The Rural Judicial Facilitators Program in Nicaragua

- an Exemplary Model of Restorative Justice?

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1 Introduction

Is litigation and prosecution always the best way of responding to a conflict or a crime? This question is highly relevant due to the fact that alternative methods of conflict resolution are frequently used in countries all over the world, and have also found its way into criminal justice. One major theory in this area is called restorative justice, representing a different view of justice than is usually provided by, what can be called, the traditional and retributive justice system. While traditional justice approaches tend to see crime as a violation of the state and seek punishment of the wrongdoer, a restorative justice approach sees crime as a violation of people and relationships and justice as repairing the harm done.\(^1\) One of the alternative models of a restorative justice approach is mediation, which means that the offender meets with the victim, often together with a facilitator, and together they try to agree on a solution that does not result in punishment of the offender. A case is often referred to mediation after a conviction or formal admission of guilt in court, but some cases are diverted prior to that in an attempt to avoid prosecution.\(^2\)

Many issues on restorative justice have been debated in the literature, concerning the theoretical and practical roles for restorative justice within existing criminal justice systems and the ability of the restorative justice paradigm to transform, or even replace, existing retributive justice systems.\(^3\) The approach in general is also subject of criticism. The negotiating element in many restorative justice processes, and the less formal procedures that are used, may jeopardize fundamental rights of the parties concerned, like due process and victims’ rights.\(^4\)

Nevertheless, restorative justice has many supporters and has attracted attention among policymakers on an international level. To encourage governments to apply restorative justice strategies, and to make sure that such programs do not violate fundamental legal rights, the United Nations (UN) has adopted a resolution on this area, setting up certain guidelines to consider in the development and implementation.\(^5\)

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5. See chapter 2.5 and appendix I
Nicaragua is one of the countries that have developed a number of alternative dispute resolution mechanisms. These are mainly used in civil matters, for example through a recently adopted law⁶ that permits judges to send civil cases to arbitration and mediation. According to the Code of Criminal Procedure (Código Procesal Penal, CPP) the parties in minor criminal cases can also choose mediation instead of a regular court process. One of the figures authorized to perform such mediation is the Rural Judicial Facilitator (Facilitador Judicial Rural, RJF). These facilitators are part of a program covering most of the rural parts of the country, helping people to solve minor conflicts and crimes in these remote areas, where access to the formal justice system is limited or nearly nonexistent. The facilitators are since 2002 a part of the judicial branch, together with for example the Public Defender’s Office (Defensoría Pública), and they are recognized in Nicaraguan law as auxiliary staff in the justice administration.⁷

The Organization of American States in Nicaragua (Organización de los Estados Americanos, OAS), responsible for the execution of the Rural Judicial Facilitators Program, says that the program has proved to be very successful. Not only in increasing access to justice and providing a judicial service to poor citizens, it also has other positive effects such as making people aware of their rights and on a long-term basis help to reduce poverty.⁸ The system with these facilitators and its features has a lot in common with the restorative justice movement.

1.1 Purpose

Our purpose is to study the Rural Judicial Facilitators Program in the light of the restorative justice theory, and examine whether it complies with relevant fundamental legal principles. This will be done in three stages:

1. First we will examine the theoretical background of using other means than prosecution to deal with crimes. What is restorative justice and in which ways can it be in conflict with due process- and victims’ rights identified in the UN International Covenant on Civil and Political Rights? In relation to this we will look at how the UN

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⁷ Guía informativa del poder judicial Nicaragua, p. 43f.
⁸ http://www.oea.org.ni/web/aspectosgeneralesfjr.php
Resolution Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters\(^9\) answers to the need of protecting these rights.

2. What is the RJF Program and how does it work in theory and in practice? Our primary focus is the mediation process in cases when it is used as an alternative to prosecution of crimes.

3. How does the RJF Program answer to the concerns expressed when using restorative justice programs? Does it comply with the recommendations in the UN Resolution and does it work in a way that is acceptable from a rule of law point of view?

The RJF Program has a dimension other than the strictly legal, and it is impossible to completely isolate the legal question we have chosen to examine from other aspects, ignoring the context in which the program operates. Therefore our study has a somewhat sociological element and we will try to give the reader some notion of the program as a whole and its effects.

1.2 The Scope of our Study

Our ambition is not to give an exhaustive presentation of the theory of restorative justice, only to cover the main ideas and what is relevant in relation to our comparison with the RJF Program.

The RJF Program is in part directed at the indigenous population on the Atlantic coast of Nicaragua, and incorporates so-called Wihtas – traditional judges in indigenous communities. In some respects, this part of the program is regulated differently from the rest. We have decided not to examine the particular aspects of indigenous justice, since it is beyond the scope of this study to take on such major subject. However, in the statistics of the RJF Program, the figures regarding the indigenous judges, for example on the number of activities performed, are not separated from the ones regarding other facilitators.

\(^9\) Hereinafter partly referred to as the UN Resolution, or simply the Resolution.
1.3 Method and Material

Since the major part of our thesis is based on a field study in Nicaragua, we initially needed to know more about the country. We gathered information on the history of the country and its political and judicial system through established sources such as the Swedish International Development Cooperation Agency (Sida), UN and the Nicaraguan public authorities.

In order to get knowledge about alternative dispute resolution and restorative justice we have used the sources directly available to us at the University Library in Umeå and on the Internet. A considerable part of the material we have used is of the authors Daniel W. Van Ness and John Braithwaite. Van Ness is executive director of the Centre for Justice and Reconciliation, a program of Prison Fellowship International; a global association aimed at expanding the use of restorative justice around the world\(^\text{10}\). He has been active in criminal justice issues for over 30 years, as a lawyer, advocate, writer and teacher. It can further be noted that he was a principal architect of the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.\(^\text{11}\) Braithwaite is a Professor in the Law Program at Australian National University. He has been doing research in the field of restorative justice since the 70ies.\(^\text{12}\) We have been able to find material very up to date, such as a collection of articles published in 2007 by scholars on the subject, and a frequently updated website hosted by Prison Fellowship International. Van Ness and Braithwaite are prominent advocates of restorative justice. To get different viewpoints we have also used articles that present critical opinions on the subject.

The International Covenant on Civil and Political Rights (ICCPR) is a binding treaty established by the UN. Therefore we are using this document to define relevant legal rights that might be violated in a restorative justice process.

In Nicaragua we began by visiting the central institutions, such as the Supreme Court of Justice and the OAS, to gather basic information. Since the OAS is responsible for the technical execution of the RJF Program they were able to arrange for us to participate in

\(^{10}\) [http://www.pfi.org/our_mission](http://www.pfi.org/our_mission)

\(^{11}\) [http://www.restorativejustice.org/resources/leading/vanness](http://www.restorativejustice.org/resources/leading/vanness)

\(^{12}\) Among the prizes he has won for his work is the Stockholm Prize in Criminology. [http://www.bra.se/extra/pod/?action=pod_show&id=737&module_instance=12](http://www.bra.se/extra/pod/?action=pod_show&id=737&module_instance=12)
meetings, evaluation seminars and other activities, and travel with them to areas covered by the program.

When studying the theory of the RJF Program we have used a document of gathered regulations for the RJFs, a manual used in the training of the facilitators, and a commentary to the Nicaraguan Code of Criminal Procedure elaborated by magistrates and judges. The latter book is edited by Marvín Aguilar García, who has also written a manual on the application of the principle of opportunity in Nicaraguan criminal law. Aguilar García is a magistrate of the Supreme Court in Nicaragua and one of the promoters of the reform of the CPP. Since the RJF Program is regulated in Nicaraguan legislation, we have also studied relevant articles in the law and, with help from our discussions with representatives of the Nicaraguan judiciary, made interpretations based on the wording and purposes of the rules. The OAS has provided us with statistics on the number of facilitators and the work that they perform. The statistics include activities performed since 1999. From the Supreme Court we obtained an evaluation of the program made by a consulting company in 2006. Due to the lack of published material we were dependent on the material that the actors in the program were willing to provide us with. For the same reason, it has been necessary to complete the written material with oral information from our meetings and interviews. The translations of the material from Spanish to English are our own interpretations, therefore we have sometimes chosen to include the Spanish versions in the text or in the footnotes.

In all we conducted 18 interviews with different actors involved in the RJF Program. On the central level, we interviewed two representatives from the OAS, a former director of the Oficina Atención a Facilitadores, and a representative from Sida. On the local level, we interviewed three judges, three prosecutors, seven facilitators, and two citizens of a community, visiting in total five different departments in the northern and central parts of the country. Two of the prosecutors and one of the facilitators were women, but in our text they will be referred to in masculine gender as to not single them out.13

On two occasions we traveled with the OAS to visit areas where the RJF Program is implemented, each lasting four to five days. We also made a couple of trips of our own to interview prosecutors. To travel together with the promoters from the OAS helped us gain

13 In general, we have chosen to use masculine gender throughout the text when the subject is neutral, instead of using he/she. This is to facilitate the reading.
access to remote communities in the rural parts of the country, and get in contact with facilitators and local judges. This also allowed us to get a larger geographical spread in our material than we would have been able to otherwise, but gave us a limited control over the selection. Although we were able to make some requests, the work had to be adapted to the schedules of the promoters. In spite of this, we were in the end satisfied with the selection and the number of interviews. Some municipalities that we visited had been attended by the program since 1998 and others since 2004, and the experience of the facilitators we interviewed varied. One had started working as a RJF only recently, while another had been a facilitator for eight years.

We interviewed everyone in person and each interview took about an hour. The interviews with the former Director of the Oficina Atención a Facilitadores, the representative from Sida, the local judges, the prosecutors, and one representative of the OAS were conducted in privacy. The interview with the other representative of the OAS took place in an office where people would come and leave. The two citizens were interviewed together. The conditions of the interviews with the facilitators varied, but most of them were not conducted in absolute privacy, owing to practical circumstances. They took place in houses with only one or two rooms without the possibility to close doors or windows, and once in a pharmacy where a facilitator was working, with the interview sometimes being interrupted by customers. At one occasion we even stopped by a roadside and conducted the interview by the hood of the car. Occasionally the promoter from the OAS would be present during parts of the interview, sometimes to help with communication. It is possible that this has affected the answers given to us. However, we never got the impression from the people we interviewed that they were censoring their answers.

Before the interviews with the facilitators and local judges we wrote interview guides.14 We also had questions prepared for the other interviews, but they were conducted in a more improvised manner. Since we only had basic knowledge of the RJF Program when we started out, and discovered relevant issues as we went along with the study, the interviews had a broad focus at the initial stage. In hindsight there are of course things we would have wanted to investigate further, had it been physically possible to communicate with our informants afterwards. None the less, we believe that our initial general ideas of relevant issues have

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14 See appendix II
turned out to correspond quite well with reality, and have served us well to gain knowledge of
the questions we set out to investigate. During the interviews we have not followed the
interview guides to the letter. We have adapted the questions and made priorities depending
on how much time we had and the answers given to us, sometimes motivating follow-up
questions and deeming some questions irrelevant.

In our communication with the people we have interviewed we have been challenged by the
fact that our skills in Spanish are limited, even more so when dialects are spoken in rural
areas. Other factors that can make communication difficult and affect interpretation are
cultural differences and not being familiar with Nicaraguan society and customs. It is possible
that our informants have interpreted our questions in a different way than what we intended.
This has been taken into account when analyzing the answers. Each interview was recorded,
to minimize the risk for misinterpretation.

It was necessary to interview the facilitators to get an idea of how they perceive their role,
how they have responded to the training, their values etc. It has to be made clear that this
study is qualitative, not quantitative. Due to the limited number of interviews, the answers
given to us cannot be assumed to be representative for all facilitators. Therefore we have been
careful when drawing conclusions from this material, and compared the results with other
sources of information. The information collected through the interviews can merely be seen
as indicators of what attitudes facilitators might have and what problems they might face. To
meet with the facilitators in their home environment was valuable to get an understanding of
the living conditions of the facilitators and the people they serve, and the practical
circumstances of the mediations.

1.4 Disposition

The following chapter contains a brief presentation of alternative dispute resolution methods
and a description of the restorative justice theory, with some examples of how it can manifest
itself in different criminal justice systems. To shed light on some special factors that motivate
the use of alternative methods in Latin America, the reasons for alternative and restorative
approaches in this region are emphasized. A separate paragraph deals with some of the
concerns raised against restorative justice programs in general, before the chapter is
concluded with a presentation of the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

In order to understand the situation in Nicaragua, *chapter three* provides us with some basic knowledge of the country, its history and judicial system, with the subsequent *chapter* describing the reasons for, and the method of, introducing mediation in the country’s criminal procedure law.

*Chapter five* presents the RJF Program and the actors involved, focusing on the facilitators, the local judges and the role of the prosecutors. The regulation regarding the mediation process and how the agreements are to be supervised are examined, revealing some deficiencies in the implementation of the program.

The major part of our field study is presented in *chapter six*, where we look into how the rules presented in chapter five are implemented in practice, and how the program in general is working in the communities. We describe the RJFs’ situation from a general perspective, also bringing up relevant social and practical factors that affect the performance of their work. In the end, some benefits of the program are highlighted, together with some concluding remarks.

Before finishing off with our conclusions and general discussion, we will give our opinion on whether the RJF Program has adopted sufficient measures to ensure that participants in mediation are protected by appropriate legal safeguards. This is done through a comparison in *chapter seven* between the results from our study and the recommendations in the UN Resolution.
2 Alternative Dispute Resolution and Restorative Justice

2.1 Alternative Dispute Resolution

Alternative dispute resolution (ADR) is the common name for various methods of resolving conflicts outside of a regular court process, such as negotiation, arbitration, mediation and conciliation. *Negotiation* is characterized by the fact that the parties come to an agreement without involvement of a third party whatsoever.\(^{15}\) *Arbitration* can be described as private procedures in which a third party gives a binding decision. This method is different from the other methods because of its adversarial nature, and is not included in all definitions of ADR.\(^{16}\) *Conciliation* differs from *mediation* in the sense that the conciliator suggests solutions. What the mediator has to achieve is a constructive communication between the parties to the point where they themselves can find a solution.\(^{17}\)

The concept of ADR is becoming increasingly popular to avoid lengthy and expensive court processes, as a voluntary option or in some cases mandatory.\(^{18}\) In some states of the United States, there is a requirement that the parties try ADR before litigation.\(^{19}\)

Methods can be categorized as court-annexed or community-based. *Court-annexed* methods include among others mediation and conciliation, and these can be used by referral from the courts. *Community-based* ADR is often independent of the formal legal system, which can be biased, expensive and inaccessible to the population. Sometimes the new systems that are introduced are based on old traditions of popular justice, where community leaders such as elders or religious leaders helped to resolve conflicts.\(^{20}\)

\(^{15}\) Álvarez and Highton, “La mediación en el panorama latinoamericano” in *Revista Sistemas Judiciales*, no. 1, June 2001
\(^{17}\) Álvarez and Highton, 2001
\(^{18}\) http://www.law.cornell.edu/wex/index.php/Alternative_dispute_resolution
\(^{20}\) Ibid.
2.2 Restorative Justice

The civil law model of dispute settlement can be considered as a better way of creating justice also when an offence have been committed. This has given rise to the concept called restorative justice. Restorative justice as a modern phenomenon has emerged in the past 30 years, but the underlying philosophy has a lot in common with ancient processes of conflict resolution.\(^{21}\) Today, over 80 countries use some sort of restorative approach to deal with crimes.\(^{22}\)

Restorative justice measures are often described as the opposite of the retributive, adversarial criminal justice system. Howard Zehr, mentioned as “the grandfather of restorative justice”\(^{23}\), is a prominent advocate on this subject, describing retributive justice as the old paradigm and restorative justice as the new one.\(^{24}\)

Restorative justice has many definitions, many interpretations and many names, such as “making amends”, “community justice” and “reparative justice”.\(^{25}\) Van Ness describes restorative justice as “...a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through inclusive and cooperative processes”.\(^{26}\) One of the fundamental traits of restorative justice is that it deals with crime as a problem for the parties involved, rather than as a violation of laws committed against the state. There are different methods that together form this concept, for example \textit{victim offender mediation} - the oldest and most widespread expression of restorative justice,\(^{27}\) \textit{community and family group conferencing}, \textit{circle sentencing}, and \textit{reparative probation}.\(^{28}\) Family group conferences, traditionally practiced by the Maori people in New Zealand, and circles, from the Canadian First Nations, are both examples of the element of indigenous processes in restorative justice.\(^{29}\) The importance of participation is emphasized in all methods. In conferencing, family, friends and representatives of the legal system participate along with the

\(^{21}\) Van Ness, \textit{An overview of restorative justice around the world}, 2005, p. 2
\(^{22}\) Van Ness, 2005, p. 1
\(^{23}\) Johnstone and Van Ness, 2007, p. xix
\(^{24}\) Zehr, “Retributive justice, restorative justice”, in Johnstone, 2003, p. 81
\(^{25}\) UNODC, \textit{Handbook on Restorative Justice Programmes}, 2006, p. 6
\(^{26}\) Van Ness, 2005, p. 3. (\textit{Italics} made by the authors)
\(^{28}\) UNODC, 2006, p. 14
\(^{29}\) Braithwaite, \textit{Restorative Justice and Responsive Regulation}, 2002, p. 8
victim and the offender to find a solution, while circles can involve any interested member of the community. In a circle, all participants are given the opportunity, in a clockwise order, to speak without being interrupted.

