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Civil society’s role in promoting alternative sentencing options and offender re-integration

Morning ladies and gentlemen. I’m going to talk about how restorative justice and alternative dispute resolution relates to our subjects on overcrowding. I thought it would be quite useful to take a quick look at pictures that did the rounds a while ago. They were suggesting future scenarios which are different to those suggested by Lukas yesterday. Most importantly the bathrooms look quite different. Marble towels entitled “hers”. The traditional cellblock has quite a different feel to it. We may even get to the extent that we have magazines on prison yard gardening, complete with articles on prison yard makeovers and the best at the bottom – get out of jail free contest. Now I’m sure not a few of you thought looking at the programme this morning - hey here is a social worker from an NGO, but we’re talking about overcrowding – let’s get serious now. This is likely to be a bleeding heart social worker. So I would like to thank the organizers for risking having me on the programme. I promise I will not advocate any of these things. I’m speaking as somebody who has some experience as a probation officer and for the last few years have been part of an NGO, the Restorative Justice Centre where we advocate for the use of restorative justice and try and show how that works out in direct services particularly around the Pretoria area. We are also part of a network of organizations that are interested in this called the Restorative Justice Initiative. Thanks to the ISS and DANIDA we could meet and reflect briefly on the outcome of a project we have documenting what restorative justice initiatives there are in the country at the moment. And considering what will we bring to this conference today. Much of what I will be sharing will be drawn from those discussions last week.

In essence I’m going to argue that we should adopt restorative justice as the prevailing frame of reference in our criminal justice system adding, to some of the voices that were raised in that regard yesterday. I contend that this will help us not to send people to prison that should not be there. A few people raised the question yesterday what do we mean when we say that - why shouldn’t people be there and how do we define that? But I hope to make some suggestions regarding that. I also think that restorative justice will help us to prevent those who do go to prison not to go back there again afterwards. Most important I will be saying something about the role of civil society and the point that we believe that civil society has a very critical role to play in the use of restorative justice programmes. I will be making some specific recommendations about all of this.

Just to pick up on some comments that were made yesterday. A number of people made the point that law enforcement alone doesn’t work I mention the quote that Jeanine Rauch had upfront. But all the departments, the department of justice, correctional services and the NPA made the same point and some others as well, - I think Anton made it and Lukas touched on it so I was quite surprised that in a group like this there seems to be a high degree of consensus regarding that point. I particularly liked Shamila Batohi’s definition of insanity: doing the same thing but expecting the same results. That’s a very apt comment because we talking about wanting different results here and she was making the

point that we need to do something differently. I would like to suggest if we are going to do things differently, we first need to start thinking differently. Now what does that mean? I suggest that we need to re-examine in quite a fundamental way our understanding of justice and punishment. In the context of criminal law that we are speaking about here they are quite closely linked - in some people's minds they are almost anonymous. I think we need to ask ourselves some questions - what does punishment achieve? In the quote that Janine had up it said clearly that the law enforcement initiatives and the huge investment that have been made over years in the States specifically does not work. Why do we keep holding onto that? I think the reason is that we haven't changed our way of thinking. I'll come back to that although I can't get into too much detail but I would like to flag that for you as a very critical issue: we need to examine our patterns of thinking because it is at that level that our behavior and actions and all our decisions are impacted. Lukas has written somewhere that 62% of all the persons convicted actually go to prison. I think we need to ask ourselves why it is like that. Does it really need to be that way, and I guess that is what the conference is about. I think we need to start thinking differently opening up our minds to other possibilities. And I hope that I can illustrate a few of those.

