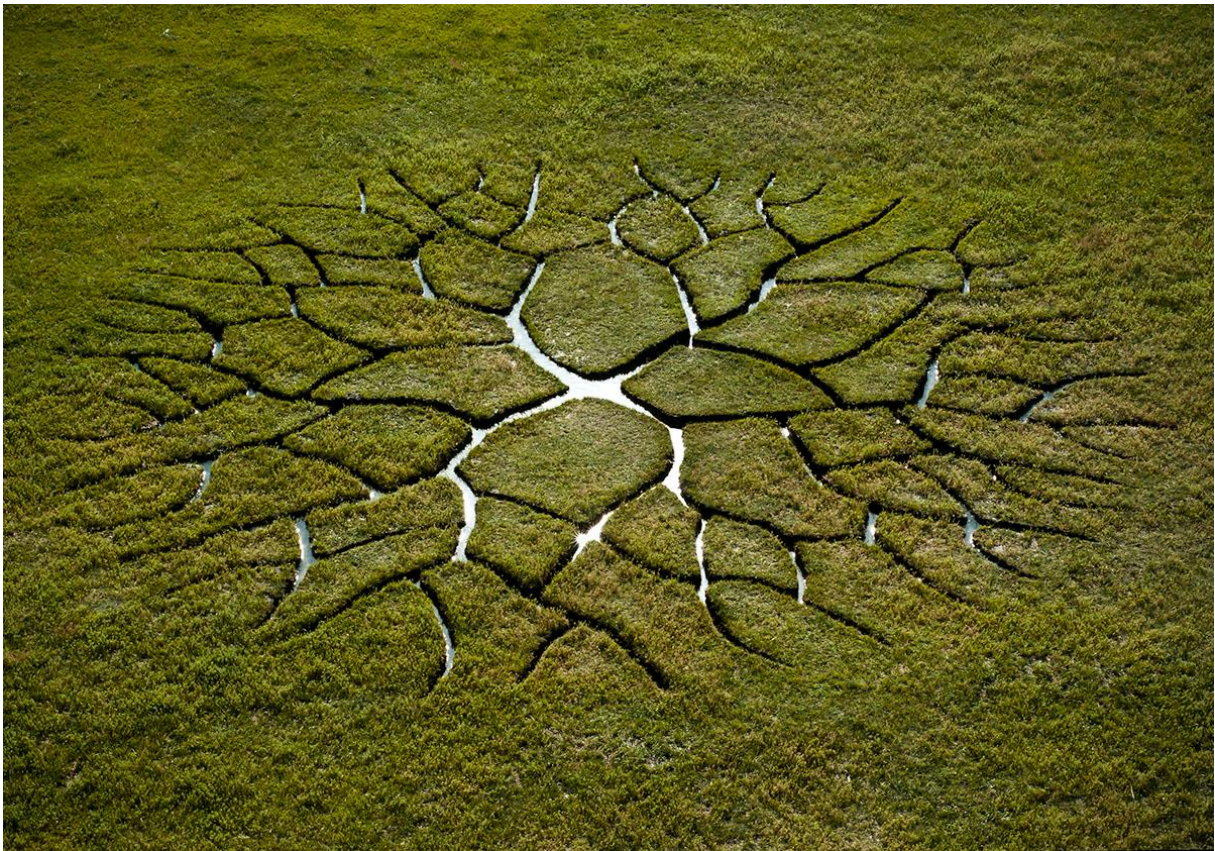


RESTORATIVE JUSTICE RESPONSES TO ENVIRONMENTAL HARM

*An IUCN report written by Femke Wijdekop
Amsterdam, 2019*



"World Tree" by Krisztián Balogh is licensed under CC BY-NC-ND 4.0

Table of Contents

Table of Contents	2
Executive Summary	4
Introduction	10
I RESTORATIVE JUSTICE: REPAIRING HARM, RESOLVING CONFLICT....	12
1. Restorative Justice: Concept.....	13
2. History	15
3. International Standards	17
4. Worldwide Growth	17
5. Assumptions & Elements.....	20
6. Functions	22
7. Types and Stages of Restorative Processes	26
8. Conclusion.....	28
II RESTORATIVE JUSTICE & ENVIRONMENTAL HARMS.....	29
1. Introduction	30
2. Victims of environmental harms.....	31
3. Restorative Justice Responses to Environmental Harm.....	33
4. Restorative Justice as Part of Ecocide Law.....	36
5. Advancing the Rights of Nature through Restorative Justice.....	39
6. Conclusion.....	47
III EXPERIENCES FROM THE GROUND: RESTORATIVE JUSTICE AND ENVIRONMENTAL HARM IN NEW ZEALAND, AUSTRALIA AND CANADA .	49
1. Introduction.....	50
2. New Zealand	51
3. Australia	61
4. Canada.....	65
5. Conclusion.....	79
IV IUCN AS A PARTNER IN RESTORATIVE JUSTICE	81
1. Introduction.....	82
2. Rule of Law.....	83
3. Old Customary Practices & New Restorative Justice Reforms.....	84
4. Community Environmental Justice Forums: a Good Starting Point?	88
5. Restorative Justice and Large Corporations.....	92

6. Conclusion	96
V CONCLUSION	98
Conclusion	99
Acknowledgement	104
ANNEX I Useful Online Resources	105
ANNEX II	106
ANNEX III	113
ANNEX IV	119

Executive Summary

Introduction

What if a wall of a dam containing highly toxic mining waste collapses, polluting the surrounding waterways and drinking water, killing ten thousand of fish and devastating the social and economic lives of the villages dependent on these waterways? Even if the State chooses to prosecute the mining company for this environmental offense, how will the imposition of a fine – the usual sanction for environmental offenses - assist the individuals and communities whose lives have been severely harmed by the criminal negligence of the company? Traditional penalties, such as fines, are unlikely to repair the environmental and social harm caused by an environmental offense. Neither does the imposition of a fine educate the offender about the harmful impact of his/her behavior. At worst, a fine is accepted as collateral damage in the pursuit of profit.

This example of environmental pollution serves as an illustration of the shortcomings in the response of the traditional criminal justice system to environmental harm. *This report explores if restorative justice might offer a more inclusive way of responding to environmental harm caused by corporate offenders and lead to more satisfying outcomes, in particular for the victims and affected communities.*

Restorative Justice

Restorative justice is a process whereby all the parties with a stake in a particular offense come together on a voluntary basis to collectively resolve how to deal with the aftermath of the offense and its implications for the future.

Its aim is to redirect or at least complement society's retributive response to crime and harm. A retributive system of justice is punitive in nature, with the key focus on using punishment as a means to deter future crime and to

provide 'just deserts' for any harm committed. Rather than focusing on retribution, restorative justice:

- focuses on harms and consequent needs;
- addresses obligations resulting from those harms;
- uses inclusive, collaborative processes;
- involves those with a stake in the situation (victims, offenders, community members; society at large)
- and seeks to put right the wrongs.

The focus of restorative justice processes and outcomes is on redressing the harm caused by the offense, promoting healing over retribution. It also has an aspiration for the future: to prevent recidivism by confronting the offender with his/her victim, which can lead to repentance and behavioral change.



The restorative justice triangle. Source: <http://dhss.alaska.gov/djj/Pages/GeneralInfo/RJ.aspx>

Restorative processes offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings. In the context of this report, offenders are corporations that cause environmental harm. Studies show that offenders that take part in restorative processes are less likely to reoffend, and that restorative justice produces a high rate of victim satisfaction and offender accountability.

Restorative justice is a young field that emerged in North America during the 1970s in response to dissatisfaction and frustration with the formal justice system. It has seen worldwide growth since the 1990s and is now practiced in more than 80 countries. Because of its indigenous roots,

restorative justice reforms can build upon customary practices while putting in place legal safeguards to ensure equal access to justice, equity and fairness.

Restorative Justice & Environmental Harm

Restorative justice has much to offer as an alternative response to environmental crime.

Traditional criminal law has an individualistic approach to crime and does not recognize many indirect or remote victims. Victims of environmental violations such as citizens, communities, indigenous peoples, future generations and the environment itself usually do not have a voice nor are their interests represented in the traditional criminal justice system. The offending company might pay off its 'ecological debt' through fines but is not reintegrated into the community. Animosity remains, though offenders and victims continue to live in-, or make use of, the same natural environment.

Restorative justice, on the contrary, has eye for the wider circle of people and communities affected by crime and gives a voice to victims who are impacted by environmental harm but who have traditionally been excluded from its resolution.

Whether a restorative conference occurs as a part of, separate to, or in place of formal legal proceedings, it presents the opportunity for a meaningful dialogue between the offender, victim and community, as well as for the offense's collective resolution which can take the shape of restoration of the affected environment.

Involvement in restorative processes strengthens community identity and resilience and empowers change from the bottom up, because it is a way for communities to develop social capital, social networks and civic interconnectedness. Participation in restorative process offers citizens the chance to mobilize their community to challenge systemic socio-economic and environmental injustice. It empowers citizens to exercise their rights to

participation, remedy, and access to justice in environmental matters in a very direct way. It also strengthens the competence of CSOs and communities to monitor compliance with environmental legislation. It helps offending companies to grow in responsibility, reintegrate, rehabilitate and regain their social license to operate. Because restorative justice de-escalates conflict, it also reduces the risk of environmental conflict leading to (lethal) violence against Environmental Defenders. Furthermore, restorative justice can help build the capacity of the justice system in countries with a weak rule of law. It also reduces prosecution costs and the backlog of cases in court.

Best Practices from New Zealand, Australia, and Canada

In New Zealand, Australia, and Canada, restorative justice has been successfully applied to smaller scale environmental offenses committed by local companies.

Caselaw from these countries shows the restorative conferences result in a variety of outcomes:

- Apologies;
- Restoration of harm to the environment and prevention of future harm
- Compensatory restoration of environments elsewhere if the affected environment cannot be restored to its former condition
- Payment of compensation to victims
- Community service work
- Measures addressing future behavior, such as an environmental audit of the activities of the offending company or environmental training.

In New Zealand and Canada, trees and rivers have been recognized as victims of environmental crime in their own right and have been represented by indigenous organizations in the restorative process. This is possible, because restorative justice processes allow a wide range of

cultural, emotional and spiritual values to be expressed and acknowledged. Thanks to this 'open' character, restorative justice is well suited to create space for eco-centric and indigenous approaches to what constitutes an environmental offense, who can be a victim of such a violation, and what restoration looks like. As such it allows for asserting the rights of nature – the subject of *IUCN World Conservation Congress resolution 100* - in a non-adversarial way.

Community Environmental Justice Forums: A Good Place to Start

The British Columbia Community Environmental Justice Forums (CEJFs) can serve as a template for the creation of localized environmental restorative justice pilot programs in IUCN partner countries. CEJFs are restorative circles, led by a trained, impartial facilitator, that typically lasts 2 – 2.5 hours, in which the offending company (that takes responsibility for the offense), the community and the enforcement agency take part on a voluntary basis, and which results in a formal agreement that records the collectively agreed remedies and restitution. CEJFs can be adapted to the local (legal) culture and implemented as a decentralized policy response to environmental offenses, operated by local or regional law enforcement according to clear policies and guidelines. The *2002 United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters* stipulate that such guidelines should cover among others:

- (a) The conditions for the referral of cases to restorative justice programs;
- (b) The handling of cases following a restorative process;
- (c) The qualifications, training and assessment of facilitators;
- (d) The administration of restorative justice programs;
- (e) Standards of competence and rules of conduct governing the operation of restorative justice programs.

Successful implementation of restorative justice programs such as CEJFs requires strategic initiatives that build on the collaboration of regional government authorities, CSOs, communities, victims and corporate offenders. IUCN, with the help of restorative justice professionals, can play a key role in this process as a convener and bridge builder between all these parties. CEJFs create an opportunity for a transformation in the relationship between law enforcement agencies and CSOs and communities because they invite the CSOs and communities to assume an active role in responding to, and resolving, environmental offenses. This will strengthen their competence to monitor compliance with environmental legislation as well.

Restorative Justice & Large Corporations

Holding large corporations or multinationals accountable for environmental offenses through restorative justice is still uncharted territory. IUCN can play a key role in engaging such companies with the restorative justice process by leveraging its political influence and mobilizing public concern. The 2019 Leuven gathering of criminologists and restorative justice experts can be a future partner for IUCN by creating restorative justice models to be applied in the field, and by exploring solutions to the challenges of holding multinationals accountable in a restorative way.

Conclusion

In a time when adversarial environmental campaigns and litigation are blossoming, restorative justice offers an innovative response to environmental harm in line with IUCN's values such as collaboration, trust, nature conservation and restoration of social and ecological relationships. *As such it is an excellent match to IUCN's diplomatic approach to natural resources conflicts and its role as a convener and bridge builder between governments, businesses, CSOs and local communities.*

Introduction

What if a wall of a dam containing highly toxic mining waste collapses, polluting the surrounding waterways and drinking water, killing ten thousand of fish and devastating the social and economic lives of the villages dependent on these waterways? Even if the State chooses to prosecute the mining company for this environmental offense, how will the imposition of a fine – the usual sanction for environmental offenses - assist the individuals and communities whose lives have been severely harmed by the criminal negligence of the company? And while some victims, such as the fisherman whose livelihood is destroyed, may be identifiable and in the best case assert their rights, what about the polluted river, or the landscape whose vegetation has been polluted by the toxic waste?¹ Traditional penalties, such as fines, are unlikely to repair the environmental and social harm caused by such an environmental offense. Neither does the imposition of a fine educate the offender about the harmful impact of their behavior. At worst, a fine is accepted as collateral damage in the pursuit of profit – an expense on the corporations' balance sheet that does not motivate the corporation to take responsibility and invest in precautionary measures to prevent future harm.