Restorative justice can offer more flexibility than a regular process, focusing on the individuals directly involved and making them the main actors rather than the state whose laws have been infringed. The purpose is to repair the harm done to the victim and to give the offender insight in the consequences of his actions and have him assume responsibility. Its aim is reconciliation between the victim and the offender and to reintegrate them into society. Possible outcomes of restorative processes are apologies, restitution, or community service. In a more extensive definition of restorative outcomes, other ways to repair harm could also be included.

As mentioned above, alternative methods can be court-annexed, and restorative processes can be used at different stages and by different actors of the justice system, partly depending on the legal tradition of the country. What effect the result from such a process has on the criminal proceeding is also varying. There are countries where even the police has the discretion to refer cases to restorative justice programs such as conferences, or is conducting them themselves. As we will later see in the case of Nicaragua, the prosecutor can have the power to divert a case until charges have been filed, even up to trial in some common law countries. Sometimes when a case has reached the court, restorative justice alternatives can still be an option. The law can provide for a case to be diverted to a restorative process by the judge before trial, or before the sentencing. A restorative justice resolution can then be presented to the judge as a recommended sentence. In other programs, the result is simply used to guide the decision in court, or independent of the court process and does not affect the outcome. There are also programs used by probation officers or in prisons after the offenders have been sentenced, that give the opportunity for victims and offenders to meet.

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30 Van Ness, 2005, p. 4
32 UNODC, 2006, p. 5ff.
33 Van Ness, 2005, p. 4
34 Ibid., p. 6ff.
2.3 Alternative Dispute Resolution and Restorative Justice in Latin America

Only in the past few years, ADR has gained a lot of importance in Latin America, being included in the reform strategies of practically all the countries in the region. Perhaps that popularity is due to the problems that are plaguing the judicial systems: lack of resources, lack of access to justice and corruption. According to Juan Enrique Vargas, director of the Centro de Estudios de Justicia de las Américas, there are three main motives to introduce ADR. The first one is to increase access to justice, using ADR as a way to provide a service that the State is incapable of providing through their courts. ADR is used to solve problems that otherwise wouldn’t be solved. Motive number two is to decrease the workload for the courts. In this perspective, poor people are not necessarily the beneficiaries, but the people who have the resources to take their cases to court. It can be argued that ADR is a lot more efficient and cheap way to solve conflicts, and that it is impossible for the courts to keep up with the overwhelming demand, being overloaded with more cases than they can deal with. Another view is that it is simply not the responsibility of the State to solve private conflicts that are not in the public interest. Finally, there is a third way to motivate ADR: not because it’s cheaper, neither because it is a private way to solve conflicts when the State shouldn’t intervene. But because the solutions are of better quality, focusing on the will of the parties, letting both parties win and creating a culture of dialogue.  

The ADR movement, together with a growing recognition of the rights of victims, has also influenced the governments in Latin America to reform and modernize their criminal justice systems. The same reasons as presented above can be used to explain the restorative approaches in this area, but there are also other motives, like the need of lowering prison populations, increasing transparency and citizen confidence in the administration of justice, and to transform Latin American society from a culture of violence to a culture of peace. In promoting non-violent ways to resolve conflict, Latin America has been described as a “laboratory for the transformative effects of restorative justice”.

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35 Vargas, “Problemas de los sistemas alternos de resolución de conflictos como alternativa de política pública en el sector judicial” in Revista Sistemas Judiciales, no. 2, December 2001
36 Parker, The Use of Restorative Practices in Latin America, 2002, p. 3f. The OAS is described as a driving force behind such reforms.
38 Parker, 2002, p. 25
2.4 Concerns Raised against Restorative Justice Programs

The use of restorative justice processes is not without controversy. Can it really protect people’s legal rights to the same extent as a traditional court process? Concerns relating to this question have been raised in the discussion about restorative justice.

The emphasis on the will of the parties does not necessarily have to be seen as a positive thing. When the particular needs of the parties decide the outcome instead of external guidelines and principles established by law, like cases are not treated alike.\(^{39}\) According to articles 16 and 26 in the International Covenant on Civil and Political Rights (ICCPR), everyone has the right to equal recognition and protection under the law. The question is: how can this be guaranteed when two possibly unequal parties are to solve a conflict through mediation, rather than a third impartial person making a decision? Inequality can take many forms, such as gender or economic inequality. Or one person simply being more dominant or having a better position of negotiation for whatever reason. Could the flexibility of the alternative method then be what gives the stronger party the opportunity to take advantage of the weaker party?\(^{40}\) This question is highly relevant when considering whether restorative justice processes are appropriate in cases of domestic violence, where pressure and manipulation can infringe on the victim’s rights.\(^{41}\) There has been strong feminist critique against the use of restorative processes in these cases. To this, Braithwaite responds that “compared with restorative justice, criminal law may prove a blunt instrument for reaching ‘the myriad controlling behaviors of a battering system’”\(^{42}\).

In many cases, restorative justice is about involving the community, and is applied through traditional practices and customary law.\(^{43}\) Being sensitive to the context of the community is also something that has its risks. Within the community, there can be discriminatory structures, and restorative justice programs must offer some protection for the individual and not conserve traditions that are harmful.\(^{44}\)

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\(^{40}\) Sekhonyane and Skelton, “Human rights and restorative justice” in Johnstone and Van Ness, 2007, p. 585
\(^{41}\) Daly and Stubbs, “Feminist theory, feminist and anti-racist politics, and restorative justice” in Johnstone and Van Ness, 2007, p. 159
\(^{42}\) Braithwaite, 2002, p. 152. (\textit{Italics} made by the authors)
\(^{43}\) UNODC, 2006, p. 5
\(^{44}\) Sekhonyane and Skelton, p. 586
As expressed in article 14.2 ICCPR, everyone charged with an offence has the right to be presumed innocent. In most cases, it is a prerequisite for restorative justice processes that the offender acknowledges responsibility. Some might say that this is not an issue if only the participation in a restorative process is voluntary, but the question is how voluntary it really is seen in the light of the options that the suspect has.\textsuperscript{45} If it is not truly optional, it could also put in danger the right to a fair and public hearing by an independent and impartial tribunal according to article 14.1 in the same covenant.

In a regular criminal process, the right to legal counsel is considered a right, expressed in article 14.3 (b). In some restorative processes, the parties are allowed to have lawyers present, but if they lack training in restorative justice, their presence can be more of an obstacle than it is helpful. According to Braithwaite, the representation of lawyers is something that belongs in adversarial processes and he opposes such representation in restorative proceedings, but thinks the suspect should be able to consult a lawyer on whether or not he should participate.\textsuperscript{46}

Yet another article of ICCPR to have in mind is article 7, stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. When a person is sentenced for committing a crime, the punishment is decided within the framework of law and custom, and the state has a responsibility that this framework does not provide for punishment in breach of this article. If the parties of a restorative process that are not connected to state control are free to decide on any obligations for the offender, the result could be outcomes that are in fact degrading or cruel.\textsuperscript{47}

To protect the rights that might be violated, many participants of the restorative justice discourse are of the opinion that international standard setting on restorative justice should be used.\textsuperscript{48} Thus, a document of guidelines has been developed by the UN, presented in the following.

\textsuperscript{45} Sekhonyane and Skelton, p. 583
\textsuperscript{46} Ibid.
\textsuperscript{47} Van Ness, 2005, p. 11
\textsuperscript{48} Sekhonyane and Skelton, p. 588
2.5 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

In 2002 the UNs Economic and Social Council adopted a resolution encouraging countries to consider some basic principles in developing and implementing restorative justice programs.\(^{49}\) The purpose was to assist member states of the UN to adopt and standardize restorative justice initiatives in their justice systems, without making the principles mandatory or prescriptive.\(^{50}\) The principles were drawn up after the member states, relevant organizations and an international Group of Experts on Restorative Justice had been consulted. During the process, although there were predominantly positive responds to the development of an international instrument in this area, some concerns were expressed. Each country has its own criminal justice system based on its culture, customs and social structures, and several countries had established national practices on restorative justice developed in its special context. Some participants were concerned that this was not taken into account when developing an international instrument defining certain principles and standards.\(^{51}\) Sweden also underlined the importance of restorative justice programs not interfering with the principles of penal law regarding proportionality, legality, equity, predictability and consistency in sentencing.\(^{52}\) All comments were taken into consideration and in the end it was decided that the Resolution was going to be a normative instrument with non-binding guidelines, taking into account the flexibility needed.\(^{53}\)

In the preamble, the concept of restorative justice is described as an evolving response to crime that promotes social harmony through the healing of victims, offenders and communities. It aims at addressing the needs of those affected by providing an opportunity for victims to obtain reparation, feel safer and seek closure, and allowing offenders to gain insight into the causes and effects of their behavior and to take responsibility in a meaningful way.

Since theories of restorative justice continue to evolve, the use of prescriptive or narrow definitions that might impede further development was avoided in the document.\(^{54}\)


\(^{50}\) The report of the Group of Experts on Restorative Justice, E/CN.15/2002/5/Add.1, para. 28

\(^{51}\) The report of the Secretary-General on restorative justice, E/CN.15/2002/5, para. 47

\(^{52}\) E/CN.15/2002/5, para. 24

\(^{53}\) E/CN.15/2002/5/Add.1, para. 27

\(^{54}\) Ibid., para. 29
Restorative justice program is defined as any program that uses restorative processes and seeks to achieve restorative outcomes. Restorative process means 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. Furthermore, restorative outcome means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programs 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. The victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process are defined as parties, and a facilitator means “a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process”. 55

Part II and III of the Resolution enumerate what should be taken into consideration in the use and operation of restorative justice programs, and recommend that the member states establish guidelines and standards on the area, if necessary with legislative authority. These policies should address, inter alia, the administration of these programs, the conditions for referral of cases to them, and the qualifications, training and assessment of facilitators (art 12). To make sure that the restorative process guarantees fairness to the offender and the victim, article 13 is referring to the following fundamental procedural safeguards:

(a) The right to consult with legal counsel and the right of minors to the assistance of a parent or guardian
(b) The right to be fully informed
(c) The right not to participate

The requirement for the process to be voluntary both for the victim and the offender is also stated in article 7, adding that restorative processes should only be used where there is sufficient evidence to charge the offender. However, the participation of the offender shall not be used as evidence of admission of guilt in a subsequent legal proceeding (art 8). If the process does not result in an agreement, or if the agreement is not fully implemented, and the

55 E/2002/INF/2/Add.2, Part I, art. 1, 2, 3, 4 and 5
case is referred back to the criminal justice process, the failure to agree or to complete the agreement should not be used in the criminal justice proceedings, e.g. as justification for a more severe sentence (art 16 and 17). In cases where an agreement is reached, it is recommended to be judicially supervised and the agreement should preclude prosecution in respect of the same facts (art 15). It is further stated that the discussions in restorative processes should be confidential (art 14).

Provisions regarding the facilitator are also provided. They should perform their duties in an impartial manner, with due respect to the dignity of the parties. They are also to ensure that the parties act with respect towards each other and enable them to find a relevant solution among themselves, which moreover should contain only reasonable and proportionate obligations (art 7 and 18). The facilitator should possess a good understanding of local cultures and communities and preferably receive initial training (art 19).

One question that was subject to extensive discussion within the Group of Experts on Restorative Justice was how to deal with cases where various forms of inequality between the parties might make the use of restorative programs inappropriate. That might occur in cases of domestic violence or cases in small communities where the party, or parties, might be subject to pressure by the community. The Group of Experts wanted to avoid enumerating these various factors on which power imbalances could be based. Thus, the disparities that should be taken into consideration in referring a case to, and in conducting, a restorative process, were expressed as those “leading to power imbalances, as well as cultural differences among the parties” (art 9). This is meant to include, among other things, age, intellectual capacity, gender or racial, ethnic or cultural factors; any disparities that might place one of the parties at an undue disadvantage.56 Article 10 further states that the safety of the parties shall be considered in the same way. Where restorative processes are not suitable or possible, the criminal justice authorities should be involved and decide on how to proceed with the case (art 11).

56 E/CN.15/2002/5/Add.1, para. 35
3 Nicaragua – a Brief Country Profile

To understand the importance of the judicial facilitators and how they perform their duties it is necessary to view the RJF Program in its context, first and foremost in relation to the Nicaraguan judicial system. It is also important to have some knowledge about social and geographical living conditions in Nicaragua.

3.1 Social and Geographical Living Conditions

Nicaragua is located in Central America between Honduras in the north and Costa Rica in the south. It is one of the poorest countries in Latin America with nearly 80 percent of the 5.4 million people living on less than 2 USD a day. Distribution of income is one of the most unequal in the world. The poor living conditions affect the infant mortality rate, which is 31 deaths per 1,000 live births. Life expectancy at birth is 69.5 years and almost every fourth person above 15 years cannot read and write. Of interest is also that the population is very young with the median age being 20.9 years.

The country’s geographical area is about 3.5 times smaller than Sweden. It is divided into 15 departments and two autonomous regions, with a total of 153 municipalities divided into smaller communities. 70 percent of the municipalities are predominantly rural and almost half of the population lives in these areas, with lower income and poor access to urban areas and services. It is in those areas the need of Rural Judicial Facilitators is paramount. With the majority of the people living in remote communities it is not unusual that people have to walk, ride on horseback or go by boat for many hours to get to the court or the police station.

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57 United Nations Development Programme, *Human Development Report 2006*. Nicaragua’s Human Development Index (HDI) rank is 112 (out of 177 countries). HDI is a composite index measuring average achievement in three basic dimensions of human development—a long and healthy life, knowledge and a decent standard of living.

58 *Human Development Report 2006*. As a comparison, Sweden’s infant mortality rate is 2.76 deaths per 1,000 live births and the life expectancy at birth is 80.3 years.

59 CIA, *The World Factbook 2007*. The median age in Sweden is 40.1 years.

60 Instituto Nacional de Estadísticas y Censos, *VIII Censo de Población y IV de Vivienda 2005: Volumen de Población: IV. Municipios*. Areas of residence is characterized as either urban or rural, with the following definitions: “Areas considered as urban are: the departmental, regional and municipal capitals, as well as places with more than 1,000 inhabitants that have some characteristics such as: streets, electric light, commercial and/or industrial establishments, etc. Rural areas include places with less than 1,000 inhabitants that do not have the minimum of urban characteristics indicated and a dispersed population.”

San José de Bocay in northern central Nicaragua can be described as an example. This municipality is the largest of five in the department of Jinotega and has had RJFs since the beginning of the program. In November 2006 the municipality had 12 RJFs, spread out on an area of almost 4,000 km² and 156 communities. Of the approximately 42,000 inhabitants, 38,000 live in rural areas, the majority earning their living on agriculture; growing grains or coffee. Half of the people above 15 years of age cannot read and write. According to national statistics there are about 6,100 households in the rural parts, most of them one-room houses with dirt floor and ceiling and the exterior made of either wood, bamboo or palm tree. Thus, people are living in confined quarters with the average household consisting of 6.2 people. Only 2 percent have electricity, but most of the housings have access to paraffin oil. The distance between the southern and northern municipality limit is approximately 140 kilometers, and the local court is situated in a town named San José de Bocay, a few kilometers from the southern limit. A rough terrain, badly maintained roads and lack of means of transportation make it difficult for people to access the urban areas.