Just for a couple points of perspective to start with. The White Paper for Social Welfare was formulated during 95-96 and published early 1997. Under the heading of crime prevention through development and restorative justice, it had some things to say about services aiming at restorative justice and it made the statement that I have highlighted: "Institutionalization will be a last result; only offenders who pose a serious threat to society should be imprisoned. Alternative forms of sentencing will be considered". I think that is perhaps a very good example of what Jeanine has said of a white paper for being ignored. That was written close to 10 years ago. We certainly haven't followed that. It might be quite a radical position. I know when I raised that with Prof Terblanche some time ago, he said from a legal point of perspective that is impossible it can't be done you will break all kinds of rules and precedents. But I like to put it up front that was a statement of government intention perhaps not policy but government intention back then. But I think we should look at that again, it is one perspective of who should be going to prison. Another take on the punishment issue - a quote from Prof van Zyl-Smit who shared with us yesterday - "While punishment does have a deterrent effect it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence (and he didn't qualify that at all - he said no evidence) empirical or even anecdotal to suggest that increasing sentences from say 6 - 11 years for rape or robbery deters rapists or robbers generally or even discourages them individually from committing a crime that they otherwise would not have risked." That was not just his opinion he was summing up extensive criminological research over many years and sighting a very authoritative international study fairly recently coming up with that statement. I think we need to take note of that because we overlooked the essence of that concept. There is an enormous amount that we can do with that reality if it is true which does seem to be on the basis of the best criminological research at present. So it

seems that the best research as well as common sense indicate the punitive approach is not effective on its own, basically the point that was made yesterday. Some of the reasons for this are that it doesn't deal with the underlying issue such as poverty and all its implications so it frequently sends the wrong message like stigmatizing and rejecting. It also does very little if anything for the victim in a very tangible way. But I think we confuse certainty of punishment with increasing punishment and we put all our energy into increasing the severity of punishment without looking at other alternatives that could relate to the punishment if it is certain what could happen then. I will come back to that. So what I'm saying from my point of departure is it needs to change. Unless we move away from our pre-occupation with a punitive approach we will not consider other alternative sentences seriously and we will not be successful in reducing overcrowding. So I think we need to focus on how we increase the certainty of punishment rather than increase the severity. We need to develop more creative ways of imposing consequences. I'm sure somebody is going to say that I'm making a link between punishment and consequences – and I think they are at least similar concepts if you think about the context of child training - punishment and consequences in that context I think are pretty anonymous. We can at least look at them being interchangeable and start differentiating a little bit between them. My contention is that restorative justice is a different way of thinking that actually provides some practical ways in which these creative consequences can be developed. These creative consequences may actually reduce the need for punishment and there is some very substantial authority in the literature to back that up. I think it will address the issue of public perception because if something is actually done people will perhaps feel better about it because they can see something is being done even if isn't a very severe response. Restorative justice processes generate consequences which provide an opportunity for clarifying norms and roles and addressing needs. That whole process helps to nurture a stronger sense of solidarity and belonging rather than sending out the messages that pure punishment does of excluding and rejecting and labeling and stigmatizing. I would like to make the point ensuring that ensuring there are creative consequences is not the same as doing nothing. So I would argue very strongly that restorative justice outcomes are different but not soft. Perhaps we can engage about that, I'm sure there will be people that will say that they are soft because where is the punishment? That is when I say that we have to go back to our paradigm. If we are not so pre-occupied with punishment then we might be prepared to shift to things that we are prepared to consider as consequences. I've heard a couple of times that police are working harder and improving the apprehension rates. Of course that has massive consequences all the way down in the rest of the criminal justice system. I think that perhaps that this idea may be able to help us. It might be able to relieve the sense that the system will be more overcrowded if more people come into the system.

I know that many of you are quite familiar with restorative justice. Let me run through a couple of the concepts very briefly. Restorative justice views crime as being less about breaking the law - obviously it is about that but it is more about harming relationships and harming community. Justice is viewed less about

punishment and more about putting the wrong right and focusing on offenders' obligations in doing this. Because of the creative focus on tangible consequences rather than just imposing punishment this could actually encourage offenders to take responsibility which is something that the punitive approach is not particularly good at doing. Just unpacking that concept of putting right a little more it consists of addressing the harms that is obviously primarily those of direct victims but also indirect victims or communities generally. But also addressing causes at all levels, personal, interpersonal, environmental and societal. I think restorative justice begins to provide a very practical way that we can make the link between the issues that we were touching on yesterday by dealing with matters on a case to case basis but then how do we relate to the broader terms of the conditions in our society like poverty and unemployment. I think restorative justice provides a practical way to make a direct link because very often when you address those we talk on a macro level. We need to address it on a macro level but I think restorative justice provides a way to make a link to the macro level between the individual and the macro level. Perhaps if sentencing officers had this in mind when they were considering appropriate sentences rather than the usual punitive principles some sentences might be quite different. I'm sure with the best legal minds in the room we can have good debates about that. Just a couple of comments about that. I think in our usual approach in the justice system our focus tends to be either on punishment or rehabilitation. Very white or black thinking. Restorative justice makes it possible to break out of this thinking with a third alternative which is using both/and logic. It makes it possible to hold offenders accountable for the harm that their actions have caused and to address the underlying factors that contributed to the offence or maybe to the reoccurrence.