This example of environmental pollution serves as an illustration of the shortcomings in the response of the traditional criminal justice system to environmental harm.

As a result of the deepening ecological and climate crises, in recent years we have seen an increase in innovative legal responses to environmental harms such as climate litigation and lawsuits against extractive industries for violations of human rights and environment. Examples are the lawsuits against mining companies in Canada, against Royal Shell in the United Kingdom and climate cases against the governments of the United States, Colombia, Netherlands, Belgium and France. Outside the courtroom, NGOs hold companies accountable for their involvement in environmental harmful

activities through their production chain and their investments in extractive industries. Many of these lawsuits and campaigns emphasize the social impact of environmental harm. However, these lawsuits and campaigns do not necessarily involve nor represent all the parties to a conflict in an equal way and can strengthen the adversarial paradigm of winners and losers. Restorative justice might offer a more inclusive way of responding to environmental harm caused by corporate offenders and lead to more satisfying outcomes, in particular for the victims and affected communities.

This report explores the benefits that a restorative justice approach to environmental harm has to offer for IUCN and its partners in the field. It uses the broader term *environmental harm* rather than environmental crime, because restorative justice can be applied to situations of harm that do not classify as 'crimes', and because environmental harm is sometimes dealt with through administrative and civil law rather than criminal law. Most of the caselaw discussed in this report, however, does concern environmental crime.

This report consists of five chapters:

Chapter I introduces the concept, history and functions of restorative justice;

Chapter II explores the added value of restorative justice in delivering justice to victims of environmental harm and in restoring damaged relationships;

Chapter III describes the application of restorative justice to environmental harms in New Zealand, Australia and Canada;

Chapter IV examines how IUCN can introduce restorative justice in their work with country partners;

Chapter V contains the conclusion.

I RESTORATIVE JUSTICE: REPAIRING HARM, RESOLVING CONFLICT



"Lady Justice" by Scott CC BY-NC-SA 2.0*

1. Restorative Justice: Concept

Restorative justice is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus.² One of the most widely accepted definitions is provided by Marshall:³

Restorative justice is a process whereby all the parties with a stake in a particular offense come together to collectively resolve how to deal with the aftermath of the offense and its implications for the future.

An essential feature of restorative justice is that it aims to redirect or at least complement society's retributive response to crime. A retributive system of justice is punitive in nature, with the key focus on using punishment as a means to deter future crime and to provide 'just deserts' for any harm committed.⁴ Rather than focusing on retribution, restorative justice:

- focuses on harms and consequent needs;
- addresses obligations resulting from those harms;
- uses inclusive, collaborative processes;
- involves those with a stake in the situation (victims, offenders, community members; society at large)
- and seeks to put right the wrongs.⁵

In short, the focus of restorative justice processes and outcomes is on redressing the harm caused by the offense, promoting healing over retribution. It also has an aspiration for the future: to prevent recidivism by confronting the offender with its victim, which can lead to repentance and behavioral change.⁶

It also gives the ownership of the conflict back to the victim and the affected community by actively involving the parties to a conflict in its resolution -

in the form of tangible outcomes - and in mitigating its negative consequences.⁷ As such, it can contribute to local decision-making, competency development and community building. Restorative justice programs can also encourage the peaceful expression of conflict, promote tolerance and inclusiveness, build respect for diversity and promote responsible community practices.⁸ Although restorative justice has arisen in response to crime out of dissatisfaction and frustration with the formal justice system, it is increasingly used in response to conflict in schools, universities, workplace environments and care homes as well.⁹ In this wider context it offers tools for conflict resolution and peacebuilding.



*The restorative justice triangle. Source:
<http://dhss.alaska.gov/djj/Pages/GeneralInfo/RJ.aspx>*

2. History

Restorative justice is a young field that emerged in North America during the 1970s when alternative approaches to the criminal justice system, such as alternative dispute resolution, were becoming a trend. It emerged alongside the victims' rights movement, which advocated greater involvement of crime victims in the criminal justice process, as well as for the use of restitution as compensation for losses. It can be understood as a response to dissatisfaction and frustration with the formal justice system,¹⁰ such as lack of stakeholder inclusion and the negative consequences of shame delivered by that system.¹¹

A **1974 case in Kitchener**, Ontario, Canada, is considered the beginning point of the restorative justice movement.

Kitchener experiment (1974)

A youth probation officer convinced a judge that two teenagers who had vandalized the property of twenty-two people should meet with each one of the victims. The officer believed that the meetings could be helpful to both parties. After the meetings, the judge ordered the two youths to pay restitution to those victims as a condition of probation.

With help from the Mennonite Church, the Kitchener experiment evolved into an organized victim-offender reconciliation program funded by church donations and government grants and supported by various community groups.

Source: <https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history>

Following several other Canadian victim-offender reconciliation programs, the first United States program was launched in Elkhart, Indiana in 1978. From there restorative justice has spread throughout the United States and Europe. Many of the values, principles, and practices of restorative justice reflect those of indigenous cultures such as the Maori in New-Zealand and the First Nations People of Canada and the USA. In these indigenous cultures, community-members, led by an elder, collectively participate in finding a solution for conflict in order to reestablish community peace and heal broken relationships. Until the Middle Ages such participatory forms of conflict resolution were also indigenous in Europe, but they were lost when the government took over the role of conflict-solver in the late Middle Ages, leaving little room for the victim (or the affected community) to play a part in the resolution of the conflict.¹²

In the beginning, restorative justice was primarily used in dealing with offenses committed by young adults. There are two reasons for this: first, when restorative justice was introduced to Western legal systems, its initial trials in New Zealand and Australia were targeted at young adults and its success indicated that it was an appropriate alternative to the often-stigmatizing criminal justice system. Second, its "child saving ethos" addresses the concern that the formal criminal justice system often fails to rehabilitate offenders and reintegrate them back into their communities, which entrenches a cycle of criminality. While its success has led to dedicated restorative justice programs to deal with offenses committed by young adults, the concept is increasingly being applied across a broader spectrum of criminal offenses, such as assault, domestic violence, sexual assault offenses, and war crimes.¹³ It is applied to individual criminal cases and to system-wide offenses, of which the South African Truth and Reconciliation Commission is the most famous example.

3. International Standards

There are a number of international standards on restorative justice, for example the *1999 Council of Europe Recommendation on Mediation in Penal Matters*, the *2001 EU Council Framework Decision on the Standing of Victims in Criminal Proceedings* and its successor the *2012 Victim Directive* that entails rights on restorative justice for victims. In 2016, the *European Committee on Crime Problems* revised the *1999 Council of Europe Recommendation* and called for a broader shift towards a more restorative culture and restorative approach within criminal justice systems in Europe.¹⁴

The *2000 Vienna Declaration on Crime and Justice* encourages the “*development of restorative justice policies, procedures and programs that are respectful of the rights, needs and interests of victims, offenders, communities*”.¹⁵ In August 2002, the *United Nations Economic and Social Council* adopted a resolution calling upon Member States that are implementing restorative justice programs to draw on a set of *Basic Principles on the Use of Restorative Justice Programs in Criminal Matters* developed by an Expert Group (see **Annex III**).

4. Worldwide Growth

Restorative justice has seen worldwide growth since the 1990s and is now practiced in more than 80 countries.¹⁶ Most academic studies suggest it makes offenders less likely to reoffend.¹⁷ According to a 2007 British report,¹⁸ 85% of victims regarded restorative justice positively and 78% would recommend it to others. Reoffending is reduced by 26% and participation in a restorative conference leads to a reduction of Post-Traumatic Stress Disorder – which also positively effects long-term health prospects - and a reduction of the desire for violent revenge. Moreover, it reduces prosecution costs and the backlog of cases in court.

Studies from different continents also show high satisfaction rates among victims, offenders and professionals. Participants feel taken seriously, they feel that justice has been served, and they appreciate the fact that the offender is held accountable.¹⁹ Even though a restorative justice intervention is a one day-event, to many people it marks a new beginning. Solid preparation and information increase the willingness of victims and offenders to take part in restorative justice interventions.²⁰

Table 1 on the following page gives an impression of the use of restorative justice around the world. (*Source: Center for Justice & Reconciliation: <https://www.restorativejustice.org>.*)

Restorative Justice Around the World

- In **Africa**, restorative justice is characterized by the recovery of indigenous justice practices, use of community service to address chronic prison overcrowding, national restorative responses to genocide and civil war, and the South African Truth and Reconciliation Commission.
- In **Asia**, interest in restorative justice has been particularly focused on juvenile justice, on regulating indigenous practices, on peacemaking and reconciliation in divided societies.
- In **Europe**, restorative initiatives have been used to address diverse issues such as juvenile justice, alternatives to paramilitary violence in Northern Ireland, and justice reform needs in Eastern Europe.
- In **Latin America**, restorative justice developed in response to justice reforms to counteract increasing rates of crime and violence while increasing citizen confidence in justice systems; national reconciliation efforts after years of civil war; and communities looking for alternative ways to create a 'culture of peace.'
- In the **Middle East**, restorative justice experiments are in the beginning stage. Some experiments involve the use of traditional processes for conflict resolution while others deal with child welfare and juvenile justice issues.
- In **North America**, restorative justice has arisen out of various sources such as indigenous practices of First Nations people, a discontent with the justice system, and a need to meet the needs of victims. It is currently being applied in various areas from prison to schools to child welfare issues.
- In the **Pacific**, restorative justice is well established as a manner of responding to crime. With roots in indigenous practices, restorative justice is being used to address crime, school discipline, and other types of conflicts.

5. Assumptions & Elements

5.1 Assumptions

Restorative justice programs are based on five assumptions:

- 1 The response to crime should repair as much as possible the harm suffered by the victim;
- 2 Offenders should be brought to understand that their behavior is not acceptable and had harmful consequences for the victim and the affected community;
- 3 The offender can and should accept responsibility for his or her actions;
- 4 Victims can express their needs and participate in determining the best way for the offender to make reparations;
- 5 The community has the responsibility to contribute to this process.²¹

5.2 Elements

A restorative justice process requires:²²

- An identifiable victim;
- Voluntary participation by the victim;
- An offender who accepts responsibility for his/her criminal behavior;
- Non-coerced participation of the offender; and
- A facilitator. Facilitators are trained in restorative justice and usually come from the ranks of police officers, prison officers, probation officers, social workers, lawyers and even judges.

If the victim is not alive, he/she can be replaced by a surrogate victim. Often, the victim's "community of care", which may include friends, family, counsellors and other support persons and members of the community are part of the process as well.²³ It is essential that an offender is not coerced into participating in a restorative justice conference as coercion may

undermine the offender's genuineness, openness and reception to differing viewpoints, and could undermine the whole process.²⁴

The skill of a facilitator is vital to the success of a restorative justice conference, which can be very demanding, stressful and emotionally draining for all participants. This includes the preparatory work undertaken by the facilitator in assessing the cases suitable for a restorative conference, assessing who should attend, understanding the intricacies of a given matter, understanding the needs of conference participants, and assessing those needs with what realistically can be delivered by the conference. Australian restorative justice facilitator McDonald says that "*preparation is crucial to success*" in any restorative justice conference. He led the restorative justice conference in the case *Garrett vs Williams* (see the box on p. 23 and Chapter 3, paragraph 3.2), in which "*a full understanding of the politics of the communities in which the events took place was paramount*" for its successful outcome.²⁵

A restorative justice conference may give the offender the opportunity to apologize to the victim for his or her actions, which may in some circumstances foster forgiveness and may help the victim and offender to heal.²⁶

6. Functions

Restorative Justice fulfills four functions:²⁷

- 1. Communication;*
- 2. Education;*
- 3. Repair and;*
- 4. Reintegration.*

1. Communication At its simplest restorative justice conferencing is a facilitated face-to-face dialogue between stakeholders to a crime or conflict. The facilitator stimulates a dialogue around questions such as 'What happened and how do you feel about it? What were your thoughts at the time? Who else has been affected? What needs to happen to put things right?' The purpose of such a dialogue – which is absent in the sterile environment of court proceedings - is to resolve the harm caused by the offending.²⁸

There are three primary elements to the communication function. Firstly, the victim can talk about the effect the crime has had on them, with other words, "how they have been violated and what they feel". This is a central need for victims: to be heard and to tell their story. Secondly, victims can ask the offender all the questions they may have. Thirdly, an offender can explain the circumstances behind the offending.²⁹ The facilitator plays an important role in guiding the dialogue, so that viewpoints are shared, and knowledge is imparted. Such a structured discussion is only possible if the facilitator has done the necessary preparatory work. Another important role for a facilitator is to ensure that all those in the conference are heard and no one is silenced by domination, because non-domination is a core value of restorative justice.³⁰

Communicating pain caused by destruction of Aboriginal heritage

The harm that follows Aboriginal cultural heritage offending can be deeply felt by affected Aboriginal people and their communities. In *Garrett v Williams (2007)*, several Aboriginal artefacts were destroyed, and an Aboriginal sacred place was damaged by mining operations. Ms. Maureen O'Donnell, a traditional owner and Aboriginal elder of the affected land who participated in the restorative justice conference, expressed her distress at seeing the damage to the Aboriginal place as follows:

"I was very upset with what I saw because the drains had been dug at a sacred place. I believe that the drains had damaged the Pinnacles sacred area because they would have disturbed the Aboriginal spirits and the story line of our teaching. I believe that the Aboriginal spirits would be very unhappy. I felt like the spirits were angry because the weather was awful that day. It was very cold and windy. The Pinnacles was serene and a place of beauty until the drains were dug. I remember saying "Isn't it terrible that they put in these drains. Feels like they put a big hole in my body".

