Rights of the Child (CRC) establishes overarching rights for those children who have been victim of neglect or any form of degrading and cruel treatment. In these cases, the State has the \textit{obligation of promoting the victims’ psychological recovery and social reintegration}, in an environment that fosters their health, self-respect and dignity\footnote{14}.

Beyond the general right to recovery, a set of specific procedural safeguards need to be applicable in the course criminal proceedings, to counterbalance the particular situation of the child victim during the justice process. From the phase of investigation to the trial, the child or young person experiences in fact enhanced vulnerability, which can further be aggravated by the circumstances of the crime and by the requirements of the criminal proceeding. The first provision on procedural safeguards specifically addressed to children victims is art 12 of the CRC, \textit{the right to be heard}, which applies to both victims and offenders\footnote{15}, and which represents the main pillar to ensure an active participation to the proceedings. The Committee on the Rights of the Child offers helpful specifications concerning the broad implications of this right, which is not limited to the free expression of personal views by the children, but also inherently linked to the right to be adequately informed of their role within the proceeding, as well as of the availability of support services\footnote{16}.

Finally, the UN Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime\footnote{17} reaffirm the basic procedural rights of victims, with particular attention to the specific needs of a child. Such guarantees, already outlined in the CRC\footnote{18}, include: \textit{the right to be treated with dignity and compassion}, which limits interferences in the child private life to the minimum necessary, and stresses the importance of trained professionals; \textit{the right to be protected from discrimination}, and the \textit{right to be informed}, together with \textit{the right to be heard}, as was specified before\footnote{19}.

\begin{thebibliography}{99}
\footnotesize
\bibitem{14} Art. 39, United Nations (1989): UN Convention on the Rights of the Child (UNCRC)
\bibitem{15} Art. 12, United Nations (1989): UN Convention on the Rights of the Child (UNCRC)
\bibitem{16} Art. 62 ; 63 ; 64, UN Committee on the Rights of the Child (CRC), General Comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12
\bibitem{17} Economic and Social Council (2005) Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime, Res. 2005/20
\bibitem{18} Art. 37, art. 40, United Nations (1989): UN Convention on the Rights of the Child (UNCRC)
\end{thebibliography}
Moreover, these Guidelines recall the **right to effective assistance** (already in article 37.d of the CRC), which entails legal assistance but also counselling, and services to promote physical and psychological recovery. Such multidisciplinary assistance should be provided throughout the justice process and is instrumental to ensure effective participation. On the other hand, participation to the judicial proceeding shall not, in any case, impact a child’s **right to privacy**. All the concrete concerns over the impact of the proceeding, from its inception to its end, on the well-being of the child, are explicitly addressed by **the right to be protected from hardship during the justice process**, which covers the detection, investigation and prosecution phase and tackles three fundamental aspects: the length of the process, the attitude and preparation of the staff, the sensitivity of the environment and the procedures\(^{20}\).

Finally, the **right to reparation**\(^{21}\) aims to ensure that the interest of the victim plays a key role in determining not only the course of the proceeding, but also its outcome. Such provision contributes to reaffirming the importance of the victim in the criminal process, and shifts the purpose of sentencing from the exclusive consideration of appropriate punishment to the offender.

Overall, in the International as well as in the EU and national legal frameworks, the safeguards for victims have multiplied in the course of the last decades, embracing the different stages of their contact with the justice system. Nonetheless their effective implementation has proved difficult, while recent research proves that victims of crime, and especially vulnerable groups, have experienced various types of difficulties in reporting a crime to the competent authorities\(^{22}\).

Taking into account the challenges to achieve effective access to justice, the latest international guidelines, as well the most recent EU legislation have emphasized the emergence of certain standards\(^{23}\), more focused on facilitating the implementation phase, specifically concerned with:

- the provision of legal aid to victims of crime;
- the specific role of frontline responders to duly communicate with the victim their rights in terms of procedural safeguards, legal aid, assistance and information;

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\(^{23}\) For an analysis of the emerging standards see page 26, Fundamental Rights Agency (2014) Victims of Crime in the EU: the Extent and Nature of Support for Victims
ensuring that the view of the victim is taken into account in the course of the proceeding;

the close coordination between the different providers of assistance to the victim (social, legal, health related).