I'm trying to get a little bit more specific and practical about what restorative justice has to offer. Let me say first that restorative justice tends to be equated with specific programmes. Prosecutors sometimes see it as equal to diversion programmes generally. It's often equated with victim/offender mediation. Those are some of the applications of that but I want to stress that it is a way of thinking based on what I have said just now. That can be applied to a range of services like the diversion services in general and all the possibilities in that but also offender reintegration and victim support. I'm talking more specifically about the concept to bringing effective parties together, drawing very much from the field of alternative dispute resolution. It is known variously by words of victim/offender mediation, victim/offender conferencing, family group conferencing and we would see that in addition, complementing the other services that I mentioned just now. Just to clarify in terms of the information that I'm drawing on from the workshop last week that was organizations focusing on these areas of victim/offender conferencing. So while we do see ourselves complementing these other services I'm not speaking on their behalf specifically but I'm hoping that I what have to say they will find some agreement in that. Quite often restorative justice is seen as only as an alternative and I don't think that is necessary - we don't need to see it as an exclusive alternative to our existing approach. There are various stages in the criminal justice system where it can be applied.

Let me run through those – first of all at a pre-trial level it is a useful way to deal with “troublesome local stuff” as John Cartwright from the Community Peace Programme mentioned last week. That can be at community level and at a charge office level. It is happening to a limited extent, particularly in the Western Cape in Guguletu and Khayelitsha with the peace programmes and with the peace committees. This also applies to the whole field of diversion using the discretion of the prosecutor. This will obviously change with the Child Justice Bill which has listed diversion programmes. I think restorative justice could be used with plea bargaining as the basis of plea bargaining and that probably we could do more plea bargaining if we understood the relevance of restorative justice in this way and could perhaps use it to produce quicker turn-around times. I think it could also be very helpful in the proposed out of court settlements project of the Law Commission. This is similar if I understand it correctly to plea-bargaining except there is no conviction and record. At a pre-sentence level a victim/offender conference can be requested instead of or part of as a pre-sentence report. Again this is listed specifically in the Child Justice Bill. Very significantly victims and members of the community are then given an opportunity to raise their concerns and to give input into the nature of the sentence. It really goes a long way to make the process more victim orientated, one of the calls from the NCPS 10 years ago. Some may have concern about the due process of the rights of offenders. Are you only going to listen to the victims and are victims perhaps quite punitive. There is quite a bit of research around that indicates that when you make it specific when you ask victims what should happen to the offenders covered in a survey, they are quite punitive. But if you make it on a case-to-case basis with the specific details and present them with a person they tend to be far less punitive than when approached in the general way.

Now I think this specific application has to do with when you consider which kind of cases alternatives to prison should be applied. The ISS had a monogram last year looking at the whole idea of outsourcing criminal justice services. They suggested that all economic crimes and all prisoners that are sentenced for less than one year could be considered for alternative sentences. They said that that can mean that up to two thirds of the current prison population then would not be in prison. Probably a radical position but I think we could debate that fruitfully. The key question is what I have said in the beginning: what are we trying to achieve with prison and with punishment. If the purpose of prison is as the White Paper for Social Welfare suggested that they are there only to protect society perhaps the ISS position is actually not that way out. I would go further and say even for people that are serving sentences for five or seven years they coming back in a relatively short time what are we protecting society from that case. So the key question becomes then will they be a better person when they come back or won't they? You need to consider this and I hope when Ann Skelton speaks about alternative sentences later she will deal with this a little bit more specifically. At a sentencing level the outcome of a victim/offender conference can come back to court with a number of recommendations. These could be

included in sentence options like conditional postponement or suspension or a cautionary reprimand or could be part of correctional supervision.