Source: *Garrett v Williams (2007)* 151 LGERA 92; [2007] NSWLEC 96, p. 76.

2. The function of education builds upon, and is contingent on, communication. The expressions of hurt and disappointment, questions and answers, and explanations all educate offender, victim and stakeholders alike.³¹

3. Repair does something for the victim rather than to the offender. As with vengeance and retribution - the punitive goals of the traditional criminal justice system - a basic aim is to reduce the inequality created by injustice. In restorative justice the strategy is to decrease suffering for the victim

rather than increase suffering for the offender. This form of redress also has a different source. Whereas revenge and retribution both originate in a judgment that someone else's behavior has been wrong, repair originates in a recognition that one's own behavior has been wrong: the judgment comes from within the offender. Repair can be achieved through reparation which may take either a material or symbolic form.

Material reparation offers something concrete to repair a specific harm or to compensate for the damage or loss associated with that harm. Examples include the return of stolen property or the covering of the cost of psychological treatment. Material reparation can also include restitution such as the payment of compensation.³²

Symbolic reparation can include an apology from the offender. As an integral part of the restorative justice process, there is considerable value in the act of an offender offering an apology. In addition to an acceptance of wrongdoing, an apology is a way for an offender showing respect and empathy for victims. An apology and forgiveness may allow both the offender and victim to move on with their lives.³³ However, an apology may be a double-edged sword. A genuine apology may, but not necessarily so, foster forgiveness. Where an apology is not made, there is a real possibility that the victims may be left with resentment towards the offender. Further, where the offender is a company operating within a community, it provides the company with an opportunity to restore its social license to operate within that community. But a non-genuine apology, for instance given out of a sense of obligation or because of the belief that it is a part of the process, may lead to re-victimization and breakdown in the whole restorative justice process. Hence, a restorative justice conference should focus on fostering a constructive dialogue between offender and victim rather than on some preconceived notion that apology and/or forgiveness is necessary to its success.³⁴

Symbolic reparation can also involve a physical act such as: buying a gift, providing a service for the victim, donating time or money to a charity of the victim’s choice, doing community service or entering treatment in order to address the roots of criminal behavior.

A	remorseful	offender
<p>Craig Williams, the defendant in <i>Garrett vs Williams</i>, asked Aboriginal elder Maureen O’Donnell for forgiveness for destroying her cultural heritage. He expressed his contrition and remorse as follows:</p>		
<p><i>“I regret that I committed the offenses and I am sorry for the harm it has caused. I realise that it was foolish not to be vigilant and more respectful about the Aboriginal objects and the Aboriginal place. During the course of these proceedings I have learnt a significant amount about Aboriginal archaeology and the importance of the Aboriginal place. I have also realised how both Aboriginal objects and the Aboriginal place are more important to Aboriginal people than I had previously appreciated. I am seriously remorseful about what has occurred.”</i></p>		

Source: *Garrett v Williams (2007) 151 LGERA 92; [2007] NSWLEC 96, p. 110.*

4. Reintegration This function is concerned with the reintegration of the offender back into society. Reintegration is premised on the relational view of crime underpinning restorative justice. That is, the view that crime is a violation of relationships. Reintegration seeks to repair that fractured relationship and ensure restored relationships (or at the least the absence of a fractured relationship) for the future. Reintegration can be achieved through the restorative justice conference when an offender acknowledges the wrongdoing, listens to victims and works with those victims to devise ways to make things right.³⁵

7. Types and Stages of Restorative Processes

There are four main types of restorative processes:³⁶

1) *Victim-offender conferencing*: a process which provides victims of crime the opportunity to meet the offender in a safe and structured setting, with the goal of holding the offender directly accountable for their behavior while providing assistance and compensation to the victim.

2) *Family group conferencing*: a meeting between victims, offenders and their respective families, led by a trained facilitator, in which the affected parties discuss how they have been harmed by the offense and how the offender might best repair the harm. It is most commonly used for juvenile cases. Family group conferencing is based on the centuries old sanctioning and dispute resolution traditions of the Maori, the New Zealand aboriginal people. The model is now also widely used in modified form as a police-initiated approach in South Australia, South Africa, Ireland, Lesotho, as well as in cities in Minnesota, Pennsylvania and Montana.³⁷

3) *Sentencing circles*: a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentence that addresses the concerns of all interested parties. These circles, sometimes called peacemaking circles, use traditional (indigenous) circle ritual and structures. They are conducted in many aboriginal communities in Canada.

4) *Restorative Conferences*: these involve a wider circle of participants than Victim-Offender Conferencing and Family Group Conferences. A conference will typically include the victim, the offender and members of the local community. The family and friends of the offender and victim are often invited. The community members discuss the nature and impact of the offense with the offender and the discussion continues until an agreement for restoration is reached. The community may also see to it that the agreement is fulfilled.³⁸

Restorative processes can be applied alongside retributive sanctions (fines/imprisonment), as part of a convicts' rehabilitation process, or, if the prosecution or judge so decides, instead of retributive sanctions. Within the criminal justice system, there are four main stages at which a restorative justice intervention can be used:³⁹

1. *Before the offender is charged*: diversion from arrest (diverting the suspect out of the criminal justice system) or out-of-court disposal, e.g. the offender gets a conditional caution;
2. *After the offender is charged but before conviction*: referral by the prosecutor or regulatory agency or court;
3. *After conviction but before sentencing*: referral by the court; the restorative intervention is meant to mitigate / reduce the sentence; and
4. *After sentencing*: referral by the court, probation service or correction service. In this scenario the restorative intervention can be an alternative to imprisonment or be part of a non-custodial sentence. The intervention can also take place during imprisonment or upon release from prison, preparing the offender for release.

Does Restorative Justice let the offenders off the hook?

Restorative justice does not necessarily replace retributive responses to crime. It is a tool which can be applied alongside traditional responses, such as fines and imprisonment, and a positive outcome of a restorative justice process can make the judge decide to reduce the punishment. It requires that the offender takes responsibility for committing the offense. Confronting the victims and committing to time consuming projects that were agreed in the outcome agreement, such as re-planting trees, doing community work or attending environmental training in the case of environmental offenses, may be more of a deterrent for the offender than a non-restorative sentence such as a fine. Paying a fine may hurt financially, but it probably does not impact the offender on an emotional level or challenge his/her assumptions about right and wrong behavior. Meeting the victims and the community face-to-face and learning about the harm caused by the offense is more likely to leave a lasting effect on the offender.

8. Conclusion

In a nutshell, restorative justice has the following objectives and social goals:⁴⁰

- supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance;
- repairing the relationships damaged by crime, in part by arriving at a consensus on how best to respond to it;
- denouncing criminal behaviour as unacceptable and reaffirming community values;
- encouraging responsibility taking by all concerned parties, particularly by offenders;
- identifying restorative, forward-looking outcomes;
- reducing recidivism by encouraging change in individual offenders and facilitating their integration into the community;
- identifying factors that lead to crime and informing authorities responsible for crime reduction strategy;
- creating a more effective and therapeutic justice system for victims;
- making greater use of informal, community-based responses to conflicts.

Restorative justice thus provides several benefits to stakeholders to a crime or conflict. It helps victims get the information they need to understand what happened to them and helps answer the question of 'why me?'. It empowers victims to tell their truth and helps them to get closure. Offenders get a chance to gain understanding of their own behaviour; make amends; experience empathy with the victim; transform toxic shame; and reintegrate into the community. Finally, the security and health of the community is strengthened when victims' needs are addressed, and offenders are educated and reintegrated.

II RESTORATIVE JUSTICE & ENVIRONMENTAL HARMES



"Canoing down the river" by LADY KATYA is licensed under CC BY 2.0

1. Introduction

As we have seen, restorative justice approaches crime and harm as a violation of people and relationships and invites one to see the world relationally. Because of this emphasis on healing damaged relationships and giving victims a voice, it seems to be well positioned to address environmental harms and to bring with it some benefits that traditional law enforcement lacks when responding to environmental harms.

The example of the toxic mud spill polluting waterways from the introduction points to these shortcomings. Firstly, victims of environmental violations have little opportunity to be heard and vindicated. Many indirect or remote victims are not even recognized as such by the traditional criminal justice system. Secondly, while a significant fine may be the penalty enforced by the State to denounce the negligent behavior of the mining company, and while orders may be made for the restoration of the environment, the damage to the economic and social fabric of the community is not addressed under traditional environmental law enforcement. The offending company might pay off its 'ecological debt' through fines, but is not reintegrated into the community, and loses its social license to operate.

This chapter takes a closer look at the many dimensions of environmental harm and its plurality of victims. It explores the added value of restorative justice interventions in delivering justice to these victims of environmental harm and in restoring damaged relationships. Furthermore, it looks at restorative justice in the context of two new developments: Ecocide Law and rights of nature.

The conclusion summarizes the findings and highlights some benefits of restorative justice from the perspective of human rights and community empowerment.

2. Victims of environmental harms

Environmental offending creates a lot of victims, some of which are not always readily apparent, which is why an environmental offense can be classified as 'victimless' in the absence of quantifiable material damage to a rights-holder in the vicinity. Closer to the truth, however, is that environmental offending is 'victim-full'. Five different categories of victims come to mind:⁴¹

2.1 Environment

The primary victim of environmental harm is the environment. It is the environment that is damaged or harmed by the loss of habitat, ecosystems, biodiversity, fauna and flora. In the example of the toxic mud spill, the river is the victim, and also the biosphere and non-human biota which form part of the ecosystem of the river.

2.2 Individuals

Individuals who can no longer use the river for drinking water, bathing, swimming, or to even glance upon the river as a non-polluted piece of the environment are victims. The woman who miscarries after being exposed to the polluted water is a victim, as is the fisherman whose livelihood is destroyed.

2.3 Community

The community is also a victim because it has lost a communal resource and could possibly suffer if the waterway brought tourists to the locality. The polluted waterway can create conflict when the affected community starts to compete with neighboring communities for fresh water and fish supplies.

2.4 Indigenous and Aboriginal peoples

Indigenous and aboriginal peoples should be mentioned separately, because they are the communities most frequently victimized by environmental harm and the violation of natural and cultural heritage. Indigenous peoples are on the frontline in the struggle to preserve, protect, restore and defend their natural and cultural commons. These natural and cultural commons are at risk of being harmed by mining activities, monocultures, the development of hydroelectric dams, poaching, illegal logging, the development of infrastructure, land and water grabbing. Indigenous and aboriginal peoples often are marginalized in their countries, which undermines their access to justice and assertion of their individual and collective rights in environmental matters.

2.5 Future generations

Future generations are also victims of environmental offending. Environmental pollution might cause loss of natural resources that are not renewable or replaceable. The extinction of species, populations or ecological communities or the loss of natural and cultural heritage impoverishes future generations, and this intergenerational injustice victimizes future generations.

In environmental offenses, the above victims often go unrecognized, and their stake in the environment is subsumed in the broader law enforcement goals of the State. These victims are not a party to environmental prosecutions, which consist of the State - through various agencies administering environmental law - and the offender. In short, individuals, communities, indigenous/aboriginal peoples, future generations and the environment usually do not have a voice nor are their interests represented in the traditional criminal justice system.

3. Restorative Justice responses to environmental harm

Engaging in a restorative justice process gives a voice to those victims who are impacted by environmental harm but who have traditionally been excluded from its resolution. Whether a conference occurs as a part of, separate to or in place of formal legal proceedings, it presents the opportunity for a meaningful dialogue between the offender, victim and community, as well as for the offense's collective resolution.

As we have seen in Chapter 1, a restorative justice conference facilitates a conversation between victim and offender. The victim, sometimes supported by his/her community of care, can explain how the commission of the offense has affected them. The offender is also given the opportunity to tell their story and has the opportunity to directly apologize to the victim, understand how his or her actions have affected the life and livelihood of the victim, and commit to actions to redress this harm. A conference also facilitates the education of the offender (and where the offender is a company, company employees) about the impact environmental crime has had on the environment and on dependant communities. Ideally, it enforces the importance of compliance with environmental laws, educates the offender about the effect of his/her behavior, and reduces the likelihood of recidivism.