In the same view of facilitating the referral of crimes and therefore the access of victims to justice, it is crucial to highlight the role of the State, and therefore of its agents, in fulfilling the rights of victims. Both the European Court of Human Rights, and the European Court of Justice have notably contributed to developing significant jurisprudence in this sense. In particular, the ECtHR underlined how competent authorities, once they have become aware of a situation of violence, or crime, should not wait for the victim’s referral to initiate proceeding, as the victim’s access to justice shall not be conditional upon their active contribution\(^\text{24}\). Furthermore, the ECJ case-law has pointed to the obligation of the State to fulfil the victim’s right to compensation which could otherwise not be redressed, as a last resort guarantor of that right.\(^\text{25}\)

**B. Minimum Standards on Restorative Practices’ Implementation**

As was mentioned, Restorative Justice’s diffusion has been particularly connected to the juvenile justice systems, since it is perceived as particularly appropriate for young people in conflict with the law and more responsive to their best interest, precisely because of its informal character\(^\text{26}\).

The principle of the **best interest of the child**, in fact, assumes particular relevance in the context of children in conflict with the law. Proclaimed in article 3 of the UN Convention on the Rights of the Child (CRC), the concept has also suffered from the inherent vagueness of its original definition. Nonetheless, the crucial work of the Committee on the Rights of the Child allows for a more operational definition of the principle, to be understood as threefold: a substantive right, whenever various interests are at stake in a decision concerning a child, his or her best interest shall prevail on other considerations; an interpretative legal principle, when a decision is taken it will be implemented and interpreted as to favour the child’s best interest; a rule of procedure for any decision-making process that can affect a child.\(^\text{27}\) Finally, the Economic and Social Council’s Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime define the best interest of the child as comprising the **right**

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\(^{24}\) ECtHR, Cadiroğlu v. Turkey, No. 15762/10, 3 September 2013, para. 30: ‘Whatever mode is employed to fulfil that purpose, the authorities must act of their own motion, once the matter has come to their attention, and they cannot leave it to the initiative of the victim’s relatives’

\(^{25}\) Opinion of Advocate General Carl Otto Lenz, Cowan v. Trésor public, 186/87, 2 February 1989

\(^{26}\) See Special Representative of the Secretary-General on Violence against Children (2013) Report: Promoting Restorative Justice for Children

\(^{27}\) Introduction, UN Committee on the Rights of the Child (CRC) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14
to protection and the right to harmonious development, therefore underlining the future dimension of the consequences not only of the crime, but also of the criminal proceeding, on the well-being of the child.

In the case of juvenile justice, the best interest principle is essential to reverse the inherently punitive approach to offenders and to substantiate the principles of social integration and education as being the overarching objectives of the process.

The association of restorative practices to the best interest of the child is made very clearly by the Committee on the Rights of the Child, in the General Comment 10, which states: ‘The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.’

In the same light, restorative justice becomes very significant as part of alternatives to criminal justice, which are less burdensome on a child, and as such can be preferable. On the one hand, as all diversion measures, it is instrumental to prevent the hardship deriving from the context of the criminal proceeding itself. On the other hand, even when implemented in a later phase, it will nonetheless, ensure that measures which entail deprivation of liberty are only applied as last resort and for the shortest appropriate period of time. At regional level, particularly clear in this sense is the Recommendation of the Council of Europe on the Rules for Juvenile Offenders subject to Sanctions or Measures, which not only provides for the availability of a ‘wide range of community sanctions and measures’, but also points out that they should be encouraged and, amongst them, priority shall be given to those that may have an educational impact as well as constituting a restorative response.

Furthermore, International instruments and recommendations also address the practice of Restorative Justice directly, setting minimum standards for mediation and restorative proceedings, to ensure their compliance with the rights of both the offender and the victim. Particularly relevant to this end are the provisions contained in the Council of Europe’s Recommendation concerning Mediation in Penal Matters. First of all, according to the general

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28 N. 2, Council of Europe, Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures


30 Art. 24, Council of Europe (2010) Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies

31 Art. 37, UN Convention on the Rights of the Child (UNCRC)

32 N. 22, Council of Europe, Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures

33 ibidem
principles, mediation can never take place without the **free consent** of both parties involved, and it is further specified that neither the victim, nor the offender should be induced to give their consent through unfair means. The importance of consent entails different elements for the offender and the victim, but it is equally important. For the former, it is linked to the acceptance of at least part of the responsibility of the crime, deemed necessary to begin a process of restoration and retribution. For the latter, it is an essential guarantee that any mediation would not impose more hardship and thus reiterate victimization. A second principle, in this COE Recommendation, provides that mediation should be **generally available**, and at all stages of the criminal process. It is also clearly stated that provisions in this sense, that would facilitate the use of mediation, should be included directly in national legislation.