San José de Bocay can be seen as an example on how the living conditions for most of Nicaragua’s rural population are. On the Atlantic coast, where a great deal of indigenous population lives, the conditions are even worse. People in this part of the country show a lower level of income and the infrastructure is even less extended with poor roads and longer distances between communal services.

The Nicaraguan society in general, and poor communities in particular, is characterized by what is called el machismo, male power and male pride, and violence against women is a big problem. According to the World Bank, Nicaragua has the second highest level of domestic violence in Latin America. Other common problems that people in the communities are dealing with are conflicts concerning land ownership, or property rights in general, and many women are being left alone with their children, often connected to the fact that the man is refusing to acknowledge his fatherhood and/or pay child maintenance.
3.2 The Judicial System

Nicaragua's constitution was adopted in 1987, during civil war. The conflict did not come to an end until 1990, having affected Nicaraguan people for nearly two decades. During that time, the judicial system suffered largely from ineffectiveness, inaccessibility and a lack of independence. The judges were subjected to a lot of political pressure, few judgments were actually implemented and sometimes the government simply changed unwelcome judgments. Consequently people did not have much trust in the system or in authorities in general. In the 90ies, steps started to be taken in the right direction to strengthen and improve the judicial branch, with help from international organizations. In one project, financed by the Swedish government, local courthouses were constructed in rural municipalities throughout the country. The courthouses were given a central location in the municipalities, which somewhat increased the physical access to the justice system.

According to the constitution there are four independent branches of government: the legislative branch, the executive branch, the supreme electoral council and the judicial branch. The Supreme Court of Justice (Corte Suprema de Justicia) is the highest court of the country and is also responsible for guiding and administering the judicial organization. The other levels of jurisdiction consist of 9 appellate courts (Tribunales de Apelaciones), 136 district courts (Juzgados de Distrito) and 186 local courts (Juzgados Locales). Over the past few years the justice system has undergone several changes and reforms, for example a reform of the CPP in 2002 with a change to oral process, the establishment in 1999 of the Office of the Human Rights Ombudsperson and a Public Defender’s Office, and in 2000 a Public Prosecutor’s Office (Ministerio Público). Due to these recent modernizations the role and competence of the different institutions is in some areas still not clear and Nicaragua's justice system remains largely ineffective. In general, two serious problems affecting the functioning of the whole system can still be identified: the generalized corruption and the politicization, i.e. Supreme Court justices being appointed on political grounds rather than based on merit.

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69 Lewin, Quintana and Åhlund, p. 5ff.
70 Ibid., p. 19
71 Consejo Supremo Electoral is responsible for organizing and conducting elections and referendums. It consists of seven magistrates, elected by the National Assembly. http://www.cse.gob.ni/index.php?s=1
73 Báez, “Corruption and Party Polarization: the Cancer in our Justice System” in Revista Envío, no. 252, July 2002
4 The Principle of Opportunity in Nicaragua

In some criminal justice systems, mainly in civil law countries, it is mandatory for the prosecutor to prosecute all crimes, and in others, mainly common law countries, the prosecutor has discretionary powers to various extents. The systems are based on two different principles: the *principle of legality* and the *principle of opportunity*. In some countries the latter principle means that the prosecutor can refer a case to restorative justice programs. Other examples would be for example the possibility of plea bargaining and guilty plea in the criminal justice system of the United States.

In Nicaragua, a country with a civil law system, the prosecutor is given some discretionary powers in the CPP:

*Art. 14 – Principle of opportunity*

In the cases presented in this Code, the Ministerio Público can offer the accused measures alternative to prosecution or limit it to some infraction or infractions or persons that participated in the criminal action. For the agreement to be valid the approval of the competent judge is required.

According to article 55, the different manifestations of the principle of opportunity are mediation, dispensing with the action, agreement, and conditional suspension of the prosecution.

Although the principle of opportunity is something that has been introduced through reforms of procedural law in several countries of the region, Nicaragua is said to have gone further than the other Central American states, by implementing mediation as a prior phase to criminal processes.

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74 Willemsens & Walgrave, “Regional reviews, Europe” in Johnstone and Van Ness, 2007, p. 494. In Sweden, a civil law country, the *absolute duty principle* prevails, but there are some discretionary alternatives, for example the prosecutor’s ability not to prosecute a case through the courts even though there is sufficient evidence to do so (*åtalsunderlåtelse*). See Lindström, “Zero tolerance criminal policy and restorative justice: a hidden link?” in Kerner and Weitekamp, 2003, p. 286
75 UNODC, 2006, p. 66
77 For the correct wording of article 14 and 55, see appendix III
78 Aguilar García (ed.), *Código Procesal Penal de la República de Nicaragua. Anotado y concordado por Magistrados y Jueces*, p. 16. Aguilar, 2005, p. 30
reform are explained in the Commentary to the CPP and the Manual on the application of the principle of opportunity.

According to the Commentary, the principle of opportunity was introduced in Nicaragua because of the incapability of the justice system to deal with the large number of cases. Thus, it was decided to create alternative mechanisms to take care of the cases that are of lesser importance to society. This would save money, time, material and human resources, and enable the justice system to focus on the crimes with a larger impact on society. Aguilar adds that for reasons of economy and criminal politics it is counterproductive for the justice system to handle all cases in the same way and with the same priority, no matter the seriousness. Because of this, you have to abandon the ideology that criminal justice always requires a process with all its stages, a sentence and a punishment. This is a form of idealized justice impossible in real life. The omnipresence of the judicial system is an illusion. The principle of opportunity on the other hand is based on utilitarianism and realism. In reality, the judicial system already applied the principle of opportunity, because of the rise in crime that overstrained it; the lack of resources to deal with all the cases lead to a condition of impunity. With the legalization of the principle of opportunity, the selection is no longer made arbitrarily, but according to the requisites established by law.

Aguilar further points out the advantages for the victim, who through mediation can get compensation faster and the security of not being hurt again by the offender. He is of the opinion that the victim never has any interest in that the offender is sentenced, but only to be compensated. Theoretically, as much as 80 percent of the cases normally handled by the justice system are misdemeanors or less serious crimes, and could be solved through simply compensating the victims.

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79 See footnote 78
80 See footnote 76
81 Aguilar Garcia, p. 23f.
82 Aguilar Garcia, 2005, p. 13
83 Ibid., p. 15
84 Ibid., p. 24
85 Ibid., p. 26
86 Ibid., p. 30f.
87 Ibid., p. 12
88 Ibid., p. 25
89 Ibid., p. 10
The principle of opportunity in Nicaragua is seen as an exception from the principle of legality, or a way to make it more flexible. However, the principle of legality in Nicaraguan law is not expressed as an obligation to prosecute and punish all crimes. Neither does the prosecutor have complete discretion; the circumstances under which prosecution can be opted out are defined by law. Aguilar emphasizes that the principle of opportunity is not a form of negotiated justice, or a privatization of criminal justice. The purposes are to repair the damages caused by the crime, reintegrate the offender into society, respect the dignity of the victim, and restore peace.

Equality between the parties, between rich and poor, strong and weak, is supposed to be guaranteed by the mediator, by promoting respect and communication. Abuse deriving from a situation of inequality between the parties is also to be avoided through a legality control by the Ministerio Público.

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90 Aguilar García, 2005, p. 15
91 Aguilar García, p. 37f.
92 Aguilar Garcia, 2005, p. 23
93 Ibid., p. 51
94 Aguilar García, p. 43
5 The Rural Judicial Facilitators Program

5.1 Background and Development of the Program

In 1997 the OAS in Nicaragua implemented what was called a Program for Technical Collaboration (Programa de Colaboración Técnica, PCT) to deal with conflict management in parts of the country that, although the war had officially ended, still had high levels of violence and conflict. In many of these areas local courts had not yet been established. A cooperation agreement was made with the Supreme Court to establish the foundations of the program, which should focus on improving access to justice in these post-conflict zones. The program supported local Peace Commissions as a means of strengthening the local society’s capacity to prevent conflicts and building local democracy. Generally, these commissions were dealing with different aspects of human rights and the need of persons who could mediate between the locals in minor conflicts soon became visible. Thus, through this program, the figure of the judicial facilitator was born in 1998.95 Initially, facilitators were created in poor communities in 13 municipalities in the northern central part of the country, acting as intermediaries between the community and the judge. Due to the positive experiences, and partly because judges in other municipalities had started asking for these facilitators, the OAS initiated an expanded program of Rural Judicial Facilitators in November 2002, which continued until November 2006 with the financing of Sida. During this time RJFs have been gradually introduced into 56 more municipalities96 with priority given to rural communities with high poverty levels.97

The creation of the expanded program coincided with the creation of the new Code of Criminal Procedure, and the establishment of the principle of opportunity, and so the RJFs role as a mediator in minor criminal cases was legalized. The RJF was at the same time included in the Organic Law of the judiciary98. In chapter 5, article 200, it is stated that the RJFs constitute a corps at the service of the Administration of Justice, and the Supreme Court shall regulate its organization, functions, status, requisites, and system of admission and

95 Interview with a technical promoter at the OAS, 2006-11-08. The Peace Commissions, Comisiones de Paz, are in parts of the country still functioning alongside the Rural Judicial Facilitators.
96 Organización de los Estados Americanos Nicaragua, Cobertura del Programa Facilitadores Judiciales Rurales 2006. See appendix IV
98 Ley No. 260, Ley Orgánica del Poder Judicial de la República de Nicaragua
training. These regulations are gathered in the *Regulation of the Rural Judicial Facilitator* from 2002, which is the main document for the facilitators.

Thus, it is the Supreme Court who according to the laws and regulations carries out in part, coordinates, and supervises the system of RJFs. More specifically, it is the task of the department called Oficina Atención a Facilitadores created for this purpose. As of yet, it is not in charge as intended. These responsibilities are gradually being transferred from the OAS who, as mentioned above, has implemented the RJF Program. The OAS has 17 field promoters who travel around in the communities, providing technical assistance and guidance for the RJF, coordinating and planning activities. They also gather statistics of all mediations and other activities performed by the facilitators. Systematically, all the actors, including the RJFs and local judges, take part in the evaluation process where they get the chance to exchange experiences and discuss achievements and problems.

By the end of 2006, mayor’s offices in 43 municipalities were involved in the RJF Program, giving the RJFs financial support through compensating their travel expenses. To involve the local government is something that is strived for in all of the municipalities, and the will is there, but not always the money, says a representative for the OAS. To get the mayor’s offices to allocate funds for this purpose is partly a way to relieve pressure from the judiciary’s strained budget, but also a step towards decentralization and citizen participation within the administration of justice, which is an objective. However, in this process it is necessary to avoid conflicts of authority, as emphasized by the former Director of the Oficina Atención a Facilitadores. The RJFs must be politically independent and are still to serve under the local judge and not the mayors.

The RJF Program was in 2006 entering a new phase that is thought to continue until the end of 2011. The financing from Sida will continue for at least four more years. The plan is to expand the program to other municipalities, not just rural ones, and also to regulate the function of the RJF as a mediator also in civil cases, in the Code of Civil Procedure (*Código Reglamento de los Facilitadores Judiciales Rurales (FJR)

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99 *Reglamento de los Facilitadores Judiciales Rurales (FJR)*
100 *Reglamento de los FJR, 2002, art. 24 and 25*
101 Interview with the Director of the Rural Judicial Facilitators Program, OAS, 2006-11-10
102 *Reporte de Facilitadores, 2006-11-10*
103 Quintanilla, 2004, p. 8
104 Interviews with a technical promoter at the OAS, 2006-11-08 and the former Director of the Oficina Atención a Facilitadores, 2006-11-08
Civil). With these changes, it is gradually going to become the National System of Judicial Facilitators (Sistema Nacional de Facilitadores Judiciales).  

### 5.2 The Rural Judicial Facilitator

When we conducted our study, the RJF Program comprised 732 RJFs, working in 78 municipalities in 11 departments of the country. A municipality can have several RJFs and each RJF is supposed to be responsible for the community where he lives. They are elected in their community, where several candidates can be nominated, and after the election the chosen man or woman is appointed by the local judge of their municipality. To become a facilitator, there are certain requirements according to article 4 in the *Regulation of the RJF*. They are as follows:

1. To be an adult
2. To know how to read and write
3. To be a recognized leader in his/her community
4. To live in the community
5. Not to have a criminal record
6. Not to hold any position of party political nature
7. Not to be in active military service or to have resigned at least 12 months prior to his/her appointment
8. To have received the training developed by the judiciary together with other organizations
9. To have been appointed by the local judge of the community where he/she is a resident

Once they have been appointed, they receive training by the judiciary and the OAS, with a frequency that is initially higher and then decreases. According to the *Regulation of the RJF*, article 31, the facilitators should receive initial training during a minimum of two years. A manual created for this purpose by the Supreme Court and the OAS is used. After two years the RJF is supposed to have sufficient knowledge, but that knowledge is being refreshed and

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105 Interview with a technical promoter at the OAS, 2006-11-08
106 *Reporte de Facilitadores*, 2006-11-10. Of these RJFs, 84 are Wihtas and other indigenous judges.
updated. A representative of the OAS told us that in the beginning they receive training one
day every month, in the municipalities where the program has been working since 2004 it is
every three months, and in the municipalities that were included in the original program
(PCT) in 1998, it is every six months. This training takes place on a local level, through
meetings with the local judge of the municipality. There is also training on a micro-regional
level (a micro region is a few municipalities but not the whole department), about two or three
days on three occasions during the first year. They are educated in such subjects as the
constitution, human rights, family law, property law, environmental law, criminal law, and on
how to perform mediations. Usually the RJFs have little education from the beginning; the
majority hasn’t finished primary school.

The functions of the RJF are to give legal advice, inform their communities on legal issues,
perform mediations, be of help to the local judge and serve as a link between the community
and the authorities of the legal system. The Regulation also stipulates in article 8 that the
RJF is obligated to comply with the principles of suitability, dignity, honesty and impartiality.
It is forbidden to receive any pay for performing these services; the work is voluntary, though
the travel costs are being compensated. The RJF can be suspended if he moves from his
community, if he doesn’t participate in the training, or if there is an ongoing legal process
against him that could result in deprivation of liberty. He can be dismissed if he has been
found guilty of a crime, manifestly abuses his position, abandons his functions, collects
payments for his services as a RJF, manifestly disobey the local judge, or uses his position as
a RJF to promote a political party. The RJF is suspended or dismissed by the local judge,
but that decision can be overturned by the Oficina Atención a Facilitadores.

108 Interviews with a local judge 2006-10-03 and a RJF 2006-10-24
109 Manual del Facilitador Judicial Rural (FJR), Libro 1 to 5
110 Reporte de Facilitadores, 2006-11-10
111 Reglamento de los FJR, 2002, art. 6
112 Ibid., art. 7 and 8
113 Ibid., art. 15
114 Ibid., art. 17
115 Ibid., art. 16 and 21
5.3 Mediation

5.3.1 The Legal Concept of Mediation

Article 6 of the *Regulation of the RJF*, naming the functions of the facilitator, states that the RJF does two different kinds of mediation: *extrajudicial* (*mediación extrajudicial*) and *prior* (*mediación previa*). Regarding how the mediation is performed there is no difference between them. The extrajudicial mediation is, according to the *Manual of the RJF*, used only in civil cases, such as payment of debts and property conflicts, and is not legally recognized. The prior mediation only concerns criminal cases, and was legalized through the above mentioned legal reform of the criminal procedure.\(^{116}\)

In article 55 CPP, mediation is enumerated as one of the possible measures according to the principle of opportunity. The same article also establishes that the principle of opportunity is not applied when it concerns crimes against the state or crimes committed by functionaries named by the president or the National Assembly in their service, or by those who have been elected by the people.