Restorative justice can also be applied after the imposition of a sentence during a sentence of correctional supervision or during a sentence of imprisonment or could perhaps be integrated into some of the parole processes. At this stage it provides similar benefits that I listed at a pre-trial or at a pre-sentence level but it obviously doesn't impact on the sentence. It is far more focused on the healing of the victim and then also the re-integration of the offender and I think it can make a massive difference in that regard. You deal with some of the underlying issues with the people that the offender will return to in terms of family and to community, starting to get very specific about dealing with the re-integration issues.

Just touching on some of the research findings in the international study that was done in the States they looked at 63% empirical studies from five countries. They have found that a vast majority of the participants meaning victims and offenders found the experience of coming together satisfactory fair and helpful. In a number of jurisdictions rates of restitution completion climbed and offenders going through conferences often had lower levels of re-offending than they did before or compared to with a similar group of offenders that did not go through conferencing. Measuring recidivism is extremely complex and this is quite a guarded statement. This is still a new field and large scale research has not been done but the indications are quite promising.

Coming then to the role of civil society and placing this within our other prevailing paradigms particularly that of social development. This term is used quite frequently to emphasize the need for economic development to incur in tandem with the development of people or human development. One of the other things it emphasizes is the need for active partnerships between government and civil society. All role-players need all the help they can get to achieve the goals that are set. I think over the years, particularly in South Africa but certainly internationally as well we have seen changes in the view of the respective roles of the State and Civil Society. Particularly in South Africa in the 70s and 80's civil society started to fill some very serious gaps which the State was unable or simply refused to address. Perhaps in the 90's you can say there was optimism about the state's ability to address all needs. I think across the world there is recognition that the state can actually not do everything and that civil society can sometimes actually fulfill certain roles better. John Braithwaite, a very renowned Australian criminologist has said that restorative justice processes can be one crucial vehicle of empowerment where spaces are created for active responsibility in civil society to displace predominantly passive statist responsibility. I can say a lot about that but I think it is suggesting that restorative justice processes provide a very real way for deepening democracy for people to really participate in civil life. And what better way to do that in the activity of the criminal justice system. Clifford Shearing has suggested that the government should play a steering role and civil society a more active rowing role on the basis of active equal partnerships. We are convinced that in this context this "rowing" actually means conducting victim/offender conference, rendering a

range of other services like life skills programme, victim support and so on. This can be done by properly constituted non-profit organizations and that is happening to a relatively large extent but in relation to the broader context it is still a small pocket. I think that can be broadened as well to include street committees and peace committees that I referred to just now but I think it can also include traditional African leaders that do operate systems that can be utilized by a bulk of South Africans that live in the rural areas at the moment. I'm hoping that Nkosi Mzimela will say a bit more about that later on. I think it is clear that government has a role to ensure that certain services exist and that they are accessible to people. And it probably needs to make sure that certain standards are maintained. We heard from Cheryl Frank yesterday the critical importance of the quality of services rather than only accessibility. But I think we need separate out in our minds whether government does really need to render the services itself directly. There are many reasons why civil society organizations can actually do these better. I've listed them here in my presentation there is a number of reasons that you find in the literature and they really relate to the fact that civil society organizations are closer to communities so they can be more accountable, they tend to do more public education, they are closer to the ground and they can develop more appropriate responses than what the State may be able to do.

Coming to my recommendations – I think I need to say on behalf of all the civil society organizations represented here and adding to the voices of government yesterday that we really need to be very specific about adopting the paradigm of restorative justice and integrating it fully into all facets of the criminal justice system. That is an enormous job and I think that is the challenge to face up to. We should then use this as the basis of investing into and expanding diversion for children and adults, for plea-bargaining, for alternative sentences, for victim support services, for offender re-integration services and for victim/offender conferences and alternative dispute resolution. Specifically we need to make sure that we integrate restorative justice paradigms into existing policies such as performance management systems for police, prosecutors and correctional service officials, Anton touched on that yesterday. I think unless those things change unless the way these officials measure what they do is based on a restorative justice paradigm we are not going to work in alignment with each other. Very specifically need to acknowledge the role that civil society play as an equal partner in the delivery of these services and if we do that we need to recognize the need to develop new models to fund these services, and also to recognize that investment into this area is likely to yield many positive benefits and savings. Thank you very much.