In addition, **recognised standards** should be adopted at the national level to regulate mediation, and particular emphasis shall be dedicated to the level of **training of mediators**, their **impartiality** and their complete information on all facts related to the case. Finally, it is also underlined that the outcome of mediation, as well as its beginning, must be reached on a **voluntary basis**.

It is nonetheless important to recall that, if mediation is one of the core practices of restorative justice, and indeed one of the more universally diffused, it is not the only one. Other restorative approaches, such as family or community conferencing, are equally relevant to the restorative approach. All these practices are encompassed by the provisions of the United Nations’ Economic and Social Council in its Basic Principles on the use of Restorative Justice programmes in Criminal Matters.

These Basic Principles highlight the importance of **complete information** being provided to both parties about their rights, the nature of the process and the possible consequences, before giving their consent. Concerning the outcome of the restorative programme, it is also established that they can be incorporated in judicial decisions and, in that case, have the **same status of a judgment** and preclude further prosecution of the same crime. Finally, States are invited to further develop restorative approaches, recognizing therefore their value ‘as an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.’

In conclusion, while it is undeniable that an international normative framework for restorative justice is developing, at the same time the initiative on how to regulate it, which standards to

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34 Art. 11, Council of Europe, Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters

set, and how to encourage the diffusion of restorative justice depends mainly on the will of the States. In this context, though, the legal framework of the European Union, which is deeply inspired and influenced by international human rights standards, represents an interesting exception to the rule.

C. Legal Framework in the EU

The relevance of the rights of children in the context of the EU is clearly outlined in the Lisbon Treaty. The Charter of Fundamental Rights, in fact, dedicates art. 24 to their right to protection and care, the right to be heard, and also incorporates the child’s best interest principle, thus reinforcing its binding nature among European States. Moreover, European Institutions have increased their direct involvement and concrete political action concerning juvenile justice, notably thanks to the EU Agenda on the Rights of the Child, adopted in 2011. Following the commitments of the Stockholm programme, the Agenda tackles directly the implementation of more child-friendly justice systems, on the basis of the principles outlined in the Council of Europe Guidelines. To fulfil this goal, the Union provides for specific actions and has tabled and adopted important directives in the course of the last five years.

In consideration of the huge disparities between the 28 justice systems present in EU nowadays, aspect that was highlighted by the EU Commission’s study on children’s involvement in judicial proceedings, the approach preferred by European legislation is that of harmonization through adoption and implementation of minimum standards.

In this context, the latest EU directives represent an important opportunity to ensure adequate protection of both the right of juvenile offenders, and those of victims. On the side of the suspects and accused persons they include: the Directives on interpretation and translation and on the right of information in criminal proceedings, which have been adopted between 2010 and 2012, and the proposals for Directives on presumption of innocence, on legal aid and, of particular relevance, on the procedural safeguards of children suspects or accused in criminal

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37 Art. 24, Charter of Fundamental Rights of the European Union, 2010/C 83/02
38 European Commission (2011) Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child
proceedings, all three presented in November 2013\textsuperscript{42} and currently undergoing the legislative process\textsuperscript{43}.

On the side of victims instead, the European Union has lately ensured more protection of victims of violence through mutual recognition of protection orders between different member States\textsuperscript{44}, and has established minimum standards for appropriate compensation schemes available at national level\textsuperscript{45}, also providing for cross-border recognition of compensation claims. In particular, the Directive establishing minimum standards on the rights, support and protection of victims of crime, approved in 2012, has replaced the Framework Decision of 2001\textsuperscript{46} and has improved the standards of protection of victims in criminal proceedings.

The Directive establishing minimum standards on the rights, support and protection of victims of crime, that all EU Member states have the obligation to transpose into national legislation by the end of 2015, establishes a set of minimum safeguards for victims involved in criminal proceedings. Art. 1 moreover specifies enhanced safeguards to be applied in the case of a child victim.

Particularly interesting in the case of this directive, is the attention dedicated to restorative justice processes. On the one hand, it is clarified that the victim’s fundamental safeguards apply also in case of justice proceedings that do not entail a formal criminal trial, on the other hand, States are encouraged to facilitate the referral to restorative justice when appropriate. Then, a set of tailored safeguards to the context of restorative justice are outlined.