Article 56 gives further limitations as to in which cases prior mediation can be used. First of all, it can be used in the cases of misdemeanors (*faltas*). These are the crimes that are listed as misdemeanors in the Criminal Code (*Código Penal*), from article 553 and onwards. Examples of misdemeanors are theft of something worth less than 20 córdobas (about one dollar)\(^{117}\), drawing a weapon during a fight without just cause\(^{118}\) or exposing oneself naked in public\(^{119}\). Second, it can be used in crimes of neglect or imprudence (*delitos culposos o imprudentes*). Third, property crimes committed between individuals without violence or intimidation (*delitos patrimoniales cometidos sin mediar violencia o intimidación*). Last, in the cases of crimes sanctioned with lower penalties (*delitos menos graves*). The distinction between crimes sanctioned with lower penalties and crimes sanctioned with higher penalties (*delitos graves*) is not clarified in legislation. According to the *Manual of the RJF*, three years of prison is the limit.\(^{120}\)

\(^{116}\) *Manual del Facilitador Judicial Rural (FJR)*, Libro 5, p. 40
\(^{117}\) Art. 554 *Código Penal*
\(^{118}\) Art. 553 *Código Penal*
\(^{119}\) Art. 560 *Código Penal*
\(^{120}\) *Manual del Facilitador Judicial Rural (FJR)*, Libro 5, p. 25
article in particular that establishes this limit; it rather seems to be a rule that follows by custom. It coincides with the limit up to which the local judges have competence, before it becomes the competence of the district judge.121

5.3.2 The Procedure of Prior Mediation

The procedure of prior mediation is explained in article 57 in the CPP. As the word prior implies, mediation is only possible before an indictment has been laid before the court. The initiative to mediate can be of the victim or the accused; participation in mediation is voluntary.122 In the case of misdemeanors, if a court process is being initiated, the judge will ask at the initial hearing if the parties have tried mediation, and if not, encourages the parties to do so, according to article 327 of the CPP. If an offence is repeated, the parties can mediate again and again as many times as they wish.123 The mediation can be performed by a lawyer, an authorized notary, a public defender, or a RJF accredited by the Supreme Court.124 A RJF cannot perform mediation if one of the parties is related to him within the fourth grade of blood relationship or within the second grade of affinity. Furthermore he cannot have any other interest in the matter of personal, economic, religious or political character.125

The Manual of the RJF instructs on how the facilitators should conduct the mediation. The mediation should take place somewhere that combines the factors privacy, silence, and hygiene. The RJF explains the rules of the mediation, for example that there should be no people present who are not involved in the process, and that the mediation is confidential. The parties are asked to promise not to speak of it outside the room. During the mediation, the RJF should not investigate; it is the parties who determine what the problem is. He should be impartial and help the parties communicate with each other. He should not suggest a solution; his role is to be attentive to that the suggestions to the solutions put forward by the parties are legal and possible to comply with, and to guarantee that the parties’ rights are protected. He writes down the agreement, and reads it to the parties before they sign it.126

121 Aguilar García, p. 136
122 Manual del Facilitador Judicial Rural (FJR), Libro 5, p. 8
123 Ibid., p. 24
124 Art. 57 CPP
125 Reglamento de los FJR, 2002, art. 8:10
126 Manual del Facilitador Judicial Rural (FJR), Libro 5, p. 9ff.
The agreement reached by the parties through mediation can be total or partial. If it is partial, the prosecution can proceed concerning the facts that haven’t been resolved.\textsuperscript{127} According to the \textit{Manual of the RJF} an agreement can be symbolic, where the perpetrator apologizes or promises to maintain peace. This can be for example in cases of slander or threats, but also in any other case when the victim forgives the perpetrator and doesn’t require money compensation. The agreement can also be reparatory: to return the property to the owner, to pay for damage caused in money or goods, or to repair the damage. The RJF should make sure to avoid excesses so that there is proportionality between the damage caused and the amount to be paid in reparations, without compromising his impartiality.\textsuperscript{128} He should also orientate the parties with the purpose that the agreements are to be realistic and possible, so that the agreements can in fact be complied with.\textsuperscript{129} After the mediation, he follows up and monitors that the parties comply with the agreement, without putting pressure on them or giving his own opinions.\textsuperscript{130}

Once an agreement has been reached, article 57 further notes that the parties should submit it to the considerations of the Ministerio Público, who within five days should make a statement about its validity. When this time has passed without a statement, the agreement is considered approved. Once approved, the prosecutor, or any other person with an interest in the matter if the prosecutor has not made a statement, should present it to the local judge and request that it is registered in the Book of Mediations (\textit{Libro de Mediación}). This suspends the prosecution for the time required, if any, for the accomplishment of the agreement. After that it is terminated, declared in a writ by the judge. If, on the other hand, the agreement hasn’t been complied with, the Ministerio Público should resume the prosecution on the request of the victim. The agreement of prior mediation cannot be used as a confession of the accused, should the prosecution be resumed. It is not considered legal evidence, according to article 16 CPP.

\textsuperscript{127} Art. 57 CPP
\textsuperscript{128} \textit{Manual del Facilitador Judicial Rural (FJR), Libro 5}, p. 9ff.
\textsuperscript{129} Ibid., p. 28
\textsuperscript{130} Ibid., p. 13
5.3.3 The Control of the Mediations

5.3.3.1 The Control Exercised by the Judges

As explained above, the RJFs serve under the Supreme Court, at a local level through the judge of the municipality. The judge is in charge of the continuous training of the RJF, the RJF reports to him about his activities, and the judge also has the power of suspension or dismissal. According to the Regulation of the RJF, article 8, the RJF has a duty to perform tasks given to him by the judge and show him due respect. Concerning the control of prior mediation, the role of the judge in theory is only to see that the act complies with the formal requirements of the law, and register it upon the request of the prosecutor. The extrajudicial agreement, on the other hand, is only handed in to the judge for informational purposes.

The role of the local judge is central to the work of the facilitators. However, this is not quite reflected in the regulation regarding the RJF. As it is today, it depends largely on the personal commitment of the judge how the program is working. The former Director of the Oficina Atención a Facilitadores told us that a reform of the Regulation of the RJF is planned, and that this is one of the things that might be revised.

5.3.3.2 The Control Exercised by the Ministerio Público

The Ministerio Público is supposed to revise the legality of the agreements that have been reached through prior mediation. No such revision is exercised over the agreements of extrajudicial mediation; the parties’ signatures are enough for the agreement to be valid. According to article 57 CPP, the control concerns the origin and the validity of the contract. The Manual of the RJF defines the origin as whether or not it concerns a crime where prior mediation is possible, and validity as whether or not the agreement is legal and possible to comply with. As explained above, the parties are largely free to formulate the agreement as they wish, but according to the interviews we have done with judges and prosecutors, the constitutional rights of a person cannot be violated. The former Director of the Oficina Atención a Facilitadores is of the opinion that the prosecutor should control the integral

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131 Manual del Facilitador Judicial Rural (FJR), Libro 5, p. 35
132 Ibid., p. 34
legality of the agreement, according to the principle of legality as a constitutional principle in Nicaragua.

One prosecutor that we interviewed said that his standards were lower when revising a mediation performed by a facilitator than by a lawyer. Since the RJFs are farmers who barely know how to read and write, you cannot have the same requirements when it comes to formalities. The important thing according to this prosecutor was that the agreement contains the will of the parties and is signed. The outcome also has to be proportional, according to the principle of proportionality. He personally had never experienced that a RJF had performed mediation where the solution wasn’t valid, mainly because the agreements are usually just about not repeating a certain action and asking for forgiveness. In the cases of compensation the prosecutor said he is consulted beforehand on the amount of money, how the payment should be done etc. Another prosecutor said that he has to disapprove of an agreement if the victim tries to benefit from the situation and demands too much compensation. But also, similar to the statement of the other prosecutor, that the Ministerio Público does not reject the agreement directly, they are in constant communication with the parties and give them suggestions to different solutions.

5.3.3.3 The Requirement of a Previous Report

Between the Supreme Court and the Ministerio Público there is a difference in how the law on mediation is interpreted. It is the opinion of the Supreme Court, as expressed in the Manual of the RJF, that the RJF can perform a prior mediation from the moment that a crime has been committed, as long as the parties have the will to mediate. The Ministerio Público on the other hand, maintain that a police report is necessary before prior mediation can take place, and there are prosecutors who refuse to receive and revise agreements when a report has not been filed.

In the Manual of the RJF, elaborated by the Supreme Court, their argument refers to the purpose of the criminal process in article 7 CPP, which is judicial peace and social coexistence. Accordingly, the will of the parties is what prevails. Also, as a judge put it, to

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133 Manual del Facilitador Judicial Rural (FJR), Libro 5, p. 23
134 Ibid.
require that people go into town to make a report would go against the purpose of having the RJFs: to increase access to justice.

When asking the prosecutors about the reasoning behind their opinion, they referred not so much to specific legal rules as to logic. Before mediation can be possible, four things have to be clear: that a **criminal offence** has taken place, that there is **evidence**, that the parties give their **consent** to mediation, and that it is a crime where the **RJF is allowed to mediate**. Without a report, how would these things be established? And if the agreement is not followed and the prosecution is to be resumed according to article 57 CPP, how would that be possible if there was no case and no evidence in the first place? Another argument was that it is up to the prosecutor to decide if it is a case that can be solved through the alternative, that is mediation, or through a judicial process. If the prosecutor decides it is not advisable to mediate due to public interest, he can oppose mediation. You could possibly base this argument upon the article 14 of the CPP, which says that it is the Ministerio Público who can offer the accused measures alternative to prosecution. If the article is interpreted to say that it is the decision of the Ministerio Público in each individual case if the alternative of mediation should be offered or not, that would imply that a report is always necessary to even give the Ministerio Público that opportunity. The same argument could also be strengthened by the Commentary to the CPP, which regarding article 55 (listing the different manifestations of the principle of opportunity) says that the decision taken by the Ministerio Público in the application of the criteria of opportunity in any of the manifestations, should be preceded by a thorough investigation.\(^{135}\)

According to the former director of the Oficina Atención a Facilitadores this is a very formalistic interpretation of the law. In his opinion you have to do an integral interpretation of the whole CPP. He argues that although it was put in that article (art 55) mediation is not really a part of the principle of opportunity from a procedural point of view. To include it in the principle is an innovation by the Nicaraguan legislator, because when you compare with other legislations, the principle of opportunity has nothing to do with mediation. In other legislations it is called negotiation, or procedural agreement in a certain phase, but not mediation in that sense of the word. It is an alternative method of conflict resolution that just shares certain characteristics with the principle. According to the former director, article 14 is

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\(^{135}\) Aguilar García, p. 131
applicable in the sense that if there already is a process, there is also the possibility to mediate, but the article is not to be interpreted as demanding a report prior to mediation.

5.3.3.4 The Control of Mediations concerning Misdemeanors

Another issue is what control is to be exercised over the agreements concerning misdemeanors. The CPP contains a special chapter on the judicial process treating misdemeanors, subjecting it to a simplified, shorter process where it is not within the competence of the Ministerio Público to prosecute. Instead, this is up to the victim or the police.\footnote{Art. 324 to 332 CPP} Seeing how misdemeanors are generally not their concern, some prosecutors have formed the opinion that when it comes to misdemeanors, it is not their business to revise the agreements from mediation either. On the other hand, the article 57 in the CPP, stipulating how the control of legality should be done, contains no exception on misdemeanors. Without the legality control, it is hard to tell what separates this kind of mediation from extrajudicial mediation.

To solve these gaps in the law and disagreements about interpretation between authorities, there is an interinstitutional commission, where judges and prosecutors meet to discuss these issues together with other authorities of the judiciary. However, they have been unable to agree on any solutions.\footnote{Interview with a local judge 2006-10-03}
6 The Rural Judicial Facilitators Program in Practice

6.1 The Work of the Rural Judicial Facilitators

According to recent statistics accumulated by the OAS, 17,345 mediations have been performed since 1999. The RJFs have also held many informational meetings in their communities, most of them on subjects like the law of inheritance, the classification of crimes and misdemeanors and on domestic violence. They are encouraged by the OAS to hold at least one informational meeting a month on a relevant legal subject. The statistics also show that the RJFs refer a significant number of cases to the local judge, the prosecutor or to the police. This could be cases where parties have tried mediation but could not reach an agreement or situations where the RJF is not allowed to mediate. A relatively big part of the RJFs work is also to perform other tasks for the judge. The most common of those are to arrange meetings or deliver warrants and other notifications, to carry out inspections of different kinds and to locate witnesses.

In our interviews with the RJFs we learned that a great deal of their time is dedicated to giving advice to people in the communities, though this may not be visible in the statistics. Two of them said they were giving advice almost daily, on subjects like how to make a police report, the right to vote or what is an equitable salary.

6.2 The Training of Rural Judicial Facilitators and the Role of Local Judges

During our study, we attended two meetings in two different municipalities where the RJFs met with the judge and received training. On both occasions, there were about ten RJFs present. On one of the meetings the subject was election law (because of the upcoming presidential election in November 2006), in the other the judge wanted the RJFs to practice, through role-playing, how to compose the mediation acts in a clear manner. Several of the

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138 The Vice President of the Supreme Court in Nicaragua has expressed that the RJF program has relieved the justice administration and contributed to the fact that in the year of 2005, the courts have been able to pass more sentences than any year in history. “A pesar de las dificultades, 2005 fue un año exitoso para el Poder Judicial” in Confidencial, no. 472, February 2006, p. 10

139 Reporte de Facilitadores, 2006-11-10
facilitators that we interviewed told us that they receive a lot of support from the judge and they ask him for advice regularly. To illustrate the good relationship, one facilitator told us that whenever he goes into town to discuss something with the judge, the judge makes time for him and sees him in his office no matter how busy he is and how many people are waiting. Some RJFs said that they meet the judge every month to give reports and ask questions, while others said that these meetings take place at least every two months. This depends much on what sort of distances and infrastructure there is in the municipality. The RJFs in remote communities with a long distance to the court cannot come every month. One judge gave an example on how some of the facilitators, on the day of a meeting, have to get up very early and forsake all work that day, without being compensated for more than the travel costs.

The RJFs were in general satisfied with the training received, although some of them pointed out that you can never get enough education. Someone told us that before he did not know anything about the law, the training is fundamental to the work they are doing. Another facilitator emphasized the importance of the training material being adjusted and written in words that also people with less education can understand. One RJF said he had found the training difficult in the beginning and needed a lot of help from the judge, and another admitted that it is pretty hard for him to study because he only went to school for three years. Also one of the judges expressed how important it is to take the RJFs low education level into consideration and give them a lot of support and motivation. It should not be forgotten that to have the competence for this, the judges need training and support too. One of them told us about a recent meeting on a national level where local judges received training on how to teach adults, focusing on adults with limited basic education. He, and others involved in the program, asks for a greater focus on the role of the judge. It is not enough to look at the frequency of the training given to the facilitators, but also the quality of the judges. As previously mentioned, a lot depends right now on the personal commitment of the judge.

On three occasions we have come across negative experiences of the judges’ involvement in the RJF Program. One was during a seminar we attended, where RJFs, local judges and representatives from the OAS had gathered to evaluate the program. One facilitator said that the judge of his municipality had meddled in agreements outside of his competence which undermined the authority of the RJF. The other was a prosecutor whose impression was that in one municipality the RJFs would just arrive and collect their travel compensation once a month, without any actual training taking place. Although he added that there could be other
judges more responsible than that. We were also informed by the OAS that during the time of the program, four judges have shown some resistance. Not because they don’t like the program, but because they do not like having to deal with simple farmers and to visit the communities, many times by horse or by foot. However, people from the Supreme Court have spoken to them and a certain change in attitudes has taken place.

The judges we interviewed were most enthusiastic about and committed to the RJF Program, and the RJFs all described their relation to the local judge as really good, using words as respect and confidence. The external evaluation from 2006 concludes that generally the RJFs are satisfied with the work done by the judges, and that the judges on their part have the same positive experiences of the program and of working with the RJFs.¹⁴⁰

6.3 Mediation

Among the facilitators we interviewed, land conflicts, road disputes, damage to property or animals and domestic conflicts were described as the most common problems subject to mediation in the communities. Other cases mentioned were disputes concerning payments, slander (injuría y calumnia) and other crimes such as thefts and threats.