Restorative justice conferencing can result in the formulation of an action plan to resolve the harm caused by the offending and thereby integrate the offender back into society and restore the offenders' social license to operate. This also reduces the risk of environmental conflict leading to (lethal) violence against Environmental Defenders. Hence such conferencing fulfils the important communicative, educative, resolving and reintegrative functions mentioned in paragraph 6.1 of Chapter 1.

Offenses against indigenous peoples seem especially suitable to restorative justice interventions because of their marginalized position and their strong affiliation and bond with the land. The sharing of their viewpoint with- and telling of their story to- a receptive offender can educate the offender and stop the offense from occurring again in the future.⁴² In *Garrett vs Williams*, the offender Mr. Williams was sensitized to the nature of the damage caused by his actions by the personal stories of anguish by local indigenous community members.⁴³ On a more general level, the social fabric is enriched by providing opportunities to share, understand and celebrate indigenous values and restorative justice conferences facilitate such sharing of values and storytelling. Finally, restorative action to be paid for by the offender can include educative projects that aim to recognize and honor the active agency by indigenous people as the knowledge holders and keepers of natural and cultural heritage.⁴⁴

Future generations and the harmed environment itself can be represented as victims 'by proxy' in restorative processes, for example by CSOs who protect the interest of future generations in their statutes or by indigenous representatives of the land. Paragraph 5 delves deeper into the issue of nature as a victim in the restorative justice process.

A restorative conference used in the context of environmental harm can result in the following outcomes:

- Apologies;
- Restoration of harm to the environment and prevention of future harm
- Compensatory restoration of environments elsewhere if the affected environment cannot be restored to its former condition
- Payment of compensation to victims

- Community service work
- Measures addressing future behavior, such as an environmental audit of the activities of the offending company or environmental training.

Unlike traditional environmental law enforcement, restorative justice has the potential to offer a significant contribution in ensuring the achievement of justice for - and empowerment of - victims of environmental harm. It can also benefit offenders. Gregg Belland, the General Manager of *Teck Trail Operations*, took part in a restorative justice forum when his company caused a mercury discharge into the Columbia River and a leachate overflow into Stoney Creek in British Columbia, Canada. He says:

"This was a process that we wanted to try. We saw this as an alternative that would benefit both sides. It is a process of engagement rather than confrontation: the facilitators created an environment in which everybody could speak openly and listen to what others had to say. The fact that the money [the payment of compensation, FW] got to stay in the community on projects that the community decided were important to the community is the most important part. The results of the forum were positive all around, there is no question that it's a much better alternative than the court process."

Source: <https://www.youtube.com/watch?v=tMn-xiK7s8M>

4. Restorative Justice as Part of Ecocide Law

Ecocide, in the definition of late Scottish barrister Polly Higgins, is the *extensive damage to, destruction of- or loss of ecosystem(s) to such an extent that peaceful enjoyment by the inhabitants of that territory is severely diminished*. The term 'inhabitants' refers to humans and non-human biota residing in the affected territory. The term 'Ecocide' was coined by the American biologist Arthur Galston in 1970, to describe the massive damage and destruction of the Vietnamese jungle during the Vietnam war. During the 1970s and 1980s, the idea of expanding the 1948 Genocide Convention led to extensive studies within the United Nations as to which crimes should be included; several countries supported the inclusion of Ecocide.

The 1991 draft of the Code of Offenses Against the Peace and Security of Mankind (the precursor to the Rome Statute of the International Criminal Court) included Article 26, which read: '*An individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced...*'. In 1995, however, this provision was withdrawn from the draft Code.⁴⁵

More than a decade later, Higgins came across the concept of Ecocide and in 2010 proposed that the International Law Commission modify the Rome Statute to include Ecocide. Higgins proposed personal liability for CEOs or State officials who are at the top of the command chain and who neglect their duty of care to prevent their actions or omissions from causing Ecocide. This means that such CEOs or State officials could be imprisoned if the International Criminal Court (or a national court applying Ecocide law – Rome Statute crimes have to be prohibited in the national criminal codes of State Parties to the treaty) finds them guilty of the crime of Ecocide.⁴⁶

However, Higgins main objective with Ecocide law was not to imprison CEOs, but to prevent Ecocide from taking place. Ecocide law is meant to be a catalyst in the transition to sustainable societies within planetary boundaries, by placing a firm bottom line on how we are allowed to relate to the natural world, the trespassing of which is a crime.⁴⁷ Higgins – who passed away on 20 April 2019, age 50⁴⁸ - was very interested in adding restorative justice to the sentencing arsenal under Ecocide law:⁴⁹

"Restorative justice offers a safe space for a CEO or company director, to accept responsibility for decisions they have made which lead to Ecocide, and then to step into a restorative justice circle. There, they come together with others who represent the beings who've been harmed, and collectively they decide what can be put in place to restore the land, to mend the damage. That's the really radical part of Ecocide law, offering up the tools to allow those who have made decisions which cause harm to face that harm in a healing space. Yes, accountability is essential – but it's no use just locking people up or perpetuating a culture of blame. It's about finding ways of healing, and so changing things – and people – in a more meaningful and enduring way."

In 2011 Higgins held a Mock Ecocide Trial in the Supreme Court of England and Wales to demonstrate the viability of a law of Ecocide. Two fictional Chief Executive Officers were put on trial for causing Ecocide in the Athabasca tar sands and the Gulf of Mexico.

As part of this Mock Trial, lawyer and former Chair of the UK Restorative Justice Council Lawrence Kershen facilitated the restorative circle that was part of the Athabasca Tar Sands-case. He says:⁵⁰

"The Ecocide Restorative Justice process was very successful in demonstrating how Restorative Justice could be used in cases of major environmental harm, within the limitations of it being a role play. One of the major lessons was the challenge of identifying who are appropriate parties and what interests could and should be represented. So, we had participants who spoke on behalf of the Earth, the birds, Future Generations, as well as those who were more immediately harmed by the Ecocide such as the Haisla People, a First Nation group that had in reality been profoundly affected by the Athabasca tragedy.

Another lesson was how it was possible to distinguish in sentencing between the CEO who declined to take part in the restorative process (who received a 4 years imprisonment) and the other CEO who agreed to take part, whose sentence was deferred to allow him to demonstrate that he was willing to implement the Action Plan that had been agreed in the restorative process. And it was hugely gratifying how the judge was able to incorporate the points of the Action Plan into the conditions of the Deferred Sentence - which would be a very powerful incentive for a defendant to implement the necessary action arrived at in the restorative process"

The Action Plan and Restoration order of the Ecocide Mock Trial are included in this report as **Annex II** as useful templates for incorporating restorative orders into environmental sentencing.

5. Advancing the Rights of Nature through Restorative Justice

5.1 Nature as subject of rights and as victim

Increasingly, the rights of nature are recognized in court decisions and legislation. This development signals a departure from an anthropocentric worldview which sees nature as an object that humans are entitled to exploit, towards an eco-centric worldview which honors and protects the intrinsic value of nature. Recognizing the rights of nature means securing the highest legal protection for- and placing the highest societal value on nature.⁵¹ The idea to expand the body of legal rights to include nature has been brewing for generations. More than a century ago, environmentalist John Muir wrote that we must respect the rights of all the rest of creation.⁵² In 2015, Pope Francis stated that, "A true 'right of the environment' does exist..."⁵³

Some key moments in the development of the movement for the rights of nature are:⁵⁴

- In 1972, the Southern California Law Review published law professor Christopher Stone's article, "*Should trees have standing – toward legal rights for natural objects.*" Stone described how under the existing structure of law, nature was considered right-less, having no legally recognized rights to defend and enforce.
- In 1989, Professor Roderick Nash, published *The Rights of Nature: A History of Environmental Ethics*. In it he explains how, throughout history, the right-less – slaves, women, others – have struggled to expand the body of legal rights to include themselves. Nash provides a context for how and why the body of rights is moving in the direction of expanding to include nature.
- In 2006, Tamaqua Borough, Pennsylvania, in the U.S., banned the dumping of toxic sewage sludge as a violation of the rights of nature.

Tamaqua is the very first place in the world to recognize the Rights of Nature in law. Since 2006, dozens of communities in ten states in the U.S. have enacted rights of nature laws.

- In 2008, Ecuador became the first country in the world to recognize the rights of nature in its national constitution. In 2011, the first rights of nature court decision was issued in the Vilcabamba River case in Ecuador, upholding the rights of nature constitutional provisions.
- In 2010, Bolivia held the *World People's Conference on Climate Change and the Rights of Mother Earth*, where the *Universal Declaration on the Rights of Mother Earth* was issued. It has been submitted to the U.N. for consideration.
- In 2010, Bolivia's Legislative Assembly passed the *Law of the Rights of Mother Earth*.
- In 2014, the New Zealand Parliament passed the *Te Urewera Act*, finalizing a settlement between the Tūhoe people and the government. The Act recognizes the Te Urewera – a former national park, of more than 2,000 square kilometers – as having “legal recognition in its own right.”
- In 2016, Colombia's Constitutional Court ruled that the Rio Atrato possesses rights to “protection, conservation, maintenance, and restoration,” and established joint guardianship for the river shared by indigenous people and the national government.
- In 2017, the New Zealand Parliament finalized the *Te Awa Tupua Act*, granting the Whanganui River legal status as an ecosystem.
- In 2018, the Colombian Supreme Court recognized the Colombian Amazon as a “subject of rights.”
- In 2018, in Colombia, the Administrative Court of Boyacá recognized the Páramo in Pisba, a high Andean ecosystem facing significant mining, as a “subject of rights.”

In 2012 the IUCN World Conservation Congress passed *Resolution 100, Incorporation of the Rights of Nature as the organizational focal point in IUCN's decision making* (see [Annex IV](#)), which recommended initiation of a process to integrate the rights of nature as a "fundamental and absolute key element" in all IUCN decisions. It further called on the Director General and IUCN Members to "*promote the development of a Universal Declaration of the Rights of Nature*".

In the practice of environmental law enforcement, nature is sometimes recognized as a victim of environmental harm in its own right and represented in the restorative process. As writes Brian Preston, the chief judge at the New South Wales Land and Environment Court (NSWLEC):⁵⁵

"Humans are not the only victims of environmental crime. The biosphere and nonhuman biota have intrinsic value independent of their utilitarian or instrumental value for humans. When harmed by environmental crime, the biosphere and non-human biota also are victims. The harm is able to be assessed from an ecological perspective; it need not be anthropocentric (...)
If the environment is recognised as being a victim of environmental crime and is represented in the restorative justice process, it becomes empowered. The environment is given a voice, validity and respect. This itself is a transformative act as it recognises the intrinsic value of the environment. By giving the environment a voice and recognising and healing it as a victim, humanity's relationship with the environment is also transformed."

Trees and rivers have been represented by surrogate victims in a few New Zealand conferences and one Canadian restorative justice conference:⁵⁶

1. In **Auckland City Council v 12 Carlton Gore Road Ltd and Mary-Anne Catherine McKay Lowe**, and in **Rodney District Council and Sam Josh Tupou**, the environment affected by destruction and cutting of trees without resource consent was represented by the local council which was responsible for administering the laws protecting vegetation in the area. In these cases, the trees were considered a victim in their own right and represented as such at the restorative justice conference.
2. In the **Waikato Regional Council vs. Huntly Quarries Ltd-case**, a river was represented at a restorative justice conference as a victim in its own right. In this case, sediment laden stormwater was illegally discharged from the offender's quarry affecting the river quality of the Waikato River, a river of particular cultural significance for the local *Maori Taiui* people. The river was represented at the restorative justice conference by the chairperson of the Lower Waikato River Enhancement Society. The outcome of the restorative conference was that the offender had to make a donation to the Lower Waikato River Enhancement Society in lieu of a fine. The offender complied and was then discharged without conviction.
3. In **Auckland City Council v G B Shaw and B & C Shaw Limited**, the restorative outcome of the conference involved restoration of the physical environment. A developer felled a protected pohutukawa tree for gain. At the conference where the defendant apologized publicly, it was agreed that the defendant would plant a new pohutukawa tree on the property, pay for an arborist to maintain it for five years under an enforcement order, make a donation of \$20,000 to the community for the purchase of 200 trees for planting in the neighborhood and contribute to Council's costs. At sentencing the outcome plan was accepted by the judge and the recidivist defendant avoided three

months imprisonment (in part because of the restorative justice process) but was fined \$80,000.

4. In the Canadian case **CopCan Contracting Ltd. and the District of Sparwood (2010)**, a restorative conference was held in response to the killing of 29 fish caused by the dewatering of a side channel of Michel Creek during construction of the Elk River Pedestrian Bridge in November 2009. During the conference, community members collectively represented the interest of the river. The community members, the offending company CopCan Contracting Ltd. and the District of Sparwood discussed and agreed upon restitution for the incident. Restitution included a habitat compensation plan, riparian improvements to increase juvenile fish rearing habitat and a letter of apology to the community.⁵⁷

5.2 Who speaks for the Earth?

This interesting development leads us to the question of who would qualify to be the surrogate victim representing the harmed environment in restorative conferences – with other words, who should be allowed to ‘speak for the Earth’? Different experts in the field of environmental restorative justice come to different conclusions.