Taking into account that Restorative Justice was not even mentioned in the Framework Decision of 2001, this Directive, which essentially promotes its consideration as a valid alternative to the traditional penal proceeding, highlights the growing relevance of restorative


\textsuperscript{43} All of these measures are part of the Roadmap for strengthening procedural rights of accused, see the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

\textsuperscript{44}Regulation (EU) No.606/2013 on mutual recognition of protection measures in civil matters; Directive 2004/80/EC relating to compensation to crime victim

\textsuperscript{45} Directive 2004/80/EC relating to compensation to crime victims

methods of conflict resolution. At the same time, it recognises a process that is already affirmed at national level, where all European States have already provided for restorative programmes, at least theoretically.

At the same time, beyond setting out procedural safeguards to ensure the rights of victims are respected throughout the criminal proceeding, the Victims Directive sets out the minimum standards concerning the availability and delivery of support services, in articles 8 and 9. It is established that States are responsible for ensuring that victims have access to confidential support services, free of charge, throughout the criminal proceeding, as well as before and after, for the appropriate time. Article 8 further underlines that access to support services is not dependent on the victim making a formal complaint with regard to a criminal offence, and that the families of the victims shall be granted access as well.

Moreover, the Directive establishes minimum features and the scope of support services, therefore once again highlighting the aspect of effective implementation. Support shall include: information concerning victims’ rights, in terms of procedural guarantees as well as compensation claims; psychological support; advice on financial and practical aspects. In particular, article 9 specifies that specialist support for victims who have suffered considerable harm shall provide: shelter for victims at immediate risk of secondary victimisation or retaliation; and target support for victims with specific needs ‘such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling’.

Altogether, the EU framework, and the Victims Directive in particular, have enhanced the minimum standards of victims protection, as well as enlarged their scope, by specifying not only States’ responsibilities to ensure procedural safeguards in the course of criminal trials, but also establishing guarantees for the delivery of support services, and specific safeguards to be applied in the context of Restorative Justice.

III. Restorative Justice in the EU: evolution of the practice

A. Definition and diffusion trends

Restorative Justice includes a variety of approaches and practices, which share basic principles but differ quite considerably in their procedures and execution: from the number

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47 This section of the article is based on the results of the study by Dünkel, F., Horsfield, P., Parosanu, A. (2015) Research and selection of the most effective Juvenile Restorative Justice practices in Europe: 28 National Snapshots, International Juvenile Justice Observatory, to be published
and category of actors involved; to the methods of exchange adopted between the different parties; to the type of final outcome that is reached.

In order to clarify which types of practices are taken into account by the present analysis, it is therefore necessary to lay down the meaning of restorative justice and provide a framework definition. A broad definition is offered by the UN Economic and Social Council Resolution on Basic Principles in the use of restorative justice programmes, which indicates a restorative process as ‘any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.’

By reason of its comprehensive character and of its formulation by the UN Economic and Social Council, such definition can provide some form of international consensus on the nature of restorative justice.

From the point of view of legal validity of the definition, it is also interesting to examine the one proposed by the EU Directive on Victims, which is enforceable in all 28 member States and states: ‘restorative justice’ means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.”

Despite being mainly inspired by the previous one, this definition stresses two essential elements: the free consent of the parties, and the impartiality of the third party. Moreover, the directive includes within the range of restorative justice services victim-offender mediation, family group conferencing and sentencing circles.

To analyse how Restorative Justice is diffusing across EU countries it is necessary to start from one macroscopic aspect, in the last 20 years, all EU countries have witnessed an increased recourse to restorative practices. Yet despite this universal diffusion, the reasons behind the phenomenon vary depending on the country.

After centuries of absolute dominance of the criminal justice paradigm, the debate on the validity of restorative principles was revamped in the seventies. One of its main theoretical origins was the perception of the failure of the traditional criminal system, which the restorative movement aimed to replace. Such abolitionist thinking was particularly significant to introduce restorative measures in certain countries of northern Europe, such as Finland, Norway, the Netherlands.

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A similar reason for restorative reforms highlighted the **limitations of the retribution** approach, and, although it didn’t aim to completely eliminate the criminal system, it pursued a shift in its underlying perspective, one that would favour reintegration and rehabilitation over mere punishment. This trend was prevalent in continental Europe, but also in Ireland; Northern Ireland; Scotland and Portugal.