The OAS statistics show that as much as 99 percent of all the registered mediations are extrajudicial mediations with 59 percent concerning property disputes. The most common ones included in this category are payments, damage to animals or crops and disputes over property limits. The next big category, 23 percent of the mediations, is cases of violence, where local fights and slander constitute the most part. 17 percent of the mediations are considered family conflicts, which according to the ones listed are cases of family arguments, alimony and child maintenance, or violence against women and minors.¹⁴¹

¹⁴⁰ Management Coaching & Consulting Group, Informe final – Consultoría para la Evaluación de medio término del “Programa de Facilitadores Judiciales Rurales”, p. 11 and 20
¹⁴¹ Reporte de Facilitadores, 2006-11-10
6.3.1 The Distinction between Prior and Extrajudicial Mediation

One interesting observation is that only 1 percent of all mediations is registered as prior mediations, divided on the categories of crimes enumerated in article 56 in the CPP. The fact that the RJFs perform prior mediations to a much lesser extent than extrajudicial mediations coincides with the information we got through our interviews. Most of the RJFs told us that they almost never performed prior mediations; at the most one or two cases a year. One of the judges had 11 RJFs in his municipality and they had in all only performed three or four prior mediations in 2006 and in the year of 2005 the mediations had been exclusively extrajudicial. At the same time the RJFs told us that very common problems solved through mediation are for example cases of domestic violence when a man beats his wife, and slander; crimes that according to the law and the Manual of the RJF are to be solved through prior mediation. The judges that took part in our study did not make it less confusing as they clearly stated that both extrajudicial and prior mediation can concern criminal cases. It wasn’t made clear though if they were only referring to mediation performed in practice or also the rules behind it. Anyhow, an example from the statistics shows that 1,106 cases of slander have been solved through extrajudicial mediation compared to only 23 cases registered under prior mediation.

An explanation to the ambiguity between the rules of mediation and their application may partly be found in how the facilitators performed their functions before the program was expanded in 2002. All mediation executed by the facilitators was at that time extrajudicial, which also included minor crimes. At this time, there was no regulation for the facilitators and no manual had been set up to use in the training. These documents were introduced when the OAS’s program of the RJF started in 2002, and the facilitators’ function also as a prior mediator was introduced in the law. The ruling distinction of today was made: mediation in criminal cases is to be performed through prior mediation and thus extrajudicial mediation only concerns civil matters. Thus, prior mediation has only been performed since 2002, and the facilitators that were appointed earlier may find this distinction difficult to uphold in practice. Further reasons for the ambiguity and the figures in the OAS’s statistics will be

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142 See chapter 5.3.1
143 The only exception was one RJF who said that among the 13 to 14 mediations he performed in a year, six of them were prior.
144 The interview with the judge was performed 2006-10-03.
145 Reporte de Facilitadores, 2006-11-10
146 Interviews with local judges 2006-10-23 and 2006-11-02
discussed later on, when describing how the conflict between the Supreme Court and the Ministerio Público is handled in practice.

Another thing that may affect the statistics is when the RJFs are reporting prior mediations to the OAS even if the agreement from the mediation has never reached either the Ministerio Público or the judge. We were told that this can happen when the parties, after a mediation, do not take the agreement to the prosecutor because of the long distance or lack of time. It can also be that when they reach the Ministerio Público, the prosecutor is not there and the documents are left and forgotten.  

6.3.2 The Competence of the Facilitator to Perform Mediations

One of the things we wanted to know in our study was: when someone goes to the RJF and wants help in solving a conflict, or asks him to mediate when a crime has been committed, can it be difficult for the RJF to decide if this is a situation he is allowed to mediate in? One of the prosecutors was of the opinion that it is hard for the facilitators to determine this, since even prosecutors have trouble resolving this sometimes. However, most of the RJFs and judges we interviewed did not think this was a hard decision to make. They are educated to know this and just follow the Manual of the RJF. Some of them admitted that in some cases it can be more or less difficult, but in these situations they consult with the judge. The situations where it might be a problem are the ones concerning crimes sanctioned with lower penalties, cases where the RJF is allowed to mediate, and the distinction made between those and crimes sanctioned with higher penalties, when the RJF is not allowed to perform mediation. As mentioned earlier, the distinction between these categories of crimes is not clarified in legislation, but three years of prison is said to be the limit. An often used example is if a person is injured and recovers within 15 days, then it is a case when the RJF can mediate because this will according to the law give the offender a maximum of five months in prison. If the injury leaves a scar in the face though, this can give the offender up to five years imprisonment and thus the RJF cannot mediate. In cases of injuries, one of the facilitators said that a doctor helps with making a statement of how serious the injury is. And, as another one told us, if it is not clear in some cases the Ministerio Público makes a decision after an investigation has been made.

147 Information from a field promoter at OAS
148 Art. 138 and 139 Código Penal
6.3.3 Conflicts of Interest and Impartiality

The RJFs in our interviews all seemed to be aware of Article 8:10 in the Regulation of the RJF, set up to avoid situations where some kind of competing interests can make it difficult for the RJF to perform the mediation impartially. If one of the parties is family, meaning the RJF’s parent, sibling, child, grandparent, aunt, uncle or cousin, all of the RJFs gave us the answer that the mediation has to be done by another facilitator. One judge said that if the RJF performs mediation anyway, the agreement is not legal and the RJF can be dismissed. If no other facilitator is available, the judge can however give the RJF permission to mediate in such a case, or the judge himself can perform the mediation. Both parties being family does not affect the facilitator’s competence to mediate. If one of the parties would be a relative or a friend, the answers varied. A couple of them said that this is not a problem or something that affects their competence, while one said he avoids mediation in these situations because he does not want to lose his credibility. We asked one of the RJFs if he thought knowing the parties well could be a problem or an advantage, and got the answer that it did not make him feel uncomfortable, people respect and have confidence in him. On the whole, all of them knew and seemed to follow the clear wording in the Regulation regarding the limit of mediating if they are related to one of the parties in a certain way, but only one of them touched upon the importance of avoiding to perform mediation in cases that also gives the appearance of partiality.

Many of the facilitators emphasized their role merely as an observer during the mediation. The result is up to the parties, the RJF cannot give opinions, they said. One of them expressed how important it is to explain the procedure to the parties without taking someone’s side. Another RJF mentioned that sometimes one of the parties may have a different interpretation of an agreement, claiming that the RJF has taken sides in the mediation. Therefore it is important to explain well what is written in the agreement and read it to the parties before they sign.

149 Manual del Facilitador Judicial Rural (FJR), Libro 4. p. 44
6.3.4 Privacy and Confidentiality

According to the Manual of the RJF the mediations are to be performed in privacy, in a silent environment, and what is said during the mediations is to be confidential. What we learned during our field study though, is that this is difficult to uphold in practice. The main reason is the lack of suitable premises. Many of the mediations take place in the RJF’s home, which is generally a very small house with one or two rooms. Due to the warm climate it is not comfortable to close the door or the windows, if at all there are any doors and windows to be closed, and therefore it cannot be easy to perform the mediation without other people having the possibility to hear what is said. However, others than the parties being present during the mediation is generally not seen as a problem. A couple of the facilitators said they allow the presence of other people, but these cannot interrupt and have to be quiet. Three of the RJFs said their mediations are performed in privacy though, adding that this is more comfortable for the parties; they don’t feel pressured and the problem only grows when more people are involved. Those facilitators are also the only ones out of the seven RJFs interviewed that said they have access to a community center or other local premises, where they perform mediation.

At one occasion we had the possibility to attend a mediation. The parties were two men who had different opinions regarding a mutual agreement. The mediation was held in a small house in the community and the RJF placed himself and the parties at a table in front of the other people present: two men, supposedly witnesses, and us. The door and window shutters were wide open, people and animals were practically walking in and out, others stood at the shutters listening, and nothing was said about privacy or confidentiality. This mediation is probably a representative example on how mediation in general is performed, and under these circumstances it is difficult to uphold the rules of privacy and confidentiality.150 At the evaluation-seminar we attended there was a general discussion among the RJFs that the lack of suitable premises when performing mediations, and thus the lack of privacy, was a problem. One of the solutions suggested was for example to use the local school for this purpose.

150 Of course there is a possibility that our presence, together with the field promoter from the OAS, may have increased the community’s attention to this specific mediation.
To the question if other people can be involved in the mediation, several RJFs answered that at times a lawyer could be present, but emphasized that they are not involved in the mediation other than as an observer or to give advice to a party; they are not allowed to make any propositions. Churchmen or mayor assistants can sometimes be used as witnesses to an agreement, but are not allowed to get involved more than that.

6.3.5 Power Imbalances between the Parties

Neither the Regulation of the RJF nor the Manual of the RJF says anything explicitly about the power relation between the parties and how the RJF is to deal with a situation where this can affect the possibility of negotiating a fair agreement. How attentive are the facilitators on this issue? Most of them did not seem to have experienced this as a problem. To the question if it is difficult to get both parties to express their will, most of them answered no, or rarely difficult. In the end it usually works out and the parties come to an understanding. One of the RJFs admitted that there can be economic imbalance between the parties, and another gave an example of one occasion when a more wealthy party tried to oppress the other. The parties in that mediation did not come to an agreement though. Only one of the RJFs expressed himself in a way that showed us he was aware of the risks in such a situation. He told us that the RJFs have got experience to see if one of the parties is putting pressure on the other. He himself is attentive to that; the agreement between the parties cannot be based on fear and pressure.

6.3.6 Domestic Violence and Mediation

Situations where there is a need to be especially attentive to power imbalances between the parties are cases involving some kind of domestic violence. Among the people we met that were involved in the RJF Program, we came across different opinions on whether it is appropriate to mediate in such cases. One of the judges did not see any problem with that and believed that mediation could change the behavior of a man that is abusing his wife. The Program officer for the Rural Judicial Facilitators Program at Sida, did not share this opinion. She said that it is not appropriate, and not even accepted in Nicaraguan law, to mediate in these cases and there has to be a greater focus on this problem when evaluating the program. She also gave an example of a female prosecutor who refuses to revise an agreement from mediation if there is domestic violence involved. But since domestic violence is one of the biggest problems in the communities, these cases are often subject to mediation. The question
is: are they handled in the right way and are people in general, especially the RJFs, aware of the complexity of the problem?

6.3.6.1 The Concept of Violence in Nicaragua

As we all know, the concept of violence often has different meanings in different cultures and legal systems. It can even differ from one community to another, or within the community. When performing a study in another language, there is also a possibility of linguistic misunderstandings. Conducting our study, we learned that people in Nicaragua were using two main words for violence: violencia and agresión. One of the RJFs gave us his definition of the words, where violencia is seen as a more extensive concept describing the different kind of abuse that can exist in every-day life and agresión is more referring to an attack, a physical assault. Though this definition cannot be used as an absolute truth, it may give a greater understanding of the Nicaraguan people’s basic view on violence, and we have had the possible different meanings in mind throughout our study.

The OAS’s statistics show that cases of violence against women (agresión a mujeres) and violence against minors (agresión a menores) are registered as extrajudicial mediations under the category Family. Could it be that violence within the family is simply seen as a private matter, conflicts to be solved through extrajudicial mediation? Already the categorization under Family instead of the category Violence indicates this, and a look at the form for the RJFs monthly report on performed activities supports this theory. On the page where extrajudicial mediations are to be reported there is no category named Violence, the mediations can only be categorized as Family or Property. But as in the statistics, cases concerning violence against women and minors are to be registered here, in the category Family.

6.3.6.2 The Concept of Domestic Violence

Without getting closer into the meaning of the concept of domestic violence, several of the RJFs told us that cases of domestic violence are solved through extrajudicial mediation. One of the RJFs said more specifically that conflicts concerning domestic violence can be solved

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151 Organización de los Estados Americanos Nicaragua, Informe mensual de actividades realizadas por FJR
through extrajudicial mediation as long as there are no injuries, i.e. only verbal violence. In cases of sexual violence and sexual abuse he made clear that they cannot mediate. Thus, domestic violence in Nicaragua is not seen solely as a private family matter, there is some kind of limit - even if this does not explain the categorization of violence against women and minors in the statistics and the monthly report-form. Discussing the matter with the RJFs also gave us the impression that the concept is not seen as the more complex problem that it is. As stated in the Manual of the RJF, mediation can be performed between the same parties any number of times, even in cases of relapse.\footnote{Manual del Facilitador Judicial Rural (FJR), Libro 5, p. 23} We were discussing this issue with a prosecutor and his opinion was that no exception is made in cases of domestic violence. When there are slight injuries and even if it is repeated every day, you can only see to the incidents separately and it is up to the victim to seek mediation or not. After this information it seems like there are only visible cuts and bruises and other physical injuries that are taken into consideration.

But what about the psychological aspect of situations where a person is being repeatedly abused, verbally and/or physically, in his or her own home?

One of the judges told us that mental abuse as a matter of fact is legally recognized as damaging, through an amendment in Código Penal in 1996. The article regarding what is considered an injury now expressly includes “...all that affects the health and any other damages to the physical and mental integrity of a person” (“...toda alteración en la salud y cualquier otro daño a la integridad física o psíquica de las personas”)\footnote{Art. 137 Código Penal. Revised through Ley No. 230, Ley de reformas y adiciones al Código Penal. The former wording of the Article was “...all that affects the health and any other damage that leaves marks on the body” (“...toda alteración en la salud y cualquier otro daño que deje huella material en el cuerpo humano”). (The italics, both in the text and footnote, are made by the authors.)}. One of the prosecutors clarified this by saying that if the violence is repeated, for example a man who is repeatedly abusing his wife, there should be a psychological evaluation to decide if there is any mental damage, which would make it a more serious crime. The judge also said that for the judges, prosecutors, police and the medical service, there is a protocol of action in cases of domestic violence, but his opinion was that most of the prosecutors and the medicals do not follow this, sometimes not even the police.

If not all people representing the authorities are taking the matter seriously it is not that remarkable that the RJFs do not seem to be that attentive to the problem either. However, they are getting training on the issue. One of the objectives in the training is to get them to know...
the different forms of domestic violence and the impact it has on the family. Domestic violence (violencia intrafamiliar) is in the Manual of the RJF described as a broad concept including, among other things, physical and sexual abuse, threats, to ridicule or manipulate, to compulsory confine someone in the house, to forbid friendship and visits, to forbid family planning, to force the children to leave school and start working and irresponsibility of maintaining the home. It is also clearly stated that according to the law not only violence that results in physical injuries is considered a crime, but also mental abuse, and therefore domestic violence is no longer seen as a private matter, but recognized as a public one.

To summarize this issue, it can be said that violence within the family is basically treated in the same way as other violence. If it leaves visible injuries in certain places or the victim do not recover within 15 days, the RJFs are not allowed to mediate. But if a person is exposed to less serious abuse continuing over a period of time, it could leave mental injuries which makes it a more serious crime and then the RJF is not allowed to mediate either. In practice though, it seems to be difficult for the RJFs to handle these cases correctly. When we were discussing the subject of domestic violence in our interviews, none of them came to think about mentioning the mental integrity of a person.

6.3.7 The Agreements Resulting from Mediation

To the question on what the parties in mediation often agree on, the most common answers among the facilitators were that the parties promise to respect each other and not to repeat a certain action. If some kind of damage has been done, the agreement can be about repairing the damage and it can also be compensation for medicine or medical treatment. One of the RJFs did not think it was appropriate for the parties to give compensation in other than money, at least not if a crime has been committed and a person has been injured. If it is a conflict regarding property, the parties could agree on a quantity of rice or beans though. If a person is very poor, the agreement can also be symbolic; a real compensation does not have to be given. He added that of course, it is always up to the parties. The answers from the RJFs corresponded with the ones from the judges. One of the judges also mentioned that an agreement can be about one party doing a couple of days work for the other, if the party for

154 Manual del Facilitador Judicial Rural (FJR), Libro 4, p. 8
155 Ibid., p. 48 and 50
example doesn’t have money. It can also be compensation for recuperation, if one party because of an injury caused by the other cannot perform his duties.

The *Manual of the RJF* also prescribes that there has to be proportionality between the damage caused and the amount to be paid in reparation, and that the agreement must be possible to comply with. Thus, what are the limits on what the parties can agree on? Overall in our interviews, the RJFs did not make much comment on this issue. Most of them said that the will of the parties is most important and that they cannot interfere with their suggestions to a solution, probably having in mind the importance of impartiality. A couple of them even said that there are no limits, at least not in extrajudicial mediation. However, one of them told us that he has put an end to exorbitant interests. Another RJF said he has not denied an agreement made by the parties because of a suggested solution, but knows that other RJFs have. He adds that a party cannot ask too much from the other, for example in cases of compensation. The reason why the facilitators didn’t have much to say about this can be, as expressed by a judge: “*People in the country are simple, they do not suggest impossible things*”.