- NSWLEC judge **Brian Preston** thinks governmental or non-governmental organizations could represent nature, as long as they are able to bring to the restorative process an eco-centric approach: *“The choice of representative will be influenced by the crime and the harm caused. For example, for a water pollution offense which affects river quality, the community that uses and benefits from the river, and the river itself, which is also a victim, could be represented by a governmental or non-governmental organization responsible for or engaged in protection of riverine ecosystems. For offenses involving the cutting of trees or native vegetation without consent, the trees and the vegetation community of which the trees were part could be represented by governmental and non-governmental organizations responsible for or engaged in protection, restoration or regeneration of native vegetation. (...) [However], where the environment and non-human biota are the victims, the surrogate victim needs to be able to bring to the restorative process an eco-centric and not anthropocentric perspective.”*⁵⁸
- **Mark Hamilton**, PhD Law Candidate at UNSW, Australia, says that a central tenet of restorative justice is that responses to crime should be inclusive. In practice this means facilitating many different voices representing the harmed environment at restorative conferencing. Those voices could include an indigenous voice but also non-indigenous individuals, environmental CSOs, non-indigenous

communities, environmental or conservation experts and even commercial operators affected by the offending.⁵⁹

- Australian criminologist **Rob White** says that the social and cultural context is important. In his opinion, indigenous people should be the preferred surrogate victims because of their intrinsic identification with the land:
“The question of expert evidence and who should speak for whom (or what) is particularly important in defining the ‘subject’ of the law and thus identifying the nature of ‘victimization,’ and hence the scope of what needs to be done to ‘repair the harm.’ For example, a ‘river’ may be defined in spiritual and cultural terms by an Indigenous community, be viewed primarily in terms of water flow according to the more narrow Eurocentric conceptions common in Australian courts, and be conceptualized as inclusive of riparian zones which relate to the observed influence of the river on the biota within and adjacent to the river from an ecological perspective. Thus, there are quite different associations with and interpretations of what ‘a river’ actually means. However, legal acknowledgement and the representation of the rights of nature should take into account the social and cultural contexts in order to honor [FW: rather than bypass] the connection between indigenous peoples and the land. The Indigenous voice should be privileged because of their intrinsic identification with the land.”⁶⁰

The argument that indigenous communities’ strong connection with the land and their skills in listening to the non-verbal communication from nature (for example the signals emanating from the natural world that denote things such as the impacts of climate change - think of oceans warming or insect eggs hatching earlier)⁶¹ uniquely positions them to be spokespersons for the harmed environment is a strong one. Since ‘indigenous’ means ‘native’ or ‘of the land’, a good spokesperson for the natural environment

would be a person or community that is (culturally and historically) intimately familiar with the land and knowledgeable about how to translate this non-verbal communication from the land into a language non-native participants of a restorative justice conference can understand.

This does raise the question how the 'indigenous peoples of the West' can reconnect to the land and improve their skills in listening to nature's non-verbal communications when playing the part of a surrogate victim in a restorative process, so that they speak with authenticity and credibility. Professor **Fred Besthorn** says that listening to the 'Earth's voice' and the voice of non-human inhabitants – which he calls the 'envoicement' of the Earth - requires us to re-inhabit our place in the world in a sensual and 'enlivened' way.⁶²

The *Work that Reconnects*, a methodology developed by environmental activist and author Joanna Macy, offers exercises to guide this process of reconnecting with the land, with non-human beings and with future generations. Dutch *Work that Reconnects*-practitioner **Manon Danker** explains that Joanna Macy calls this reconnection an 'act of moral imagination'. It is about remembering (and experiencing) our connection with the web of life and acting from a place of sensitivity to the integrity of all life:

*"The Work that Reconnects offers ways to invite perspectives in that help to leave narrow self-interests behind and become present for ways in which to care for communities beyond the present day anthropocentric focus", she says.*⁶³

6. Conclusion

Restorative justice approaches crime as a violation of people and relationships and invites one to see the world relationally. Because of restorative justice's emphasis on healing damaged relationships, its search for the roots of harmful behavior and its community-orientation, it seems to be well positioned to address ecological harms. After all, it takes an in-depth look at what is needed to restore both the environment and fractured relationships. It is a systemic response to wrongdoing and because environmental pollution causes systemic harm to our shared life-support system, the Earth, the systemic response to these harms offered by restorative justice makes sense.

Restorative justice strengthens community identity and resilience, it empowers change from the bottom up, because it is a way for communities to develop social capital, social networks and civic interconnectedness. Participation in restorative processes offers citizens the chance to mobilize their community to challenge systemic socio-economic and environmental injustice. It can encourage citizens to challenge norms and stimulate political debate.⁶⁴ Seen from a human rights angle, restorative justice also empowers individuals to take their rights to participation, remedy, and access to justice in environmental matters - 'environmental democracy rights' that are recognized by the *Aarhus Convention* and *Escazu Agreement* - to another level by becoming direct stakeholders in the resolution of the environmental harm.

The 2010 Ecocide Mock Trial also demonstrated the added value of including restorative justice in the sentencing arsenal under a future law of Ecocide. In addition, restorative justice allows a wide range of values, including spiritual and emotional values, and needs to be expressed and culturally appropriate procedures to be followed. Thanks to this 'open' character, it could be well suited to give space for rights of nature-approaches to what constitutes an environmental violation, who can be a victim of such a

violation, and what 'restoration' could look like from an eco-centric perspective. The mentioned cases from New Zealand and Canada show that nature itself can be represented in restorative justice conferences as a victim in its own right, and that the outcome of such conferences can include the obligation to restore the harm done to the environment. The fact that restorative justice uses indigenous processes such as peacemaking circles can create a conducive environment for rights-of-nature approaches (which borrow from indigenous worldviews) and strengthen the active agency of indigenous people as spokespersons for the harmed environment. It should not be assumed, however, that indigenous peoples all speak with the same voice when representing the harmed environment. Such a romanticized notion of indigenous stewardship ignores complex economic, social and political realities. Summarizing, restorative justice can have a transformative effect in matters of environmental harm:

1. With regards to *victims*; restorative justice can give them a voice and empower them. It helps them heal from harm and get closure.
2. With regards to *offenders*; restorative justice can help them grow in responsibility. Restorative justice conferences can educate the company and help it reintegrate, rehabilitate and regain their social license to operate.
3. Restorative justice *revitalizes community bonds*, because it gives the control over the resolution of the conflict back to the community. The community members' participation in restorative processes is also an expression of the right to information, participation and access to justice in environmental matters.
4. Recognizing the *environment as a victim in its own right* is recognizing the intrinsic value of the environment. This contributes to the transformation of humanity's relationship with the environment away from unsustainable exploitation towards a duty of care.

III EXPERIENCES FROM THE GROUND: RESTORATIVE JUSTICE AND ENVIRONMENTAL HARM IN NEW ZEALAND, AUSTRALIA AND CANADA



"Welcome To Waikato" by nim is licensed under CC BY-SA 2.0

1. Introduction

This chapter takes a close look at restorative approaches to environmental harm in New Zealand, Australia and Canada.

Restorative Justice has been an important element in New Zealand sentencing since 2002. According to a 2012 report of the Ministry for the Environment, between 1 July 2001 and 30 September 2012, a restorative justice process was used in 33 prosecutions under the Resource Management Act in New Zealand. In addition, New Zealand's local government Environment Canterbury has designed the *Alternative Environmental Justice* scheme, a restorative justice response to environmental offenses.

In Australia, the New South Wales Land and Environment Court (NSWLEC) uses restorative processes in addressing environmental offenses. The Australian Victorian Environmental Protection Agency uses restorative justice conferences in communities afflicted with environmental harm as well.

In Canada, the British Columbia Ministry of Environment and Climate Change Strategy is breaking new ground with its use of Community Environmental Justice Forums (CEJFs) to deal with companies who break environmental laws.

This chapter gives an overview of these developments and sums up the findings in the conclusion.

2. New Zealand

2.1 *Restorative Justice in environmental and planning law cases*

Restorative Justice has been an important element in New Zealand sentencing since the introduction of the *Sentencing Act 2002*, the *Parole Act* in 2002 and the *Victims' Rights Act* from 2002. Restorative justice conferencing has occurred in 33 environmental and planning law cases between 30 June 2002 and 30 September 2012.⁶⁵ Environmental offenses in New Zealand are largely contained in the *Resource Management Act* 1991, with prosecutions generally run by regional councils.⁶⁶

Although the Sentencing Act is not specifically directed at environmental crime, it sets down the rules for sentencing for all crime in New Zealand and its restorative justice provisions are therefore applicable to prosecutions under the Resource Management Act.⁶⁷ In sentencing an offender a court is required, according to section 8 j of the Sentencing Act, "*to take into account any restorative justice outcomes that have occurred, or that the court is satisfied are likely to occur, in relation to a particular case*". The court must also take into account any offer of amends made by the offender to the victim, any agreement between the offender and victim going to a remedy for the loss or damage caused, any measures taken or proposed to be taken by the offender to make compensation, apologize or make good the harm to the victim or their family, and any remedial action taken or proposed to be taken by the offender.

The Victims' Rights Act 2002 also contains restorative justice provisions. According to section 9, if a victim requests to meet the offender to resolve issues relating to the offense, a member of the court staff, police or a probation officer, must, if satisfied that the necessary resources are available, refer the request to a suitable person who is to arrange and facilitate a restorative justice meeting. A victim impact statement can be made during the sentencing procedure. As soon as is practicable after the

victim comes into contact with a government agency, the victim must be given information about programs, remedies or services available, with services including participation in restorative justice processes.⁶⁸

Section 8 of the New Zealand Sentencing Act and section 9 of the New Zealand Victims' Rights Act are recognition of the value of restorative justice processes, and are applicable to environmental offenses. The restorative justice process in the 33 registered cases generally took place after the charge but prior to the offender being sentenced where a guilty plea had been entered by the offender. The following three cases give an impression of such proceedings:⁶⁹

In *Auckland City Council v L&L's company*, the defendant destroyed two exotic trees and damaged a third. As a result of the restorative justice conference an apology was given to the victim by the defendant, payment was made for the facilitator's costs, money was provided for landscaping works on the victim's property, as well as payment to a local residents association for environmental projects.

In *Canterbury Regional Council v Deane Hogg* the owner of land was charged with two offenses under the Resource Management Act after unlawfully disposing of 600 tons of waste material that had been left on his property by an evicted tenant. The defendant ignited the waste material which burnt for 12 hours and discharged smoke for five days, causing adverse health effects to nearby residents and animals. The defendant participated in a restorative justice conference and offered an apology to his neighbors and the community, which was accepted, and consequently the fine imposed was reduced.

In *Northland Regional Council v Fulton Hogan Ltd, Cates Bros Ltd & North End Contractors Ltd, Whangarei District Council & T Perkinson* the defendants caused waste and other materials to be discharged into a

tributary from a landfill for which no development consent had been obtained. Four of the defendants were granted conditional discharges without conviction as a result of their participation in a restorative justice process. The discharges were conditional because a number of the outcomes from the restorative justice process were yet to be completed and the court wanted to ensure that they were completed. As a part of the restorative justice process, the defendants consulted with the local indigenous groups and signed a memorandum of understanding to establish a local eco-nursery. The fifth defendant, who was more culpable than the others, also participated willingly in the restorative justice process and received a reduced fine of \$400.

2.2 Overview of Cases

Table 2 gives an overview of the use of restorative justice conferencing in New Zealand in all 33 cases, with a description of the types of cases, the involved stakeholders and the outcomes (the case-details can be found in the footnotes).

Table 2: *The use of restorative justice conferencing in a New Zealand environment and planning law context by Mark Hamilton 2017⁷⁰*

Types of Cases	Stakeholders (not including who have caused harm)	Outcomes
<ul style="list-style-type: none"> • Pollution • Discharge of offensive odours¹ • Discharge of untreated pig effluent² • Discharge of human 	<ul style="list-style-type: none"> • Community members including local residents⁸ • Council officers⁹ • The environment represented by the Council¹⁰ 	<ul style="list-style-type: none"> • An apology¹⁵ • Commitments regarding the offending behavior: <ul style="list-style-type: none"> - dialogue to put the wrong right¹⁶

<p>sewage³</p> <ul style="list-style-type: none"> • Dust nuisance⁴ • Breach of conditions of development consents⁵ • Destruction and felling of trees without consents⁶ • Contravention of an abatement order⁷ 	<ul style="list-style-type: none"> • The Waikato River represented by the Chairperson of the Waikato River Enhancement Society¹¹ • Indigenous people represented by the local Maori trust¹² • The Chairperson of a local community board and walkway trust¹³ • Arborist¹⁴ 	<ul style="list-style-type: none"> - a plan to the stop incident reoccurring in the future¹⁷ - an agreement to work with Council to produce a solution to the problem causing the harm¹⁸ - ongoing consultation¹⁹ • The payment of various costs by the offender: <ul style="list-style-type: none"> - Council costs²⁰ - facilitator costs²¹ - clean up costs²² - council costs of testing air quality²³ - compensation to two local businesses for car-cleaning²⁴ • The undertaking of work (or the payment for that work) to repair the harm caused and to stop the harm occurring again in the future: <ul style="list-style-type: none"> - provision of an odor entrapment device and
---	---	--

		<p>other associated work including the construction of a planted barrier around part of the offending site²⁵</p> <ul style="list-style-type: none"> - installation of a new effluent system²⁶ - remediation of septic tanks²⁷ - installation of fly screens on neighboring properties²⁸ - landscaping work²⁹ - planting of a tree to replace a tree that was cut down and the payment of an arborist to maintain the tree for five years³⁰ <ul style="list-style-type: none"> • Donations: <ul style="list-style-type: none"> - to a local college for a native tree planting project³¹ - to the Waikato River Enhancement Society for a walkway project³² - to a local residents' association for environmental projects³³
--	--	--

		<p>- to the local community for community projects³⁴</p> <p>- to the community for the purchase of 200 trees for planting in the neighbourhood³⁵</p>
--	--	--

1 *Auckland Regional Council v Times Media Ltd and Anthony David Cook* (Unreported, Auckland District Court, McElrea DCJ, CRN 2084004885, 16 June 2003) (*Times Media*).