Moreover, in various cases, the same countries witnessed a considerable growth of **movements in defense of victims’ rights**, advocating a stronger and more active role, instances that also converged on the support for restorative justice.

Finally, diversion from the criminal system through increased recourse of alternative practices was also stimulated by the cost-efficient considerations. Countries such as Bulgaria, Croatia, Hungary, Greece, Portugal etc. were experiencing a considerable **over-burden** of their penal system, with subsequent backlog of cases. In these situations, a facilitated access to impartial mediation, and stronger involvement of the community in the rehabilitation process, were considered instrumental to relieve the criminal systems. In certain cases, this also went hand in hand with a diffuse perception of the traditional system as inefficient and untrustworthy.

The development has been so significant that, in the last fifteen years, every juvenile justice reform in Europe has either included or somehow enhanced the use of restorative justice practices, and guaranteed that there’s a possibility to access it at different stages of the criminal proceeding. In this reform process, a considerable role was also played by the **harmonisation** of legislation that is at the heart of the European Union construction and which was particularly relevant to determine the reform processes of those countries that accessed during the latest enlargements (for instance in: Bulgaria; Croatia; Czech Republic; Estonia, Hungary Poland; Romania and Slovenia).

Nonetheless, it is worth mentioning that the legislative reform and the formal introduction of restorative possibilities do not always guarantee the **availability of the service in practice**. In various countries access is limited by the financial constraints that hinder the development of restorative programmes, or at least prevent their availability on the entire national territory. Of the 28 Member States, in fact, only 13 can currently provide nationwide availability of Victim-Offender Mediation, while the rest can only guarantee regional services\(^\text{51}\):

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\(^\text{51}\) Professor Frieder Dünkel’s presentation on Restorative Practices in Europe, during the 6\(^\text{th}\) IJJO International Conference: *Making Deprivation of Children’s Liberty a Last Resort: Towards evidence-based policies on alternatives*
Such lack of funding can depend on various reasons, some more ideological, for instance the prevalence of a punitive climate in the country, and some other more structural, such as the lack of investment in the justice sector.

Other reasons that undermine the use of restorative practices can be identified in the scarce knowledge of the general public, or even among the judicial staff, about both the functioning and the benefits of restorative process, something that seems to be particularly common for those countries that introduced the measures as a result of the EU accession, and therefore are, in some cases, still quite new to the practice.

A different issue seems to be posed by the refusal of judges, prosecutors or even police officers (where they have the power to do so) to refer a case to restorative programmes, which can depend on the underlying conflict between two systems of justice perceived as opposed; or rather on mistrust towards mediators.
On the other hand, it is also true that the fields of application of restorative methods are expanding. If its prevalent application remains anchored to the sphere of juvenile justice, various experiences across Europe are extending the use of restorative processes to adults (with Hungary and Slovenia representing interesting exception to the general trend and referring a higher percentage of adults than of children to restorative measures), in prison setting, and in schools.

B. Core principles of the restorative process

Apart from the broad definitions mentioned before, a multitude of studies of restorative justice focus on the nature of the process, rather than outlining specific aspects of the procedure. Such alternatives formulations are particularly interesting to determine the core principles that animate the use of restorative justice. In this light, the one by Gavrielides proves particularly interesting: ‘Restorative Justice is an ethos with practical goals, among which is to restore the harm done by including all affected parties in a process of understanding through voluntary and honest dialogue, and by adopting a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals.’

One of the crucial considerations of Gavrielides is that Restorative practices shouldn’t be interpreted as especially beneficial for the offender or the victim. Such exclusionary connotation, based on the opposition of the two interests, is the opposite of the restorative ideal, which concentrates on reaching a practical goal through a mutually satisfying process.

Another overarching principle of restorative justice, which is also the basis of its original distinction from the traditional criminal process, is to be found in its primary objective: rehabilitation. Again, this goal is valid for both the experience of the offender and that of the victim. If the offender will gain the possibility of rehabilitation from the crime, instead of mere punishment, on the other hand the victim will more easily attain full recovery from the victimization and trauma. This element is crucial to allow both parties to overcome not only the impact of the crime, but also the identification self-stigmatization in the role of the offender or victim, and its destructive potential.