### 6.3.8 The Control of the Mediations

#### 6.3.8.1 The Conflict regarding the Requirement of a Previous Report

Since the regulation is ambiguous and the authorities cannot agree on a uniform position regarding the necessity of a police report to perform prior mediation, it is interesting to know how this is affecting the work of the facilitators in the field. The answer is that it is simply not possible for them to handle certain cases in the way they are supposed to be handled. One of the judges made a statement that can be used to illustrate the problem. He always invited the police and a prosecutor to the RJFs’ monthly meetings at the local courthouse, but admitted that he had to be careful choosing which prosecutor to invite since he did not want the RJFs to hear too many contradicting views regarding how their work should be performed. The people we met; judges and others involved in the RJF Program advocating that a report is not necessary, justified their opinions by saying that the law has to be applied in a rational way according to what is suitable and just and the Ministerio Público’s opinion is very formalistic. If the aim is to increase access to justice, demanding a report is a contradiction since the RJFs are working in remote communities where finding a prosecutor is even more difficult than
finding a judge. The Ministerio Público on the other hand is saying that they as a formal institution cannot make statements about cases that have not been made known to them, i.e. not reported; these cases have not entered the formal judicial system.

In practice, as a result of the differing opinions, the RJFs are taught through the Manual of the RJF and through most of the judges that they are allowed to perform prior mediation even if a report has not been made, but in a great deal of cases, the prosecutor refuses to revise the agreement since there has been no initial report. As a consequence, the agreement goes directly to the judge and the mediations get registered as extrajudicial. It should be noted that the conflict is not an obstacle in every municipality in the country, and not all RJFs are taught in the same way. One judge told us that in his municipality the prosecutor does approve agreements without previous reports. And one of the RJFs was of the firm opinion that a report has to be filed before prior mediation can be performed. Another RJF said that a report is not needed but after the parties have reached an agreement, it is usually taken to the prosecutor. This is obviously working since he said that he performed about 6 prior mediations a year, more than any other RJF we interviewed.156

6.3.8.2 The Control of Mediations concerning Misdemeanors

In our interviews, judges and RJFs as well as prosecutors, classified mediation on misdemeanors as extrajudicial, although it is clearly stated in Article 56 CPP that those cases are to be subject to prior mediation. This can also most likely be explained as a result of the Ministerio Público’s reluctance to revise the agreements concerning misdemeanors. Even if an exception from control in these cases does not seem to have been the intention of the legislator, these cases are in practice subject to extrajudicial mediation since the Ministerio Público does not agree. One judge explained this problem as a consequence from the recent changes in the CPP, which did not fully come into force regarding misdemeanors until 2004. Before this, there was no formal difference between misdemeanors and crimes sanctioned with lower penalties; they were treated in the same way.

156 This is just a conclusion drawn from the information gathered from all facilitators and the OAS statistics (Reporte de Facilitadores). We can only speculate on the reasons to the number of prior mediations performed in a certain community.
Thus, as long as there is no defined criminal policy, cases subject to mediation are treated differently in different municipalities, depending on the attitudes of the prosecutor and the local judge. In general though, and due to the conflicts, when there is no report and the prosecutor rejects the agreement, criminal cases get registered as extrajudicial mediation. This can be seen as an additional explanation to why there are so few prior mediations registered in the statistics. The former director of the Oficina Atención a Facilitadores supports this as an emergency solution, due to the fact that the system is not working, and the Oficina is trying to achieve that the actors on a local level; the judges, prosecutors and the police, come to an understanding. The correct thing, he says, would be for the Ministerio Público to make a statement, and like several judges, he points out the intention of the system, which is free access to justice. One of the judges claimed that as a consequence of the unclear directives it is often the judges who revise the legality of the content of the agreements, even though the law doesn’t provide for it.

6.4 Other Aspects

6.4.1 The Lack of Resources

It is not only the lack of premises or different interpretations of the regulations that can make it hard for the system to function the way it is supposed to. There is also a need of resources as in copies of relevant laws and other material that can make the monthly training given by the local judge more efficient. At one of the meetings we attended, the judge only had one copy of the teaching material that he read out loud to the RJFs while they took notes. Afterwards she said he would ask the Mayor for help, so the RJFs could get a copy each, and a non-governmental organization had offered to help with copies of the law. In other municipalities the RJFs can borrow the material from the judge, maybe for a couple of days each. This is obviously not a very efficient solution due to the long distances between the communities.

The long distances also constitute an obstacle in the communication between the RJF and the judge. It is expensive and time-consuming for the facilitators to have to get to the courthouse every time they have questions, for example regarding the law. One of the judges we interviewed said that he can sometimes communicate with the RJFs through a radio
transmitter, and is trying to get a transmitter to his office. The judges on the evaluation-seminar we attended also brought this up; a radio transmitter would make the work easier and improve the communication.

In the *Regulation of the RJF* it is said that the RJF should be responsible for the community he lives in, but in fact it is more a rule than an exception that the RJF is responsible for other communities as well. Among the ones we met, one is currently visiting as many as 11 communities. The Director of the Program at the OAS points at this problem, but also that the flexibility of the regulation is the very reason why the system is working out in practice. At the evaluation-seminar mentioned above, some of the RJFs emphasized the lack of time as one of the problems. The voluntary work they are doing as facilitators can be hard to combine with taking care of work and family, even without having to travel long distances to other communities. To give an example, one of the female RJFs we met covers two communities and usually dedicates three days a week to her tasks as a facilitator. In addition, she is a single mother of six children and earns her living as a coffee producer.

What also has to be kept in mind is that the Ministerio Público is quite a new institution. We were told by people responsible for the RJF Program that they do not have enough resources such as offices or communication equipment, and with their limited number of prosecutors they do not reach all the communities where the RJFs are working. At the evaluation-seminar we got the information that there is a lack of appointed prosecutors in as much as 25 percent of the municipalities with RJFs. One of the prosecutors we interviewed said that in his department, the prosecutors have a responsibility for two municipalities each. They have their office in one municipality and visit the other for maybe two days a week, attending to people in a room at the local police station.

6.4.2 The Rural Judicial Facilitator Program’s Impact on Society

The overall attitude towards the RJF Program is very positive, both in the interviews we have made and in evaluations we have taken part of. It seems that it has had a positive impact on many different levels. Almost everyone we have spoken to has been quick to point out the time and the money people save by having someone in their own community to turn to with their problems. In many cases, these problems wouldn’t have been dealt with at all, and small
conflicts escalated into violence. One RJF explained how people after making the long trip to the courthouse could find that the judge wasn’t there, or that a lot of people were waiting in line for him. In the end, they could lose several days of work.

The RJF Program also seems to have a preventive effect. The local police have reported a reduction of crime. A judge told us that there are examples when people have been killed in land conflicts. Now, he said, fewer people are armed. One RJF said that as a result of his work, he now only has to mediate in about five conflicts every month instead of twenty as before, and another one expressed that people now understand each other in a better way. The knowledge has improved in the communities as wholes concerning legal rights and obligations. Even if there is a lot to be said about mediating in cases of domestic violence in particular, the Program Officer at Sida says you cannot ignore the positive aspects that are coming from the fact that they are dealing with this issue in the communities. She has heard people saying that the level of domestic violence has decreased because of the fact that someone is watching them. The RJF is spreading a lot of information to women and children about their rights, opening their eyes, showing that it is not an accepted behavior and creating a kind of social pressure within the community. So in a way, even if it is not the best way, the fact that the RJFs are dealing with domestic violence means that the mentalities of people in the communities are changing. As one judge expressed it, a *legal culture* in general has been created.

Also, the relations between the citizens and the judges have improved. As we experienced ourselves, the judges travel out to the communities with the promoters from the OAS and together with the RJF they hold community meetings where they give information and answer questions. People have more confidence in the judges, and the judges have gained a better understanding of the realities and the culture of the people in the communities.

An interview we did with two citizens from a community with a RJF summarizes the above mentioned aspects pretty well. When they first got the RJF in their community they didn’t have much information about the RJF Program, but through experience they now really have confidence in the facilitator and know that he can solve problems. They also said that thanks

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157 Also supported in the evaluation by the Management Coaching & Consulting Group, 2006, p. 17
158 Management Coaching & Consulting Group, 2006, p. 18
159 Also supported in the evaluation by the Management Coaching & Consulting Group, 2006, p. 33
160 Management Coaching & Consulting Group, 2006, p. 19
to the facilitator, they are no longer afraid of the authorities. They find the RJF’s work really important since it takes time to go into town, to the judge. The judge is also very occupied and it will take a lot longer time to solve a problem that way. Before they had a RJF, people only went to the judge or to the police if it was a serious matter. Otherwise they didn’t do anything with their problems, which often made the situation even worse. Now, with the RJF in the community, people know more about the law and what actions constitute a crime. Their opinion was that this especially prevents young people from making mistakes. A young person can do something for the first time because he doesn’t know better, as one of them said, referring to a mediation he had been part in. A teenage boy had made some kind of damage to his property and the matter was solved through mediation. The boy admitted he had made a mistake, the man forgave him and they ended as friends. The citizen concluded with saying: the most important thing is reconciliation.

The judges we interviewed were very positive towards mediation as a method to solve conflicts, and didn’t view it merely as a substitute to a court process due to lack of resources. One of them said that with mediation, there are two winners instead of one winner and one looser. He also thought that in a country with a history so full of conflicts, learning how to solve problems through dialogue is important. A prosecutor said that in principle mediation is always to prefer over a court process; it both resolves the conflict and increases people’s understanding for each other and that violence only creates violence. However, he didn’t think mediation could be used in for example cases of murder or rape. The Director of the Program at the OAS agrees on this, seeing mediation as a way to clear the justice system from cases that are less relevant, cases that are better solved in the community instead of going through all the procedures in a court process.

6.4.3 Some Final Aspects Regarding the Facilitators

Of all the facilitators that have been appointed, 15 percent have resigned, 21 percent have been dismissed, and 64 percent are still active.161 One of the judges had on two occasions dismissed a RJF: one because he was involved in a conflict and lacked the people’s confidence and the other because he never turned up for the meetings. A third RJF in his municipality resigned on the recommendation of the judge, since he didn’t fulfill his

161 Reporte de Facilitadores, 2006-11-10
functions. One of our informants pointed out that the fact that some of them have resigned or been dismissed can be a good thing; it means that someone is watching them. There is a certain social control of the RJFs and their conduct, since they have been elected by the community itself.\textsuperscript{162} A person from the OAS also told us that many RJFs emigrate because of poverty.

One of the aims of the RJF Program is to achieve broad participation of both men and women. The female facilitators serve as important role models for many women, but the majority of the municipalities do not have any female RJFs. In a study from 2004, it was estimated that 30 percent of the RJFs would be women by 2006.\textsuperscript{163} In November 2006 this number was 18 percent.\textsuperscript{164} A person at the OAS explained that it is difficult to get women chosen because of the culture in the countryside. In communities where there has not been much work with gender issues, the woman herself rejects the role, saying it is a position for a man. In other communities where there has been quite a lot of work by different organizations to create awareness of gender equality they have not experienced any problems.

Most of the RJFs are handling their work really well. One of them clearly expressed that he sees his role as a RJF like offering a service rather than performing work. One concern though is if it is possible to continue with and expand the program without giving the RJFs some kind of compensation or appreciation for all the effort and time they are putting in this. As one of our informants said: “\textit{It is a contradiction because the Court [i.e. the judiciary] has failed to have a system that goes down to the last citizen in the country, and then the poor are the ones who have to pay the bill and work for free}”.

\textsuperscript{162} Management Coaching & Consulting Group, 2006, p. 18
\textsuperscript{163} Quintanilla, 2004, p. 3
\textsuperscript{164} Reporte de Facilitadores, 2006-11-10
7 The Rural Judicial Facilitators Program and Restorative Justice

Despite the absence of specific reference to restorative justice as a concept in the material we have collected in Nicaragua and among the people we have spoken to at the OAS and in the judiciary, the underlying philosophy of both the application of the principle of opportunity in Nicaragua and the RJF Program incorporate key features of restorative justice. The Commentary to the CPP is referring to a new way of administering justice, allowing a humanization and a democratization of the penal process and promoting the participation of all actors in a conflict.\textsuperscript{165} The agreement resulting from mediation is called a reparatory agreement and as mentioned, Aguilar describes the purposes of mediation as reintegrating the offender into society and respecting the dignity of the victim.

A question to be answered is if the RJF Program in Nicaragua can be seen as an exemplary model of restorative justice according to the UN \textit{Basic Principles on the use of Restorative Justice Programmes in Criminal Matters}.

First of all, the Resolution encourages member states to establish guidelines and standards on the use of restorative justice programs, with legislative authority when necessary. In Nicaragua, it is stated in law that the Supreme Court is handling the administration of the RJF Program and the law also provides the conditions for referral of cases to prior mediation. Additionally, the \textit{Regulation of the RJF} and the \textit{Manual of the RJF} are more or less covering almost every important aspect emphasized in the Resolution, but as we have seen, it is quite a different thing to get it to work also in reality. The lack of clear directions and set policies for the interpretation of the rules leads to a lack of conformity in the application. One thing that needs to be regulated in a more detailed manner, as also pointed out by the authorities, is the prominent role of the local judges that take part in the program. The few existing guidelines regarding their involvement today may give the impression that the work they are doing with the RJF is additional to their other duties rather than within them, as intended. This is a contributory factor to the varying quality of training and support the RJFs are getting in different municipalities.

\textsuperscript{165} Aguilar García, p. 130f.
There is no doubt that the RJF Program satisfies the criteria in the Resolution’s article 19 about the facilitator’s understanding of local cultures and communities. Even if many communities are attended by facilitators from other communities, they are always locals of the municipality and live under the same conditions as the people they help. It is quite a relevant factor in many ways for the functioning of the program that the facilitator is elected from within the community, and not a legal professional coming from the outside.

The right to information before the parties agree to participate in mediation may not be specifically emphasized in the RJF Program, but due to the amount of information given to the people in the communities both before and after they choose their RJF and the ongoing information they receive through visits from the local judge and the OAS, the facilitator is not an anonymous figure among the people becoming parties of mediation. It is generally known who the RJF is and what he is there for. Regarding the right to consult with legal counsel, another thing not emphasized within the program, our interviews show that some of the parties have lawyers present during the mediation, so at least it is not prohibited. But, as with so many other rights existing in theory, a lot is up to the parties themselves and the question is if they make use of this possibility or choose not to, due to the lack of lawyers in the rural areas and the distance to the municipalities where they can get in contact with one.

If the RJF Program is to follow the recommendations in the Resolution, mediation should only be used where there is sufficient evidence to charge the offender. What is considered sufficient evidence varies between different criminal justice systems, but a confession from the person said to have committed the illegal act is rarely sufficient. This supports the Ministerio Público’s opinion of a previous report, so that they, after an investigation, can decide if a case can be referred to mediation. But since the Supreme Court is of the opinion that in these specific situations, the consent of the parties is enough, the program does not follow the recommendations in the Resolution on this point. However, article 16 in the CPP clearly regulates that the fact that someone participates in mediation, and even admission of guilt, is not accepted as evidence in a legal proceeding that may follow, which corresponds to article 8 in the Resolution. How this rule is followed in practice, however, is something that we cannot answer.

As to not violate the right to a fair hearing before a judge, or to deprive the parties from the right to equal protection under the law, the free and voluntary consent to participate in a
restorative process is emphasized in the Resolution. This is also one of the most important cornerstones of mediation in Nicaragua. No one is to be pressured to participate and the parties may withdraw from the mediation at any time. Even if participation in some cases may simply result from a wish to avoid further judicial consequences, it is still an option. However, sometimes people might think that the RJF is a substitute for the judge. At one occasion we attended a meeting of the kind where the local judge visits one of his communities that has a RJF, to give information to the citizens and be available for questions. He encouraged the people to always go to the RJF with their problems and try to see if he can help them before they turn to other authorities, like the judge himself. Perhaps this encouragement could give the impression that people are not allowed to turn directly to the judicial authorities, when it should be merely a recommendation. And when there is a requirement to consider mediation before a court process, as in cases of misdemeanors, there is a risk that the parties feel pressured to participate, and the right to have the case tried in court could be if not denied then at least delayed. However, we have not during our study come across anything to make us question that the victims’ or the offenders’ decisions not to take part in the mediation procedure are respected.