2 *Waikato Regional Council v PIC New Zealand Ltd* (Unreported, Auckland District Court, McElrea DCJ, CRN 4057500082 & 79, 29 November 2004) (*PIC New Zealand*).

3 *Waikato Regional Council v Matamato-Piako District Council* (Unreported, Morrisonville District Council, Thompson DCJ, CRN 0409500061 & 63, 6 May 2005) (*Council & Council*).

4 *Manukau City Council v Specialised Container Services (Auckland) Limited* (Unreported, Auckland District Court, CRN 08092501579, 16 September 2009, Judge McElrea) (*Specialised Container Services*).

5 *Waikato Regional Council v Hamilton City Council and Perry Environmental Ltd* (Unreported, Hamilton District Court, Whiting DCJ, CRN 401950677 & 86, 1 March 2005) (*Perry Environmental*).

6 *Auckland City Council v L&L's company (name suppressed)* (Unreported, Auckland District Court, McElrea DCJ, CRN 04004502283, 11 April 2005) (*L&L's company*); *Auckland City Council v 12 Carlton Gore Road Ltd and Mary-Anne Katherine Lowe* (Unreported, Auckland District Court, McElrea DCJ, CRN 04004502283, 11 April 2005) (*12 Carlton Gore*); *Auckland City Council v G B Shaw and B & C Shaw Limited* [2006] DCR 425 (*Shaw & Shaw*).

7 *Waikato Regional Council v Huntly Quarries Ltd and Ian Harold Wedding* [2004] DCR 156 (*Huntly Quarries*).

8 *Times Media* (n 1); *12 Carlton Gore* (n 6); *Auckland Regional Council v PVL Proteins Limited* [2008] DCR 84 (*PVL Proteins*).

9 *Times Media* (n 1); *PIC New Zealand* (n 2); *Huntly Quarries* (n 7); *PVL Proteins* (n 8).

10 *12 Carlton Gore* (n 8).

11 *Huntly Quarries* (n 7).

12 *Huntly Quarries* (n 7).

13 *Huntly Quarries* (n 7).

14 *12 Carlton Gore* (n 6).

15 *Times Media* (n 1); *Council & Council* (n 3); *Perry Environmental* (n 5); *L&L's company* (n 6); *12 Carlton Gore* (n 6); *Shaw & Shaw* (n 6).

16 *PIC New Zealand* (n 2).

17 *Perry Environmental* (n 5).

18 *PVL Proteins* (n 8).

19 *Specialised Container Services* (n 4).

20 *Times Media* (n 1); *PIC New Zealand* (n 2); *12 Carlton Gore* (n 6); *Shaw & Shaw* (n 6).

21 *Times Media* (n 1); *PIC New Zealand* (n 2); *12 Carlton Gore* (n 6); *Shaw & Shaw* (n 6).

22 *PIC New Zealand* (n 2).

23 *Times Media* (n 1).

24 *Specialised Container Services* (n 4).

25 *Times Media* (n 1).

26 *PIC New Zealand* (n 2).

27 *Council & Council* (n 3).

28 *Perry Environmental* (n 5). 29 *L&L's company* (n 6); 12 *Carlton Gore* (n 6).

30 *Shaw & Shaw* (n 6).

31 *Times Media* (n 1).

32 *Huntly Quarries* (n 7).

33 *L&L's company* (n 6).

34 12 *Carlton Gore* (n 6).

35 *Shaw* & *Shaw* (n 6)

These 33 cases from New Zealand show that restorative justice conferences can be utilised across a:

a) Wide variety of offenses:

- pollution, both air and water;
- breach of conditions of development consent; and
- destruction of trees.

b) Wide variety of victims:

- individuals;
- communities; and
- the environment.

c) Wide variety of outcomes: the defendant was willing to offer:

- an apology;
- payments of costs (both facilitators and prosecutors);
- tree planting;
- undertaking of steps to prevent further occurrence of the offense;
- donations to community associations, local schools and resident associations; and
- landscaping.⁷¹

3.1 *Alternative Environmental Justice*

In addition to the restorative justice conferences in the above-mentioned court cases, New Zealand's local government Environment Canterbury has designed the *Alternative Environmental Justice* scheme, which is a mixture of restorative justice and diversion. Alternative environmental justice or diversion processes are used where a prosecution is justified but where the nature of the offending and/or the remedial actions taken by the defendant are such that a conviction is not regarded as a necessary outcome. These processes are recognised by the *Criminal Procedure Act 2011*⁷² and are a lawful exercise of a council's prosecutorial discretion. They enable eligible defendants to complete specified requirements within a given timeframe to avoid the continuation of a prosecution and the possibility of receiving a conviction.⁷²

These processes provide an alternative forum that supplements the Court process and enables an offender to put right the harm caused by their offending. A key feature of alternative environmental justice is the ability to engage community groups and affected parties and allow them to participate actively in a restorative justice process tailored to environmental offending. The involvement of the community allows the offender to more fully understand the consequences of their offending. Community participation also helps determine what the appropriate outcomes are for the remediation of the harm and enables resources to go back into environment or community directly affected by the offending.⁷³

3.2 *Alternative Environmental Justice in practice: the Station Peak Dairy-case*

In 2015 the directors of Station Peak Dairy Limited pleaded guilty to illegally clearing riverside land in the lower Waitaki. Station Peak Dairy Limited

applied to take part in Environment Canterbury's alternative environmental justice scheme. In 2016, the defendants, Council staff, members of the Waitaki community and the Maori local council Te Rūnanga o Waihao attended a conference in Waimate. The conference was conducted by Restorative Justice Services Ōtautahi Christchurch.⁷⁴

It was agreed that Station Peak Dairy Limited were to pay \$21,000 to plant willows for river protection and to pay \$18,000 for the implementation of an experimental trial of native planting for river protection to see how they fare against willow. This was broadly equivalent to the fine that would likely have been imposed by the Court, with the key difference being that the funds could be applied directly to positive environmental outcomes in the same community. In addition, it was agreed that Station Peak Dairy Limited would undertake further remedial actions and address other concerns raised at the conference, including:

- Providing Te Rūnanga o Waihao the location of all springheads on the property;
- Constructing a permanent fence line along the riverward boundary of the property;
- Maintaining the indigenous bank protection and erosion control planting once it is done;
- Ensuring no further harm to any vegetation planted or used for flood control purposes within a specific area; and
- Paying costs associated with the conference.⁷⁵

After the conference, the Council withdrew the charges and an enforcement order was issued in December 2016 which recorded the outcomes. All participants were pleased to have the matter resolved and for practical and useful outcomes to be achieved. Station Peak Dairy director Kieran Pavletich said:

"We believe the outcomes to be mutually beneficial for all the parties involved. The Alternative Environmental Justice scheme that we worked through with the help of Environment Canterbury proved to be a very thorough and consultative process."

Source: <https://www.ecan.govt.nz/get-involved/news-and-events/2017/environmental-justice-best-practice-approach-to-enforcement/>

According to a report by Wynn Williams Lawyers to the New Zealand Minister of the Environment, the terms of the restoratively agreed enforcement order went well beyond what would have resulted from a contested enforcement order imposed as part of the sentencing process. This example illustrates some of the real benefits of the alternative justice process, namely the community's involvement in achieving tangible and local outcomes that both remediate the harm caused by the offending and also provide additional benefits to the wider community.⁷⁶

3. Australia

3.1 Introduction

In New South Wales, the New South Wales Land and Environment Court (NSWLEC), a specialist environment and planning court with jurisdiction over environmental crime, allowed for restorative justice interventions in two cases of Aboriginal cultural heritage offending (destruction and damage to Aboriginal places and objects) which harmed the Aboriginal peoples' connection to the land: *Garrett vs Williams* (2007) and *Clarence Valley Council* (2018). Environmental offenses in New South Wales are primarily contained in the *Protection of the Environment Operations Act 1997* (POEO Act). In addition to imposing a fine, the NSWLEC has various sentencing options open to it, including orders for the restoration and prevention of environmental harm.⁷⁷

In 2015 the POEO Act, along with other legislation, was amended to explicitly include restorative justice processes among the available orders that may be made by the NSWLEC.

Paragraph 3.2 discusses the two NSWLEC cases, *Garrett v Williams* and *Clarence City Council*, in which restorative justice was applied.

In Victoria, the Victorian Environmental Protection Agency has used restorative justice conferencing to formulate enforceable undertakings in an air pollution matter: this is addressed in paragraph 3.3.

3.2 NSWLEC Caselaw

➤ *Garrett v Williams (2007)*

*Garrett vs. Williams*⁷⁸ concerned the destruction of Aboriginal artefacts during construction and exploration activities undertaken by a mining company. As part of the settlement of the case, a restorative justice conference was facilitated by the prosecutor and funded by the defendant. The Aboriginal people nominated a representative of the relevant local Aboriginal Land Council to represent them in the process. The conference provided the opportunity for the chairperson of the Broken Hill Aboriginal Land Council and the defendant to meet, and for the defendant to apologize for the harm caused. The parties produced a document outlining the agreement that was reached at the conference, which included financial contributions to be made to the victims, future training and employment opportunities for the local community, and a guarantee that the traditional owners would be involved in any salvage operations of Aboriginal artefacts. These results of the restorative justice intervention were taken into account by the judge in the sentencing process, but the restorative justice intervention did not substitute the court sentence for the offenses committed by the defendant.

➤ *Clarence Valley Council (2018)*

*Clarence Valley Council*⁷⁹ concerned a prosecution of Clarence Valley Council before the NSWLEC because it destroyed an Aboriginal Object, a scar tree, through its lopping and removal. The registered scar tree was culturally significant to the local Aboriginal people; under Australian law it is an offense to harm or desecrate it. Lisa Southgate, who recorded the tree to protect it, said: "*Aboriginal objects such as this are extremely important to the Aboriginal community as they provide a link between the present and*

the past and people's ongoing links to the culture and landscape". The Council pleaded guilty to the offense and at the end of the first day of the sentencing hearing agreed to participate in a restorative justice conference with representatives of the local Aboriginal community.

At the restorative justice conference, the Council Mayor, the Deputy Mayor, the General Manager and the field officers who removed the scar tree as part of their work, all personally apologized to representatives of the local Aboriginal community, who accepted their apologies. The participants then prepared a restorative justice conference agreement, which included measures by the Council to increase cultural awareness and skills among Council staff and the public in general about sacred Aboriginal objects, improve Aboriginal consultations procedures in planning and development and improve Aboriginal employment opportunities. The outcome of the restorative justice conference was taken into account in the sentencing process.

The restorative measures that were implemented aimed to recognize the active agency by Aboriginal people, as the knowledge holders and keepers of the cultural heritage, to redress the harm done and as such to redress the nonrecognition of Aboriginal cultural heritage and the Aboriginal people that the commission of the offense expressed.

3.3 Enforceable Undertakings and Restorative Justice

Enforceable undertakings are part of a range of regulatory tools used by regulatory agencies in Australia at a national and state level. They are usually accepted by environment regulators as a low cost, low resource use alternative to civil or criminal court action for alleged environmental offenses that are at the lower end of the scale of seriousness. An enforceable undertaking is a court enforceable written commitment by a party alleged to have caused environmental offending. Such undertakings are voluntary, legally binding and made between the Environmental

Protection Agency (EPA) and the offending party. They are an alternative to prosecution. Failure to comply with an enforceable undertaking can lead the EPA to prosecuting the original alleged offense in response to which the enforceable undertaking was entered.⁸⁰

The power to make an enforceable undertaking is akin to an administrative law provision but is prompted by a breach of the *Protection of the Environment Operations Act* (POEO Act), which is criminal law. The EPA ensures compliance with the enforceable undertaking and compliance with the POEO Act. The EPA has discretion in choosing whether to prosecute an offense of the Act or whether to pursue an administrative solution such as an enforceable undertaking.⁸¹

The Victorian EPA used restorative justice conferencing to formulate enforceable undertakings in an air pollution matter. SITA Australia, the owner of the Hallam Road Landfill-site, had numerous breaches of conditions of its license in relation to permissible odor limits. SITA met with the EPA and the victims: the members of the community and affected residents. The purpose of the conference was to get input into the draft Enforceable Undertaking and incorporate stakeholder views into the process. SITA Australia had voluntarily committed to participate. The conference resulted in the EPA entering an enforceable undertaking with SITA Australia requiring it to collate an academic literature review into scientific findings on the health impacts of landfill odor, to conduct infra-red aerial surveys to identify odor hotspots, plant trees along the southern boundary of the site, and to contribute \$100,000 towards a community environment project. Additionally, SITA Australia published a statement of regret. The rationale for entering into an enforceable undertaking was that it provided a more flexible sanction than court action as it can benefit the affected community much more than a prosecution could.⁸²

4. Canada

4.1 Community Environmental Justice Forums

Community Environmental Justice Forums (CEJFs) is an enforcement tool that applies the principles of restorative justice to the resolution of non-compliance by companies with environmental legislation that is enforced by the *Conservation Officer Service (COS)* of the Canadian *British Columbia Ministry of Environment and Climate Change Strategy*.⁸³ The CEJF is an alternative to prosecution and enforcement officers are empowered to exercise discretion when choosing the most appropriate responses to non-compliance, giving consideration to the nature of the offense, the facts of the case and the regulatory history and attitude of the offender.⁸⁴ The ministry's *Compliance & Enforcement Policy* guides this decision (see paragraph 4.2).