Therefore, two subsequent components of the restorative practice can be identified. The first one is that understanding of the other, awareness and assumption of responsibility are crucial aspects of the process. In this sense, an interesting insight is offered by Gellin’s study of the skills acquired by young people involved in restorative measures, amongst which she recognizes: understanding of the other’s situation, listening and developing empathy, developing an objective point of view, patience and other conflict solving skills, which also

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leads to responsibility recognition. This analysis clarifies essential steps in the restorative process and at the same time, by emphasizing the aspect of skills acquisition, it highlights the long-term potential for future well-being of the child.

The second component is constituted by the crucial role of the community and society at large in the restorative ethos, and in certain cases in the practice as well. First of all, the concept of collective justice entails the shift from considering a crime as an action against the State, to its interpretation as damaging to the community. This in turn leads to the focus on the victim and on the reparation process, rather than on punishment. Moreover, in the broader restorative practices such as conferencing, it also entails direct participation of those members of the community which can be more affected, such as families, and can also play a more decisive part in rehabilitation. On the other hand, this concept is at the basis of the perceived positive connection between restorative justice and reoffending rates. Focusing on positive re-socialisation allows the offender to build stronger bonds to society, and moving from anti-social to pro-social relationship, which, according to Ward and Maruns’ analysis, is one of the key determinants of a lower probability of reoffending. Other perspectives emphasize, on the other hand, the understanding of the victim’s experience and pain. Decreasing the distance between victim and offender, and confronting the latter with the other’s suffering may in fact prove crucial to increase inhibitions and raise the threshold of offending.

Finally, the entire process of restorative justice and its methodology revolve around the voluntary participation of the parties. While the traditional criminal system, especially in the course of the trial, delegates the participation of the parties to their legal representatives, who’s task is to defend opposing interest as effectively as possible, restorative measures require personal participation, at every stage, to both the offender and the victim. In a context like that of justice, where participation, of young people especially, poses various specific issues, the restorative approach seems particularly effective.

C. Typology of Measures in the frame of Restorative Justice

Restorative Justice Measures can vary under two different points of view. First of all, from a procedural perspective: national legislation in fact can provide for the referral to restorative practices at different stages of the criminal proceeding. Secondly, from a more substantive point of view: restorative practices include various services, such as victim-offender mediation, conferencing and so on, which entail different approaches, involve different actors and may reach different outcomes.

C.1 Procedural Categorization

The importance of the procedural aspect is essential to evaluate how the access to restorative justice is truly facilitated by national policy makers and legislators. According to the UN

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ECOSOC Basic Principles on the use of Restorative Justice programmes in criminal matters: ‘Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law’. Regionally, the Recommendation of the Council of Europe concerning mediation in penal matters states, in its General principles that: ‘Mediation in penal matters should be available at all stages of the criminal justice process.’

The development of Restorative Justice in European countries, through the related judicial reforms, has progressed according to this principle and restorative practices are now accessible at three different stages: before trial, in the course of trial, as part of sentencing, as alternative measure.

In the first case, the participation to restorative programmes constitutes valid grounds for, or a condition to, access pre-trial diversion, which allows both the offender and the victim to avoid proceedings in court entirely. Provisions in this sense are almost universally present in European legislations, with the only exceptions of Denmark and France. This element, together with the recognition of judicial validity to restorative agreements leads to the consideration of the growing importance of restorative justice as a system that, although always dependent on criminal justice, can develop in parallel and still lead to legally meaningful outcomes.

The other two options, which provide for access to restorative programmes as part of court diversion or sentencing, also enjoy very broad application, which testifies to the large degree of legislative compliance of European countries with regional and international standards. In practice, this means that the power to refer a case to restorative programmes is conferred to different actors at different stages. Some systems provide for a direct referral from the police, for instance England and Wales; others empower the prosecutors to make this choice through the application of the principle of opportunity of prosecution, as in the Netherlands, in France, in Estonia and in Romania since the latest penal reform; and then clearly the Courts retain such power in all jurisdictions.

C.2 Substantial Categorization

To analyse the diffusion of substantially different restorative programmes, the present article will focus mainly on two types of measures: victim-offender mediation and conferencing. Community sanctions, in fact, despite their relevant restorative component, which is especially evident in the attempt of repairing and strengthening the bond of the young person with society, allow for a more limited role of the victim.