The choice to participate must also be made in the context of other alternatives. As explained, the people in the Nicaraguan communities have very limited resources and must travel a long way to get to the local courthouse or a prosecutor’s office. Because of this, and when mediation is made more available than access to courts, the option is limited or even merely fictional to these people.

Regarding the confidentiality of what is discussed during the mediations, the RJFs seem to be aware of this rule and gave us affirmative answers to the question if the mediations are confidential. But some of them may not fully realize that practical circumstances, such as people overhearing what is said, affect the possibility to maintain this rule. The connection between the use of local premises and mediation performed in privacy can be seen as an indication of how important it is with such suitable premises available in the communities.

The risk for impartiality is to be avoided first and foremost through the regulation prescribing that the RJFs cannot mediate in cases where a party is related to them in a certain way. In general, as explained earlier, this part of the article that is quite simple to follow seems to be applied. But the regulation also covers other situations where there might be a conflict of
interest, which is frequently used in many regulations to prevent bias among decision-makers, and is there as a reminder of that they do not only have to be impartial. They must also be seen to be impartial. We are doubtful on whether some of the facilitators fully understand the significance of this part of the rule. On the other hand, the purpose of having a RJF in the communities would probably not be maintained if the regulation on this area would be as comprehensive as it is for say a judge. It also has to be kept in mind that the RJF is not a decision-maker; his role is only to be like an observer. Therefore, the situation is not really comparable to that of a judge and it is not necessarily wrong that it is to some extent up to the RJF himself to decide where to set the limit.

Another question is whether or not power imbalances between the parties are taken into consideration. On a higher theoretical level it is said that the mediator should be attentive to and deal with this issue. However, the matter is not discussed in the manual used in the training of the facilitators, and in general the people we interviewed didn’t seem to view this issue as something problematic. The question is if this is due to a lack of awareness, or if it is simply because the facilitators haven’t experienced any difficulties in dealing with it. What appears to be emphasized first and foremost is the will of the parties and the role of the mediator as an impartial observer. To try and balance the power relationship between the parties and at the same time take the role as an independent and impartial mediator may at times be hard to combine. Since the latter obligation is emphasized in the rules and regulations, the RJF might in general be more attentive to this part.

Furthermore, it should be noticed that article 9 in the Resolution not only speaks of awareness of power imbalances during the mediation, but also in the very referral of a case to a restorative process. If a report is not made previous to mediation and the decision to mediate is completely up to the parties and the RJF, the Ministerio Público never has the opportunity to make a decision on whether or not to refer a case to mediation, also ruling out the possibility to take power imbalances between the parties into consideration in such a decision. However, it can be questioned why article 9 mentions this to be taken into consideration in the referral but not in the outcome. If all power imbalances were to put mediation out of the question, then mediation wouldn’t ever be an option, since no two parties are in a completely

166 See chapter 4
equal position. The main issue should be to avoid that existing power imbalances are reflected in the agreements.

It is also necessary to evaluate whether mediation is a feasible and constructive option in each and every case, due to other circumstances than power imbalances between the parties. When prior mediation is conducted without the knowledge of the criminal justice authorities, the prosecutors, once more, do not get the opportunity to consider whether mediation is suitable. Some might argue that this is not a problem since the RJFs consult with the judges when in doubt and refer cases to the authorities in difficult cases. But this is scarcely done in all cases and it can be questioned whether it is sufficient according to the recommendations in the Resolution.

To prevent the mediation from resulting in obligations that are rejected by law as degrading or cruel, the Resolution states that obligations should be reasonable and proportionate, and that agreements should be judicially supervised. Although people on a higher level of the judiciary speak of a constitutional limit to the agreements, and the Manual of the RJF refers to proportionality of the outcomes, the question is what awareness the facilitators have of the meaning of this in a specific situation. We have not encountered any concrete examples given in the Manual, nor have we gotten much response when asking this question. In practice, this doesn’t seem to have manifested itself as a problematic issue, perhaps because the constitutional limit in reality largely coincides with what is considered common sense. Thus, it is mainly a problem on a theoretical and hypothetical level.

The Resolution’s call for judicial supervision of the agreements reached through a restorative process is corresponded in article 57 CPP, which also follows the recommendation that an approved outcome should preclude prosecution. But as we have described, the conflict regarding the Ministerio Público’s involvement prevents many of the agreements from being submitted for approval. On this point, the wording of article 15 in the Resolution, merely saying that prosecution is to be precluded, cannot necessarily be interpreted as to say it is a requirement for the Ministerio Público to be familiar with the case before mediation is performed. But according to article 57 in the CPP, the prosecution is either to be suspended, terminated or resumed167 after an agreement has been reached through mediation, which

167 The exact wording is suspensión de la persecución penal, extinguirá la acción penal and reanudará la persecución penal. See appendix III
seems to presuppose that a prosecution process has already begun, thus supporting the Ministerio Público’s argumentation.

In general, there is a need of clarifications on when the RJF has competence to perform prior mediation. Also on a higher level, between judges and prosecutors, this does not seem entirely simple to determine, such as the distinction between serious crimes and less serious crimes, and the subject of domestic violence. It can hardly be expected of the facilitators to be familiar with the minimum and maximum sentences of each and every crime. In practice this problem is handled through the support and guidance that the RJF receives from the judge. It is also something that the prosecutors should control while revising the agreements. In some cases though, where there is a lack of such control, it can lead to the RJFs mediating in cases outside their authority.
8 Concluding Discussion

After studying the relevant articles in the CPP and the Commentary, we draw the conclusion that the intention of the legislator was to give the Ministerio Público the exclusive authority to refer cases to prior mediation. Their involvement is also necessary if the Nicaraguan criminal justice system, with mediation performed by rural judicial facilitators, is to comply with fundamental principles concerning due process and victims’ rights, as expressed in the UN Resolution. Besides the arguments previously presented, one important reason for involvement is to make sure that evidence is gathered and documented. One possible scenario is this: The victim of an assault agrees to mediate without reporting the crime to the authorities. It turns out that the victim and the offender are unable to reach an agreement. The visible injuries on the victim may at that time have healed. If the victim wants to bring a legal action against the offender, who then protests his innocence, a prosecutor may not have enough evidence to prosecute, or the case may for the same reason not hold up in court. With the risk of us being too conspiratorial, the offender could even calculate on this and agree to participate in mediation but after a while withdraw the consent, knowing that the fact that he confessed the assault prior to mediation cannot be used as evidence in a following court proceeding.

Why then has the Ministerio Público’s involvement become subject to so much disagreement? A possible explanation could be the following. The principle of opportunity in Nicaragua was introduced to first and foremost take care of the backlog in the courts and one way was to let smaller routine cases be subject to mediation performed by lawyers, authorized notaries and public defenders. The OAS already had a program with rural facilitators mediating in criminal cases in parts of the country and this program had proved to be very successful. Thus, to demonstrate how meaningful the RJFs are to the justice system, they were given the same legal status as the other mediators. But did the legislator realize that the main issue the RJFs are dealing with is access to justice for people in remote areas, and that this could add a problematic dimension to the application of the rules on prior mediation? The mediation performed by RJFs cannot necessarily be compared with the mediation performed by lawyers and other jurists. However, the RJF was included in the same article and consequently the same rules are applicable. One might think that the legislator should have predicted that it could be hard to combine these rules with the fact that it is difficult enough for the RJF to get
to the judge and report every month. Access to justice is not much improved if mediations are to be performed only by referral from the Ministerio Público, as the participants then by definition already have found their way to the authorities.

This leaves us with a dilemma. Is it inevitable to give up important principles of legality and due process to achieve access to justice, or the other way around: decrease access to justice to uphold important principles?

It may be an illusion that the principles and procedural guarantees of a legal order can all be upheld at the same time, without one of them ever being at the expense of another. They have to be weighed against each other in each specific situation. An example given to us by a local judge can serve to illustrate this: A person has traveled from his community to the court to attend a hearing, but the judge decides not to proceed with the hearing due to some procedural obstacle. In doing this you could say that he is upholding the law. On the other hand, you may also say that he is violating the principle of justice being free of charge, since postponing the hearing to another day would in practice result in costs that a Nicaraguan farmer might not afford.

One principle that has crystallized itself as central to the Nicaraguan criminal justice system is the principle of proportionality in article 5 of the CPP. From our discussions with people within the judiciary we understood that this principle can be interpreted as having three levels. First, that the punishment should be proportionate to the crime committed, which is the traditional meaning of the principle. Second, that the compensation to the victim should be proportionate to the damage caused, having the outcomes from mediation in mind. And third, that the measures taken by the authorities to investigate, prosecute and sentence crimes should be proportionate to the seriousness of the crime. This third and last dimension of the principle has also been discussed in for example the United Kingdom as a way to redefine access to justice as the availability of “effective solutions that are proportionate to the issues at stake”.

168 Department for Constitutional Affairs, Modernising Justice - the Government's plans for reforming Legal Services and the Courts, 1998, chapter 1.10. The report is discussing the justice system and its lack of access due to economical factors, and this new definition is used as a motive for introducing alternative methods to litigation in civil cases. However, the former Lord Chancellor, presenting the report, has on another occasion also presented this as a suitable approach when responding to minor criminal cases.
http://www.cedr.co.uk/index.php?location=/library/articles/lord_irvine.htm
Is it then justifiable to violate such a fundamental principle as the principle of legality to apply the principle of proportionality in this way, as deciding what actions are to be taken against a crime, or to disregard some procedural safeguard in favor of another important principle? Aguilar García is referring to a flexibility of the legality principle, and in relation to the RJF Program it can be argued that the principle is present and applied due to the fact that the limit of cases that can be subject to mediation are defined by law. Having the lack of access to the justice system in mind, our conclusion is that the principle of proportionality is in some cases more important than upholding the principle of legality, or other principles, at any cost.

One could question the purposes of the RJF program and say that it benefits the justice system more than the parties, easing the pressure on the courts and hoping for minor cases to be solved locally. A consequence of this could be that mediation is viewed as a second-class justice, in the lack of “real” justice that the state has failed to provide. So why create this kind of alternative solution instead of strengthening the courts’ ability to deal with all cases? An answer could be that it is wrong to assume that all social order must be imposed by some kind of “authority”. In this case restorative justice can be seen as an attempt to transform the traditional criminal law model by applying certain principles of civil law to the handling of crime. Instead of the state imposing a sanction, individual citizens are provided with a greater possibility to cope with their problems. If one makes the above interpretation of the principle of proportionality, it can be argued that the principle of subsidiarity is not only viable within civil law, but can also be applied to criminal law. In that case, every criminal law should introduce alternative, and restorative, measures and/or sanctions, with punishment (fines or imprisonment) imposed only as a last resort.169

A major question is if restorative justice is to be considered as an act of decriminalization, when it treats an offence merely as a conflict. Is there not a dimension of justice beyond that of the victim being compensated for damages? Dealing with crimes publicly in the courtroom and delivering sentences is a way of creating common values and predictability. Crime can be seen as a public wrong, in the sense that it is a violation of these fundamental societal values. Hence, restorative justice as a theory can be criticized for forgetting that the public also has a legitimate interest in the way the crime is defined and handled. Since crimes are the most

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169 See Löschning-Gspandl, “Corporations, crime and restorative justice” in Kerner and Weitekamp, p. 146
serious violations of other people’s, or the community’s, interests, one could question if a response by means of civil law is sufficient.

One of the benefits of restorative justice approaches is that they bring into focus the direct victim of the crime, whose interest in the way the wrong is defined and dealt with is not the main focus of the criminal justice system. Even if the RJF Program does not directly benefit the community by making the offender do some kind of community service (if of course this is not the agreement of the parties), the communities are benefited as a whole if the people involved in a conflict, that may have resulted in a crime, make peace. To create a peaceful relationship between the victim and the offender is much more important in a small isolated community than it is in an urban society. The benefits of prosecuting the offender and solving the case through a public hearing in court, in terms of influencing the citizens and creating common norms and values, may not be as relevant in the context of rural Nicaragua. The people to be affected are living quite isolated with little or no contact with the judicial authorities and would not be much affected by the public ventilation. Dealing with the situation on a local level, with a trained facilitator connected to the judiciary, may benefit the community to an even larger extent, creating awareness of what is wrong and a culture of peace from the grassroots level rather than from above. Especially concerning women’s rights and the awareness spreading in the communities on this subject, it can be said that the RJF Program is a way to empower women instead of decriminalizing domestic violence.

To legitimize a justice system, demands for consistency, impartiality and a respect for other fundamental rule of law principles, as the right to a defense, right to a proportionate sanction and the right to appeal, are crucial. Since restorative justice is a different way of defining justice, which involves different values, it does not meet all these needs. Is it really fair to compare restorative justice programs with principles that its advocates opposes to and do not see as important? Most of these principles were created with the adversarial model in mind. Take the right to legal counsel for example. Of course the offender, and the victim, has the right to get information about what happens in and what are the consequences of either procedure, so they can make an active choice between a court process and mediation. However, the purpose in a mediation process is not to put the offender in a defensive role where he tries to minimize his responsibility to avoid sanctions imposed on him. The priorities are completely different. Let’s take another example. The outcome of one mediation process may not be consistent with the outcome of a similar case subject to mediation. But
inconsistencies between outcomes are not a problem, as long as the parties have agreed on the appropriate outcome. After all, consistency is a construct that serves abstract notions of justice and does not necessarily reflect the wishes of the parties. The legitimacy of a restorative justice program must instead derive from the specific values it seeks to uphold, which are inclusion of key parties, increased understanding of the offence, respect etc. In these processes, as in mediation by rural judicial facilitators in Nicaragua, all needs and wishes are taken into consideration. What is strived for is uniformity or consistency in the approach instead of the outcomes.  

This is a reasonable way of describing a restorative justice view in relation to the more commonly used criminal justice approach, and it also captures a bit of the core in the RJF Program; focusing more on regulating the procedure than deciding on uniform and appropriate outcomes. The problem in the RJF Program is that, due to the conflicts between the different actors, different approaches are applied throughout the country. This might work in the short term, but is difficult to defend on a permanent basis. As it is now, there is a risk that the indistinct procedures and definitions lead to arbitrariness within the program. We are not the ones to judge how this is to be solved; what is required is cooperation and a common policy within the judiciary.

Moreover, all general issues and concerns on restorative justice may not be relevant in the case of Nicaragua. Special needs and realities are facing the justice system in a developing country where poverty and access to justice are great problems. The original purpose of the RJF Program was to clear the system from cases with little public importance and to increase access to justice rather than to apply a different approach on justice. Nonetheless, some of the restorative justice-values are evident, when seeing what kind of effects the program has. We are positive towards the RJF Program, and believe that similar approaches can help developing countries in their strive for access to justice. When trying to improve a deficient criminal justice system, one cannot simply discard the existing system and make restorative processes the ideal replacement. In Nicaragua a sort of middle ground has been taken; the RJF Program is also used to strengthen the original justice system. One thing that could be even more constructive is to integrate restorative values into the regular justice system; for example introducing alternative sanctions to prison like community service.

Although much remains to be sorted out and there is much room for improvement, procedural guarantees do exist within the RJF Program. Most importantly, a consistent application of those is still to come, before the program can be seen as an exemplary model of restorative justice. What is fundamental is that the institutions responsible are aware of the problems, and they are currently trying to agree on a solution. All actors that we have met involved in the program agree on one thing; that the overall achievements are very positive, and to quote a local judge: *access to justice has become a reality*. Naturally it takes time to create a watertight system, especially when there are limited resources. It might be better to have a system with some flaws than no system at all. As it is now, the Rural Judicial Facilitators Program is not merely representing a different concept of justice, but filling a void where there in many cases would be no justice at all.
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Appendix I

Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN)

Preamble
Recalling that there has been, worldwide, a significant growth of restorative justice initiatives,
Recognizing that those initiatives often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people,
Emphasizing that restorative justice is 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,
Stressing that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs,
Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime,
Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into account legal, social and cultural circumstances,
Recognizing that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders,

I. Use of terms
1. “Restorative justice programme” means any programme that uses restorative processes and seeks to achieve restorative outcomes.
2. “Restorative process” means 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.
3. “Restorative outcome” means 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.
4. “Parties” means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.
5. “Facilitator” means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.
II. Use of restorative justice programmes

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.