Led by trained facilitators, the CEJF brings together the *responsible party* ("the offender"), *community members impacted by the offense* ("the community"), and the *enforcement agency* to discuss what happened and why, and to collectively agree on appropriate restitution for the offense. After verbal consensus is reached on the actions and/or financial payments required of the offender, this is recorded in a written agreement that is signed by all forum participants.

The successful conclusion of a CEJF results in the following outcomes:

- restore or compensate for harm done to the environment;
- promote a sense of responsibility in the offender;
- acknowledge and repair harm done to a community;
- improve long term compliance (reduce the likelihood of recidivism);
- build positive relationships between the offender, the community and regulators; and
- promote general deterrence.⁸⁵

The CEJF process requires the company to take responsibility for the offense in a meaningful way. The process recognizes the individuals or community harmed by the offense and invites them to be directly involved in determining appropriate restitution. In short, CEJFs offer an alternative to an adversarial process, providing opportunity for participants to engage in meaningful dialogue, collaborative problem-solving and relationship building. The Ministry of Environmental and Climate Change Strategy is breaking new ground with this use of CEJFs to deal with companies who break environmental laws. Fisheries and Oceans Canada has used restorative justice on a number of habitat-degradation files as well, and other natural resource agencies in BC are actively exploring how they can use restorative justice.⁸⁶

4.2 When to consider a CEJF?

When considering the use of a CEJF, enforcement and program staff consult on the facts of the case, the magnitude of the harm done and the capacity and willingness of the offender to participate. They consider what is in the best interests all parties involved in-, or impacted by, the incident and what will achieve the best outcomes in terms of behavioral change and achieving compliance.

According to the ministry's *Compliance & Enforcement Policy Community*, Environmental Justice Forum *should* be considered for any case of noncompliance where all of the following conditions are met:⁸⁷

- the offender did not intend to commit the offense - it resulted from an accident or lack of due-diligence (no mens rea);
- the offender admits fault and takes responsibility for the offense;
- harm has been done, or potentially could have been done, to a community and appropriate community representatives can be identified to speak to the harm;
- the offender is remorseful and demonstrates a sincere desire to repair the harm caused by the offense;

- the offender, community representatives and the investigating officer freely and fully consent to participate; and
- in the opinion of the investigating officer, there is enough prima facie evidence to pursue charges against the company if the forum does not proceed. A CEJF is not an option to be considered only to truncate an investigation or in cases of insufficient evidence.

A CEJF *may* still be considered to deal with an offender alleged to have knowingly committed an offense if:⁸⁸

- the offender is remorseful and demonstrates a sincere desire to repair harm caused by the offense and to address the underlying causes of the offense; and
- in the opinion of the investigating officer and/or ministry program staff, the offender has the demonstrated capacity and willingness to comply with a CEJF agreement.

A CEJF would *not* be a suitable choice to deal with non-compliance when:⁸⁹

- the offense was committed with intent, posing significant actual or potential risk to the environmental or human health and safety; or
- the offender takes no responsibility for the offense; or
- the scope and scale of the non-compliance is such that the environmental impacts extend far beyond a single community and become a matter of provincial concern; or
- a community forum may be expected to do more harm than good; or
- it is felt that a more public forum (a court) would provide better deterrence than a closed forum, even if the prosecution is not successful.

In addition to meeting the conditions outlined above, when considering the suitability of a CEJF, enforcement staff must consider:⁹⁰

1. *The regulatory history of the offender:* If an offender has a history of non-compliance or has an otherwise contentious regulatory relationship with the ministry, careful consideration must be given to

whether they are a suitable candidate for a CEJF.

2. *The public interest:* Even when all the pre-conditions for a CEJF have been met, staff must consider whether it is the best tool to achieve the desired outcomes or whether the matter is more appropriately addressed using another approach. For example, the public interest may be better served by an immediate cancellation or curtailing of an offender's operating permit or by a court prosecution that more effectively promotes general deterrence in a specific industry.

3. *Implications for other operations:* Where the offense does not extend beyond a single community, but where the offending company has similar operations in other locations in BC, the expectation is that the company will apply improved business practices and/or new technology identified via the CEJF to those other operations.

4.3 How does a Community Environmental Justice Forum work?

A CEJF is led by a trained, impartial facilitator. The facilitator conducts a pre-forum meeting with company representatives – those most responsible for the incident - and interviews prospective community members so that all participants understand the process and know what to expect and what will be expected of them. Participation in a CEJF by the company, the community and the enforcement agency must be voluntary. At any time before or during the CEJF, prior to signing the final agreement, participants can withdraw from the process. At that time the enforcement agency would decide how to proceed with the case.

The forum follows a prescribed 'circle' format that typically lasts 2 – 2.5 hours. During this time, all participants are given an opportunity to be heard: the company is asked to explain how and why the offense occurred;

each community representative describes the real or potential impact of the incident on themselves, or on the community as a whole. Collectively the group then agrees on appropriate remedies and restitution which is documented in a formal agreement and signed by all participants at the conclusion of the forum.⁹¹

Discussion within the forum is confidential; however, once the forum concludes the offender is required to issue a press release accepting responsibility for the incident and summarizing the terms of the CEJF agreement. The outcomes of the CEJF are recorded in the Ministry of Environment and Climate Change Strategy's publicly accessible *Environmental Violations Database*.⁹²

A monitor is assigned to ensure all terms and conditions of the agreement are completed. Once this happens, the matter is concluded.

4.4 What can the company expect going into a forum?

A considerable amount of work is done in advance of the forum by the facilitator, in consultation with the company, the community and the enforcement agency in order to ensure an outcome that is fair and acceptable to all. Before committing to participate in a forum, an offender will be informed about:

- the format of the forum and what will be asked of them;
- what the time commitment will be;
- who will be attending; and
- the range of remedies and restitution likely to comprise the CEJF final agreement.

To be eligible to participate in a CEJF the company will be expected to:

- take responsibility for the offense;
- demonstrate a sincere interest in repairing harm caused by the offense;

- be prepared to explain during the forum how and why the offense happened;
- listen to community members describe how the incident impacted them, which may include the expression of strong emotions;
- sign a CEJF agreement at the end of the forum, agreeing to comply with the prescribed remedies and restitution; and
- issue a news release taking responsibility for the incident, expressing remorse and outlining the terms of the agreement.⁹³

4.5 What is the role of the community?

Community participants are carefully selected to speak to the real or potential impacts from the incident and may include individuals directly affected or others who can speak on behalf of the broader community.

Community participants will be expected to:

- sign a confidentiality agreement;
- participate willingly with a sincere interest in achieving a meaningful outcome;
- speak to the impact of the actual or potential harm caused by the incident; and
- sign a CEJF agreement at the end of the forum.⁹⁴

4.6 What are the benefits of a CEJF?

For the company, the CEJF:

- Helps build good public relations: the CEJF provides an opportunity to demonstrate accountability and to repair the wrong;
- Avoids an adversarial court process and potential conviction;
- Builds appreciation and understanding in the community for the business; and
- Can result in a better working relationship with ministry officials responsible for overseeing the business operations.

For the community, the CEJF:

- Empowers them to be a partner in administering justice and problem-solving;
- Offers answers to their questions about the incident and insight into the company;
- Provides an opportunity to reinforce community values and expectations; and
- Can result in remedial actions and/or compensatory payments, which benefit the community directly

For the government the benefits are:

- Timelier and cost-effective resolution of cases, reducing the burden on the court's time;
- Positive environmental outcomes;
- An opportunity for learning and building relationships with communities and companies
- Improved compliance through reduced recidivism.⁹⁵

4.7 Overview of Cases

Table 3 gives an overview of the CEFJ cases since 2010.

Table 3: Overview of CEJF cases compiled by Mark Hamilton⁹⁶

Forum No	Year	Offender	Description of offense	Summary of Community Environmental Justice Forum
1	2010	Ainsworth Lumber Co. Ltd.	Introduce Business Waste	A forum was held in response to the burning of prohibited material in a beehive burner by Ainsworth Lumber Co. Ltd. During the forum, which brought together representatives from the company and the community, appropriate restitution for the incident was identified. The company was required to pay \$20,000 to establish a local bear aware program and \$4500 to fund the operation of an air monitoring station within the town site for three years. Additional restitution included issuing a public apology in the local newspaper, posting signage, and conducting instructional staff meetings. ⁹⁷
2	2010	CopCan Contracting Ltd. and the District of Sparwood	Harmful Alteration Disruption of Fish Habitat	A forum was held in response to the killing of 29 fish (fingerlings) caused by the dewatering of a side channel of Michel Creek during construction of the Elk River Pedestrian Bridge in November 2009. During the Forum, CopCan Contracting Ltd., the District of Sparwood and community members who

				collectively represented the interest of the river discussed and agreed upon restitution for the incident. Restitution included: a habitat compensation plan; work valued at \$20,000 to add 700 cubic meters of instream and riparian improvements to increase juvenile fish rearing habitat and stabilize gravel bars; letter of apology to the community; partnering with the local Fish & Game club on future work. ⁹⁸
3	2011	Teck Metals Ltd.	Fail to Comply with Terms of Permit	Two forums were held in response to a mercury discharge into the Columbia River and a leachate overflow into Stoney Creek. The forums brought together representatives from the company and the community. Monetary restitution covered both events and was directed to community environmental initiatives. The company was also required to conduct numerous internal process reviews and plant upgrades and issue a Public Apology through a press release. ⁹⁹
4	2011	Fox Forest Products	Harmful Alteration of Fish Habitat	A Forum was held following a disturbance of soils and vegetation within the riparian zone of the Kettle River during a clean-up by the company. As a result of the Forum the company made a public apology and paid \$10,000 to the Granby

				Wilderness Society to aid in river restoration. ¹⁰⁰
5	2012	Encana Corporation	Introduce Business Waste	A forum was held following a pipe failure by Encana Corporation that resulted in an uncontrolled release of natural gas containing hydrogen sulphide (sour gas) into the environment and an evacuation of local residents. The forum which brought together representatives from the affected communities of Pouce Coupe and Tomslake, the company, and the Oil & Gas Commission. The restitution agreement included: equipment and facility upgrades for the Pouce Coupe volunteer fire department (\$110K); one-third of the cost of a rural interface fire truck (\$100K); enhancements for emergency evacuation preparedness at the Tate Creek Community Centre in Tomslake (\$10K); \$30K for wetland environmental enhancement projects in the South Peace region; and a public apology made by the company. ¹⁰¹
6	2014	BC Trophy Mountain Outfitters Ltd.	Hunts or kills wildlife at a time not within an open season	A forum was held following the accidental shooting of a grizzly bear by an employee of BC Trophy Mountain Outfitters Ltd. The incident was self-reported by the company and led to a forum that brought together representatives of the local St'at'inc Nation, the

				<p>Conservation Officer Service and Trophy Mountain Outfitters, and resulted in a \$2,000 payment to the British Columbia Conservation Foundation (BCCF) to be used for helicopter monitoring of the South Chilcotin grizzly bear population unit; 80 hours (approx. value \$3,000) for investigative field research and monitoring of collared grizzlies in support of provincial wildlife program work; a \$3,500 payment to the BCCF for DNA analysis of grizzly hair samples; 5 days (approx. value \$1,500) of white bark pine cone collection in collaboration with the St'at'inc Nation. The agreement also includes a commitment to meet with the St'at'inc Nation to develop a protocol of information sharing, and to submit a letter of apology (including the forum outcomes) to be published in a local newspaper.¹⁰²</p>
7	2014	Lower Dean River Lodge	Destroying a natural resource in a conservancy	<p>A forum was held in response to the unauthorized cutting and milling of trees by the Lower Dean River Lodge within the Dean River Corridor Conservancy and the traditional territory of the Nuxalk Nation. The forum brought together representatives of the Lodge, the Nuxalk Nation, and BC Parks, and resulted in an agreement that the</p>