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Victim-Offender Mediation (VOM) aims to reconciliation between the victim and the offender, and the restorative process concentrates on these two parties. Starting when the victim and the offender agree on both the fundamental circumstances of the case, including reciprocal roles, and on taking part in mediation, the process includes two different phases. During the initial period, offender and victim remain separate and a facilitator conducts with each of them pre-mediation sessions, which provide to both parties the opportunity to give their version of the events and also to assess the critical points to be addressed during mediation. Then, victim and offender meet in a safe and structured setting and engage in a dialogue that aims to attain a fruitful and mutually beneficial exchange. While the victim has the opportunity to explain how the events have affected him or her, the offender can relate his or her circumstances and can elaborate the responsibility for the events. Finally, victim and offender work to agree on a final outcome that addresses the harm done.

Victim-Offender Mediation is the most diffuse restorative practice, present in all European countries. Nonetheless, the differences in its implementation are quite considerable. First of all, the aforementioned gaps in availability, which entail that the service is truly accessible on the entire national territory only in certain States. Secondly, the responsibility to provide the mediation process can be attributed to different actors, such as NGOs, probation services or social services.

Finally, the quality of the service crucially depends on factors that cannot be entirely ensured by the legislative framework, or by the regulations that determine which body will provide the service. the one example over the rest is the quality of training provided to mediators and other professionals. One significant element in this sense is the level of training and professionalism of the mediators, which can be assumed to vary greatly between volunteer workers and professionals.

Conferencing, on the other hand, varies from mediation mainly because of the actors involved, which are not anymore limited to the victim and the offender but may include, depending on the type of process, families, members of the community, friends, even police officers. This ‘enlargement’ of the scope is based on the notion of collective responsibility, which stressed two aspects of the offence: its consequences on the community at large, and the role of the community in deciding how to solve a conflict. This traditional notion has also evolved to incorporate a special recognition of the specific needs and interests of the victim. Also in the case of conferencing, the victim and the offender will have the opportunity to express their views, and the final agreement will originate from the contributions of all participants.

Originally derived from tradition methods of conflict resolution in New Zealand, conferencing has seen a very broad implementation in Australia, in some Latin American countries such as Brazil and Peru, but also in South Africa and in the Philippines and,
increasingly so, in Canada and the US. Nevertheless, its diffusion in Europe remains modest, and it attested by nationwide provisions only in Belgium; Ireland, Northern Ireland and Scotland. In other EU member States, for instance Austria, Germany, Hungary, Latvia, its implementation is connected to localized projects on juvenile justice.

Yet, beyond its narrow application, the conferencing process has been associated to remarkable levels of satisfaction, both on the part of the offender and of the victim, and that it had a positive influence on reoffending. In particular, experiences seem to indicate that conferencing could be particularly effective on more serious offences\(^\text{57}\), which suggests that it could also be an interesting practice to broaden the use of restorative justice.

Finally, there are also measures that provide for \textit{reparation} to the victim, but that do not involve a restorative process. They are present in the majority of EU countries, and can constitute ground for lighter sentencing, but because of their different nature, their deeper analysis does not fall within the scope of the present article.

\section*{IV. Conclusion: Restorative Justice and the Rights of the Victim}

The present analysis has concentrated on one of the core aspects of restorative justice: its devoting a primary role to the victim, and not only to the offender. This, it has been argued, is not only one of the essential aspects of the restorative perspective, but also a crucial innovation compared to the configuration of traditional criminal justice.

First of all, through an overview of existing international and regional standards, this article has provided a general framework to evaluate how a restorative approach can fit with the safeguards and rights of victims of crime. Then, an examination of the practice has highlighted in what forms and on the basis of which principles, restorative practices have gained relevance in the European context.

In this light, it is worth to specify once again, that before any referral of a case to the restorative services is made, it is necessary to consider whether the format of restorative processes is appropriate to the situation of the individual victim, and it is absolutely necessary to ensure that direct confrontation with the offender does not entail a risk of secondary victimization or intimidation.

Building on this evidence-based assessment of restorative justice’s prerogatives, it is now possible to conclude with an evaluation of the determinant benefits that it can entail for the

victim. Considering the rights and safeguards of victims in the context of criminal proceedings, in light of the key values which animate the restorative ethos, three fundamental rights appear to be particularly advantaged by a restorative perspective.