10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.

III. Operation of restorative justice programmes

12. Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in the present instrument and should address, inter alia:

(a) The conditions for the referral of cases to restorative justice programmes;

(b) The handling of cases following a restorative process;

(c) The qualifications, training and assessment of facilitators;

(d) The administration of restorative justice programmes;

(e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:

(a) Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;

(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;

(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.

14. Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.

15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome
should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.

17. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In that capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.

19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

**IV. Continuing development of restorative justice programmes**

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

**V. Saving clause**

23. Nothing in these basic principles shall affect any rights of an offender or a victim which are established in national law or applicable international law.
Appendix II

Interview Guide to Rural Judicial Facilitators

1. Name
2. Age
3. Municipality and community
4. How many people live in your community?
5. For how long have you been a facilitator?
6. Do you function as a facilitator outside your community?
7. How long is the distance to the nearest RJF? How much time does it take to get there?
8. Since you don’t make any money being a facilitator, how do you make a living?
9. Are you involved in other projects in your community?
10. Approximately, how much time in a week do you spend functioning as a RJF?
11. Do you feel you have enough time?
12. How were you elected as a facilitator? Were there any other candidates?
13. Before the RJF Program, what did people do with their problems? Was there a person with functions similar to the ones of the RJF?
14. In the beginning, what did people think about this way of solving conflicts? What did they think about your role as a RJF?
15. And now? Have the attitudes changed?
16. For how long were you educated before you became a RJF? What did you learn then?
17. How often do you get education now, and from whom?
18. What do you think about the education that you have recieved? Is it sufficient to do your work?
19. What sort of issues do you deal with as a RJF? What issues are solved through extrajudicial mediation and what issues are solved through prior mediation?
20. How many of the mediations that you perform are extrajudicial and how many are prior?
21. How and where is the mediation done?
22. Can other persons be present than the parties? Who?


24. Does it ever happen that the parties are unable to reach an agreement? How often does it happen?

25. In what type of cases is it the most difficult to get the parties to agree?

26. What the people say during the mediations – is it confidential? Can other people hear what the parties say during the mediation? Is there a difference between extrajudicial and prior?

27. If someone else wants to see the agreement – can they? Is there a difference between extrajudicial and prior?

28. In general -concerning how the mediation is done, is there any difference between prior and extrajudicial?

29. Is it necessary that the matter is reported before you do a prior mediation?

30. Do you tell the partes to take the act of prior mediation to the Ministerio Público? Do you know if they do it?

31. In what type of situations are you not allowed to mediate?

32. There can be different opinions on what violence is in different countries, different cultures, even among different people. If someone hits another person – is that violence? Is there a difference between violence in general and domestic violence? According to the law? In practice? Attitudes among people?

33. Are there situations when it is difficult to know if it is a situation in which you can mediate, or if it is not? What do you do then?

34. Can you give examples of what the parties agree upon? Can it be compensation with money? Other type of agreements? Can it simply be that a person has to stop doing something? Difference prior/extrajudicial?

35. Can the parties agree on anything? Are there any limits (rules) to what they can agree on? Has it ever happened that you have had to say that this agreement is not valid?

36. Do you in any way try to influence the parties to have in mind that one of them is very poor? For example if a party has to pay compensation, do you have in mind his poverty when deciding the extent of the compensation?

37. Does it ever happen that the parties have a different interpretation of what they have agreed upon?

38. Does it ever happen that one of the parties changes their minds after they have come to an agreement?
39. Do you have a responsibility to make sure that the parties follow the agreement?

40. During the mediation, do you explain to the parties what the law says about their problem?

41. If so – why? So they know what happens if they go to the police/judge, or so that their solution should be in accordance with the law?

42. Is it difficult to get both parties to express their will? For example if someone tries to put pressure on the other, and that person is afraid to say what he or she really thinks.

43. Do you normally know the parties well?

44. Do you mediate in cases when one of the parties is a relative/family? What is the limit according to the rules you have to follow? Or is it up to you? What about friends?

45. How is your relationship with the local judge? Does he help you? How?

46. How often do you see him?

47. How much contact do you have with other RJFs? Is there any cooperation? Do you share experiences? Would you like to have more contact?

48. All the laws, CPP, CP, laws about property and others, can they be in conflict with what you or the parties think is just? If so, what is more important: to follow the rules, or to do what is just? Can you give examples of this?

49. Do you think some of the laws are not adjusted to people living on the countryside?

50. Do you think the law is something simple, or something difficult to understand and interpret?

51. Is there anything about the system of RJF that could be improved?

52. If you have any suggestions and opinions regarding the system of RJF, do you feel that you can express these opinions and that you get listened to? (To the OAS or to the judge for example).
Interview Guide to Local Judges

1. Name
2. Age
3. Municipality
4. For how long have you been a judge?
5. How many communities are there in the municipality?
6. How many people live in the municipality?
7. How long has the RJF Program been working in your municipality?
8. How many RJFs are there in your municipality? Women/men?
9. How is your relationship with the RJFs?
10. How often do you meet the RJFs? What are the meetings about (information, education)? Do you meet them one by one or together?
11. Do you believe that the RJFs receive sufficient education? Do you think the education is suitable?
12. What are the differences between prior and extrajudicial mediation? Can criminal cases be solved through extrajudicial mediation? What about misdemeanors?
13. Is it true that the Ministerio Público does not revise the agreements of prior mediation when they are about misdemeanors? In that case, what happens to those agreements?
14. Is it always necessary that one of the parties has made a report for prior mediation to take place? A report to you, the prosecutor or to the police? According to which rule? Is it followed?
15. Are the documents confidential? Can we see the Libro de Mediacíon?
16. There are rules in the Manual of the RJF about privacy and confidentiality of the mediations. Are they strictly followed or is it just an ambition?
17. Are there situations when the RJF turns to you when he/she finds it difficult to know if it is a situation in which he/she can mediate, or if it is not? Do you sometimes find it difficult to do this estimation?
18. Is there a difference between violence in general and domestic violence? Is it the same punishment if someone hits someone on the street as if someone hits his wife? In practice? Attitudes among people?
19. Can you give examples of what the parties agree upon? Can it be compensation with money? Other type of agreements? Can it simply be that a person has to stop doing something?

20. Can the parties agree on anything? Are there any limits (rules) to what they can agree on?

21. Do you sometimes think the laws are not adjusted to people who live on the countryside? Can they be in conflict with what the RJF or the parties think is just or/and best for the community? If so, what is more important, the rules or justice?

22. Does it happen that the parties have a different interpretation of what they have agreed upon? How is that solved?

23. Does it happen that one of the parties changes their minds after they have come to an agreement? Do they sometimes turn to you as a judge wanting the situation to be solved through a judicial process? In that case – does the agreement resulting from the mediation have any importance in the judicial process? Even if not - would that affect your judgement?

24. How can the facilitator combine his role as an objective observer (not intervening with the will of the parties), with making sure the agreement is just for both parties?

25. What happens in a situation where the RJF cannot mediate because he/she stands to close to the parties? Does the RJF know the exact limit? Is it a question of the RJFs own judgement?

26. What happens if a facilitator misuses his position or neglects his duties? Has it ever happened?

27. Are some people reluctant to the mediation process?

28. Before the RJF Program, what did people do with their problems? Was there a person with functions similar to the ones of the RJF?

29. Since the RJF Program started – have you seen a reduction in cases at the local court?

30. Does the program take up a lot of your time?

31. Mediation versus judicial process – without considering improved factors like access, time- and moneysaving – is mediation always to prefer?

32. Is there anything about the system of RJFs that could be improved? What are the problems? Do you have any suggestions or general opinions?
Appenidix III

A Selection of Relevant Articles in the Nicaraguan Code of Criminal Procedure

CÓDIGO PROCESAL PENAL DE LA REPÚBLICA DE NICARAGUA
LEY No. 406, Aprobada el 13 de Noviembre del 2001
Publicada en La Gaceta No. 243 y 244 del 21 y 24 de Diciembre del 2001

TÍTULO PRELIMINAR
PRINCIPIOS Y GARANTÍAS PROCESALES

Artículo 1.- Principio de legalidad. Nadie podrá ser condenado a una pena o sometido a una medida de seguridad, sino mediante una sentencia firme, dictada por un tribunal competente en un proceso conforme a los derechos y garantías consagrados en la Constitución Política, a las disposiciones de este Código y a los tratados, convenios y acuerdos internacionales suscritos y ratificados por la República.

Artículo 5.- Principio de proporcionalidad. Las potestades que este Código otorga a la Policía Nacional, al Ministerio Público o a los Jueces de la República serán ejercidas racionalmente y dentro de los límites de la más estricta proporcionalidad, para lo cual se atenderá a la necesidad e idoneidad de su ejercicio y a los derechos individuales que puedan resultar afectados.
El control de proporcionalidad de los actos de la Policía Nacional y del Ministerio Público será ejercido por el Juez, y los de éste por el tribunal de apelaciones a través de los recursos. Los actos de investigación que quebranten el principio de proporcionalidad serán nulos, sin perjuicio de la responsabilidad penal en que pueda haber incurrido el funcionario público que los haya ordenado o ejecutado.
Las disposiciones de este Código que autorizan la restricción o privacidad de la libertad tienen carácter cautelar y excepcional. Sólo podrán ser interpretadas restrictivamente y su aplicación deberá ser proporcional a la pena o medida de seguridad que pueda llegar a ser impuesta.

Artículo 7.- Finalidad del proceso penal. El proceso penal tiene como finalidad solucionar los conflictos de naturaleza penal y restablecer la paz jurídica y la convivencia social armónica, mediante el esclarecimiento de los hechos y la determinación de la responsabilidad de los acusados, la aplicación de las penas y medidas de seguridad que en justicia procedan, y de otras soluciones basadas en la disposición de la acción penal, la mediación y acuerdos entre las partes en los casos autorizados por este Código.

Artículo 14.- Principio de oportunidad. En los casos previstos en el presente Código, el Ministerio Público podrá ofrecer al acusado medidas alternativas a la persecución penal o limitarla a alguna o algunas infracciones o personas que participaron en el hecho punible. Para la efectividad del acuerdo que se adopte se requerirá la aprobación del juez competente.

Artículo 16.- Licitud de la prueba. La prueba sólo tendrá valor si ha sido obtenida por un medio lícito e incorporada al proceso conforme a las disposiciones de este Código. Ninguno de los actos que hayan tenido lugar con ocasión del ejercicio del principio de oportunidad entre el Ministerio Público y las partes, incluyendo el reconocimiento de culpabilidad, será
admisible como prueba durante el Juicio si no se obtiene acuerdo o es rechazado por el juez competente.

LIBRO PRIMERO
DISPOSICIONES GENERALES

TÍTULO II
DE LAS ACCIONES PROCESALES

Capítulo II
De las Condiciones Legales del Ejercicio del Principio de Oportunidad

Artículo 55.- Manifestaciones. Son manifestaciones del principio de oportunidad las siguientes:
1. La mediación;
2. La prescindencia de la acción;
3. El acuerdo, y,
4. La suspensión condicional de la persecución

No se aplicará el principio de oportunidad cuando se trate de delitos contra el Estado o cometidos con ocasión del ejercicio de sus funciones por funcionarios nombrados por el Presidente de la República o la Asamblea Nacional o por los que hayan sido electos popularmente o sean funcionarios de confianza.

En todo caso, la aplicación del principio de oportunidad dejará a salvo el derecho al ejercicio de la acción civil en sede penal o civil ordinaria.

Artículo 56.- Mediación. La mediación procederá en:
1. Las faltas;
2. Los delitos imprudentes o culposos;
3. Los delitos patrimoniales cometidos entre particulares sin mediar violencia o intimidación, y,
4. Los delitos sancionados con penas menos graves.

Artículo 57.- Mediación previa. En los casos en que la mediación proceda, de previo a la presentación de la acusación o querella, la víctima o el imputado podrán acudir en procura de un acuerdo total o parcial ante un abogado o notario debidamente autorizado, o ante la Defensoría Pública o un facilitador de justicia en zonas rurales, acreditado por la Corte Suprema de Justicia para mediar.

La Corte Suprema de Justicia organizará el funcionamiento de los facilitadores de justicia en zonas rurales.

De lograrse acuerdo total, se deberá hacer constar en un acta que las partes someterán a la consideración del Ministerio Público, el que dentro del plazo de cinco días deberá pronunciarse sobre su procedencia y validez. Si transcurrido este plazo no ha recaído pronunciamiento del Ministerio Público, se tendrá por aprobado el acuerdo reparatorio.

Cuando en criterio del Ministerio Público el acuerdo sea procedente y válido, el fiscal o cualquier interesado si éste no se ha pronunciado, lo presentará al juez competente solicitándole ordenar su inscripción en el Libro de Mediación del juzgado, y con ello la suspensión de la persecución penal en contra del imputado por el plazo requerido para el cumplimiento del acuerdo reparatorio, durante el cual no correrá la prescripción de la acción penal.
Si el imputado cumple con sus compromisos contraídos en el acuerdo reparatorio se extinguirá la acción penal y el juez a solicitud de parte dictará auto motivado, declarándolo así. En caso contrario, a instancia de parte el Ministerio Público reanudará la persecución penal. Si se lograra acuerdo parcial, al igual que en el caso anterior, el acta se anotará en el Libro de Mediación del juzgado y la acusación versará únicamente sobre los hechos en los que no hubo avenimiento.

LIBRO SEGUNDO
DE LOS PROCEDIMIENTOS

TÍTULO III
DEL JUICIO POR FALTAS

Artículo 327.- Audiencia Inicial y mediación. Admitida la acusación, el juez citará a las partes a la Audiencia Inicial. En el momento de recibir la acusación, el juez interrogará a las partes sobre la previa celebración de trámite de mediación y lo promoverá, si procede, en la forma prevista en el presente Código.

LIBRO CUARTO

TÍTULO III
DISPOSICIONES TRANSITORIAS Y FINALES

Capítulo II
Disposiciones finales

Capítulo V (bis)
De los Facilitadores Judiciales Rurales

"Facilitadores Judiciales Rurales
Arto. 200 (bis). Los Facilitadores Judiciales Rurales constituyen un cuerpo al servicio de la Administración de Justicia. La Corte Suprema de Justicia mediante acuerdo regulará su organización, funciones, calidades, requisitos y sistema de ingreso, formación y perfeccionamiento.”
Cobertura del Programa Facilitadores Judiciales Rurales 2006

Municipios atendidos por PCT desde el 98

1. Cinetí - Jinotega
2. Pantasma
3. Cinetí - Nueva Segovia
4. El Guá
5. Rancho Grande
6. Wawalalá
7. La Dalia
8. Matiguás
9. Río Blanco
10. Papas
11. El Tortugüero
12. Santo Domingo
13. La Libertad
14. La Cruz del Río Grande

Municipios atendidos desde el 2003

15. Julapa
16. Jicaro
17. Murra
18. Quilalí
19. San Juan de Río Coco
20. Escuipulas
21. Moyi
22. San Dionisio
23. San Pedro del Lovago
24. Villa Sandino
25. San Tomás
26. Acayapa
27. Samá
28. Nueva Guinea
29. Coral
30. Almendro
31. Muelle de los Bueyes
32. San Carlos
33. Morrito
34. San Miguelito
35. San Fernando
36. Ciudad Antigua
37. Cinco Pinos
38. San Pedro del Norte
39. San Francisco del Norte
40. Santo Tomas del Norte
41. San Juan de Limay
42. Fotolapa
43. San Lucas
44. Las Sabanas
45. San Rafael del Norte
46. Concordia
47. Talca
48. San Ramón
49. Bonanza
50. Rosita
51. Silrito
52. Waspán
53. Puerto Cabezas
54. San José de los Remates
55. Camomía
56. Santa Lucía
57. El Castillo
58. San Juan del Norte

Municipios en el 2005

59. Mozonté
60. Maguelito
61. Dipilto
62. Santa María
63. Prinzapolka
64. Laguna de Perlas
65. Teustepe
66. Karawa la
67. Ayote
68. Kurka Hill

Municipios en el 2006

69. Bluefields