First of all, the **right to be heard**, which is presented as a crucial aspect of access to justice and fair treatment\(^\text{58}\), or, in the EU Charter of Fundamental Rights, as part of the right to good administration\(^\text{59}\), and which constitutes one of the key guarantees of a fair trial. The definition of this specific rights, in the case of children victims, is clarified in the Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime: ‘ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process.’\(^\text{60}\) In this context, it appears obvious how the restorative procedure, both in the stage of preparation, and in the one of mediation or conferencing, revolves entirely around the victim’s expression of personal views. Moreover, the process is progressively built around those expectations and necessities that are expressed by the victims, therefore guaranteeing that meaningful participation that is a cross-cutting principle of child-friendly justice.

Secondly, the **right to reparation**, which is instrumental to achieve ‘full redress, reintegration and recovery’\(^\text{61}\). Thanks to this definition, it can be inferred that the right to reparation entails a more comprehensive perspective than the right to compensation. The right to compensation, in fact, emphasizes two aspects: the right of those who have suffered injuries, traumas, or loss of property, to see the subsequent expenses reimbursed, and the responsibility of the State to cover such expenses, when compensation cannot be obtained directly from the offender. The right to reparation, on the other hand, emphasizes the negative impact of the crime on the future well-being of the victim, by stressing the aspect of recovery and reintegration. This element leads to considering not only the monetary aspect (which is nonetheless essential, and often a component of the restorative outcome) but also a psychological aspect which can be particularly favoured by a dialogue with the offender. Clearly, in order for reparation to be favoured by a restorative approach, it is necessary that the offender willingly recognises his or her responsibility of the crime.

Finally, the **protection from secondary victimization**, which, according to the Council of Europe’s Recommendation on assistance to crime victims ‘means the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and

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\(^{59}\) Art. 41, Charter of Fundamental Rights of the European Union, 2010/C 83/02

\(^{60}\) No.21 (b) Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime

\(^{61}\) No.35, Guidelines on Justice in Matters involving Children Victims and Witnesses of Crime
individuals to the victim". Victims are in fact particularly vulnerable when they enter in contact with justice professionals and procedures. In this sense, special attention should be paid to the specific needs of child victims, who, when facing the criminal system, have to deal with a system that is not built around their needs. Repeated questioning, unfriendly environment and difficulties to be believed are only some of the issues experienced by child victims. Restorative processes, thanks to the informal setting and to the specialisation of facilitators, mediators, and other professionals can thus particularly indicated to avoid hardship during the justice process.

Nonetheless, evidence shows that the recourse to restorative justice still doesn’t exploit the full potential of these services in most EU States, and in particular the participation of victims is still very limited. As is increasingly underlined by international standards, in order to guarantee effective reparation and appropriate protection from secondary victimization in the practice, it is necessary to strengthen access to justice first, which proves especially complicated for victims, who often have to deal with repeated questioning and different authorities before being able to access support, and can be easily discouraged.

In this light, the IJJO underlines its support for the notion of integrated support, also highlighted in the EU Victims’ Directive, art. 9, and especially important for victims who have undergone particularly dramatic experiences. Integrated support emphasizes multi-agency coordination, and combined assistance, in order to avoid repeated hearing of a child victim, and at the same time provide since the beginning psychological or medical support that may be needed. In pursuing more effective assistance, various countries have developed practices that allow a potential child victim to refer its case to only one child-friendly structure (providing shelter and accommodation if needed), where help of different types is directly accessible⁶³; while others have potentiated specialist training for some police-men following cases that concern children victims, which includes developing direct contact with protection services. Capacity building of all practitioners and public authorities who are directly in contact with children is another fundamental element to encourage children who have suffered harm to report it and pursue reparation. These good practices deserve particular attention, as they foster a holistic approach to the needs of victims, facilitating their recovery and opening the door to a process of reparation.

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⁶² See art.1.3, Definitions, Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims
V. Glossary

For the purposes of this article, the terminology that has been employed to describe Restorative Justice and its application to juveniles and victims of crime should be interpreted in accordance with the definitions provided here below, based on the Report: ‘Promoting Restorative Justice for Children’ of the Special Representative of the Secretary General on Violence Against Children.64

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

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

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

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

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

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

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

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

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

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64 Special Representative of the Secretary-General on Violence against Children (2013)Report: Promoting Restorative Justice for Children
**Non-custodial measure:** a measure to which a child may be sentenced by a competent authority that does not include deprivation of liberty.

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

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

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

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

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

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

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

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

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

**Serious offence against a person:** homicide, non-intentional homicide, kidnapping, sexual assault or abuse, assault or an attempt to carry out any of these acts.
Violence: under article 19 of the CRC, all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

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