				<p>Lodge would provide a financial contribution of \$8,000 to provide swift water rescue training for Nuxalk Nation youth and the donation, delivery and set up of 4 tents for the Nuxalk Nation rediscovery camp for youth. The agreement also included a requirement to hold annual meetings between the Lodge, the Nuxalk Nation, and BC Parks to facilitate ongoing relationship building, and an ongoing commitment by the Lodge to report to the Nuxalk Nation the location of any heritage sites located within their permit operating area.¹⁰³</p>
8	2015	City of Kamloops	Introduce waste by prescribed activity or operation	<p>A forum was held after the accidental release of an estimated 4,300 cubic meters of raw sewage into the South Thompson River. The forum brought together representatives of the City of Kamloops, Conservation Officer Service, Interior Health Authority, Tkemlups Te Secwepemc, and the Kamloops Fly Fishing Association. As a result of the forum, the City of Kamloops contributed \$20,000 towards reclamation work on the Tranquille Creek to improve fish habitat and spent \$8,000 enhancing the alarm systems at all sewer locations to prevent similar incidents in the future. The City also</p>

				submitted a letter of apology to the community through the local newspaper and committed to conducting an annual review with its partner agencies of how it provides notification of environmental spills. ¹⁰⁴
9	2017	Caspian Apiaries Inc.	Attracting dangerous wildlife and accidental killing of wildlife	A forum was held to address multiple black bear killings by a contractor hired to set up beehives in order to pollinate a blueberry farm in Pitt Meadows. The bears had been causing damage to the hives. Participants in the forum included a director from the blueberry farm; two elders from the Katzie First Nation; a representative from WildsafeBC; and a provincial apiculturist from the Ministry of Agriculture. As a result of the forum, the company agreed to make \$40,000 in upgrades to their operation to ensure that bears are deterred, and to fund a portable e-fence for WildsafeBC. Further, they agreed to speak to the Katzie Nation youth on bee husbandry and apiaries co-existing with bears and offer training to members of the BC Beekeepers Association on proper prevention measures. The company also agreed to make a public apology in a local newspaper. ¹⁰⁵

These cases show that the CEJF has been utilized across:

a) Wide variety of offenses:

- air, land and water pollution;
- killing of wildlife (fish and bears);
- illegal cutting and milling of trees; and
- failure to comply with the terms of a permit.

b) Wide variety of victims:

- individuals;
- communities, including First Nation communities; and
- the environment.

c) Wide variety of outcomes:

- Apologies;
- Donations to environmental enhancement projects, scientific research, volunteer fire department and training projects;
- Providing training to a Beekeeper Association;
- Annual reviews of the notification system of environmental spills;
- Internal process reviews and plant upgrades;
- Relationship building and partnering;
- Developing protocols on information sharing; and
- Practical interventions such as the improvement of alarm systems, installation of portable e-fences, funding the operation of an air monitoring station and donation of tents for a youth rediscovery camp.

5. Conclusion

The caselaw from Australia, New Zealand and Canada shows the participation in restorative justice conferences of a variety of victims:

- individuals;
- communities; and
- the environment.

The cases involved a variety of offenses:

- Pollution, both air and water;
- Breach of conditions of development consent;
- Failure to comply with the terms of a permit;
- Destruction of protected Aboriginal objects;
- Killing of wildlife - fish and bears; and
- illegal cutting and milling of trees.

They also involved a variety of restorative outcomes:

- apologies;
- restoration of environmental harm and prevention of future harm through practical safety measures and environmental education of the offender;
- compensatory restoration of environments elsewhere;
- payment of compensation to the victims or to community organizations dedicated to environmental conservation;
- community service work; and
- measures addressing future behavior, such as an environmental audit of the activities of the offending company or environmental training

Finally, the cases have the following characteristics in common:

- The environmental harm is local and – relatively – smaller scale;
- The offenders are local businesses and local governments who were embedded in the web of local social relationships and have a stake in repairing the harm to those relationships; all of them took responsibility for the offense.
- Indigenous/aboriginal communities are involved in both cases in Australia, in at least 5 cases in New Zealand and in 4 of 9 cases in Canada. In general, indigenous communities are the communities that are most frequently victimized by environmental harm and the violation of natural and cultural heritage. Such offenses against indigenous peoples are especially suitable to restorative justice interventions because of their marginalized position and their strong affiliation and bond with the land. Also, the restorative circle is a form that is culturally familiar to – and borrows from - indigenous and aboriginal traditions of conflict resolution.
- The environment is represented as a victim in the conference in three cases from New Zealand and one from Canada.

IV IUCN AS A PARTNER IN RESTORATIVE JUSTICE



"dec04kmural2" by UrbanSeedEdu is licensed under CC BY-NC 2.0

1. Introduction

The caselaw from Australia, New Zealand and Canada shows that restorative justice interventions work well in cases of smaller scale environmental harm caused by local offenders who are embedded in the web of local social relationships and who take responsibility for, and have a stake in, repairing the harm to those relationships.

This chapter explores what promise these findings hold for IUCN's work on the ground. IUCN positions itself as a convenor and connector between governments, businesses, CSOs and local communities. This positioning and IUCN's diplomatic approach to natural resources conflicts promises to be an excellent match with the values of restorative justice: collaboration, trust, reconnection and restoration of social and ecological relationships.

First, this chapter shortly discusses a key difference between Australia, New Zealand and Canada and many IUCN partner countries: the presence of a strong rule of law. Is the absence of a strong rule of law a deal-breaker when applying restorative justice to environmental harms?

Second, it takes a look at how customary practices and new restorative justice reforms can go hand in hand and highlights some national restorative justice policies in IUCN partner countries.

Third, it explores how the Community Environmental Justice Forums could serve as a template to set up restorative justice programs in IUCN partner countries.

Fourth, it signals challenges in applying restorative justice to environmental harm caused by large corporations.

2. Rule of Law

Australia, New Zealand and Canada are resource-rich countries, whose original inhabitants – the aboriginal and First Nation peoples – were colonized by Western powers. The legacy of colonization still lives on, and aboriginal and First Nation peoples are still marginalized and unjustly burdened by social-economic and mental health problems. They are also disproportionately affected and frequently victimized by environmental harm and environmental offenses. In general terms, many IUCN country partners share these features: resource-rich, former colonies and home to indigenous peoples who find themselves in a marginalized position and vulnerable to environmental injustices. However, a big difference between the three researched countries and IUCN country partners is that Australia, New Zealand and Canada are Western nations with a functioning rule of law in place. Is the absence of a strong rule of law in IUCN partner countries an obstacle for the successful application of restorative justice?

This is not the case. Mediator Lawrence Kershen, who worked for the peace-building organization *Search for Common Ground*, says that there is an appetite for- and a willingness to adopt restorative-type processes in post-conflict countries.¹⁰⁶ Truth and Reconciliation Commissions set up in the context of transitional justice usually work with restorative principles. Anneke van Hoek, a Dutch criminologist who set up restorative interventions in post-war Rwanda,¹⁰⁷ says:

Restorative justice works particularly well in countries that lack a strong rule of law. Absent a strong rule of law and State-run law enforcement, local traditions of conflict resolution gain importance and maintain their legitimacy. Because of its indigenous roots and open character, restorative justice can easily be integrated into these local conflict resolution traditions, as well as build the capacity of the justice system.

Grassroot restorative justice practices can actually strengthen a culture of rule of law when it empowers communities to hold offenders accountable. It is a way for communities to develop social capital, social networks and civic interconnectedness. Participation in restorative process also offers citizens the chance to mobilize their community to challenge systemic socio-economic and environmental injustice and inequality before the law. It can encourage citizen to challenge norms and stimulate political debate. It is also a tangible way for citizens and communities to exercise their environmental democratic rights: the rights to information, participation and access to justice in environmental matters. In Brazil for example, restorative justice initiatives increased citizen confidence in justice systems and contributed to the creation of a 'culture of peace' from the bottom up.

This short overview suggests that countries lacking a strong rule of law can benefit from restorative justice in unique ways.

3. Old Customary Practices & New Restorative Justice Reforms

There are many similarities between restorative justice and indigenous and customary practices that were in place before colonial rule in Africa, Asia and Latin America. The main objective of the pre-colonial justice systems was to restore social safety and reconciliation between the wronged and the wrongdoer.

In many parts of the world, indigenous and customary justice forums are still in place. At the same time, new restorative justice reforms are introduced that build upon these customary practices while putting in place legal safeguards to ensure equal access to justice, equity and fairness. Such safeguards are necessary, because the outcome of indigenous and customary justice forums is often decided by the arbitrator rather than agreed on by the stakeholders and the offender's consent to participate is not always a requirement. Other risks of customary practices can be the failure to adequately inform participants

about their rights, patronage, corruption or gender bias in the proceedings.¹⁰⁸

It is valuable to identify positive aspects of existing indigenous and customary justice forums and to build upon their strengths to make them more restorative, as was done in South Kivu in the **Democratic Republic of Congo**:

Building on customary practices

In the Democratic Republic of Congo, most people apply to their chiefs and elders for settlements of disputes and judgment even in serious criminal matters (due to the absence of courts) and only apply to the State justice system when an official stamp is needed (e.g. in civil matters concerning guardianship and adoption). However, due to the displacement of communities and corruption of traditional chiefs and elders, new mechanisms have been developed by NGOs and faith groups to assist people in resolving their disputes. For example, Héritiers de la Justice, a non-governmental organization, has set up Comités de Médiation et Défense which have been established throughout South Kivu. The members of the committees and of their individual cells are trained in human rights and mediation skills and provided with basic introduction to the relevant laws.

Source: UNODC, Handbook on Restorative Justice Programs, p. 31.

Likewise, in the **Philippines**, the Barangay justice system consists of a locally elected Barangay captain and a “peacekeeping committee” hearing cases involving conflicts between residents. There is a mediation session that is facilitated by the captain or another member of the committee. *Mediation* is a structured, interactive process where a neutral third-party assists disputing parties in resolving conflict. In mediation, both parties are assumed to have contributed to the conflict and therefore both need to compromise to reach a settlement – this is different in restorative justice conferences, in which one party has victimized the other(s). Agreements reached through the Barangay mediation process are legally binding and

are recognized by the courts. The system has been criticized for failing to adequately inform participants about their rights in it, or for patronage, corruption or gender bias. To alleviate some of these shortcomings of the process, a program has been initiated to train community leaders, many of them women, as Barangay justice advocates.¹⁰⁹

Over **80 countries** use some form of restorative justice in addressing crime, and it is suggested that the actual figure could now be closer to 100 countries.¹¹⁰ While in many of these countries, restorative programs are experimental and localized, in an increasing number of others restorative policies and programs play a significant part in the national response to crime. Here follow a few examples – most of them involving juvenile criminal justice - from countries in which IUCN National Committee of the Netherlands operates:

In **Indonesia**, restorative justice is an integral part of the National Strategy for Access to Justice as well as the Medium Long-Term Plan and the National Law and Human Rights Development Plan 2015-2019. It is also part of Indonesia's commitment to achieving the Sustainable Development Goals (SDGs), particularly Goal No. 16 on Peace, Justice and Strong Institutions. The enforcement of Law No. 11 Year 2012 on juvenile criminal justice is a major milestone for Indonesia, as it adopts restorative justice principles for juvenile cases.¹¹¹

In **Myanmar**, IUCN's partner organizations Dawei Development Association (DDA), Green Network, Southern Youth and Myeik Lawyers Network mediate with companies to secure compensation for mining affected communities.¹¹²

In the **Philippines**, the Parole and Probation Administration (2018) values restorative justice as a process through which remorseful offenders can accept responsibility for their misconduct, particularly to their victims and to the community. Rehabilitation programs under the PPA utilize restorative

processes and aim to achieve restorative outcomes.¹¹³

In **Bolivia**, restorative juvenile justice programs are regulated under Articles 316-321 of the Code for Children and Adolescents (Código Niña, Niño y Adolescente), which include Victim-Offender Mediation, Community and Family Group Conferences and restorative circles that accompany compliance with “socio-educational measures”.¹¹⁴

In **Paraguay**, the use of restorative justice processes for child alleged offenders became institutionalized after an assessment of the juvenile justice system conducted in 2014. In that year, the Ministry of Justice, in partnership with Terres des Hommes, hosted the First International Seminar on Restorative Justice in Paraguay and more than 70 criminal justice officials were trained on the fundamental principles of restorative justice. On the basis of the Agreement of the Supreme Court of Justice, a Pilot Plan on Restorative Justice has been implemented in the city of Lambaré since then.¹¹⁵

In **Colombia**, the 2016 Peace Accord between the Government of Colombia (GOC) and the FARC-EP guerrilla group negotiated in Havana included restorative justice as a guiding principle within the transitional justice process. Some legal experts propose that former FARC-members should assist with the environmental restoration of landscapes that suffered from the Colombian civil war as part of this process.¹¹⁶

In **Uganda**, the 1996 enactment of the Children’s Statute incorporated restorative justice practices for cases involving young offenders and in 2001 a community service program was introduced to address the increasing problem of overcrowding in the Uganda prison system. Restorative justice also remains popular amongst communities as an indigenous approach to conflict resolution: in Northern and north-western Uganda, for example, the communities ravaged by more than 20 years of civil war consistently

insisted on the search for a peaceful end to the conflict through the communities' restorative justice mechanisms.¹¹⁷

Finally, in **Ghana** the 1998 Children's Act determines that a Child Panel shall assist in Victim-Offender Mediation in minor criminal matters involving a child where the circumstances of the offense are not aggravated.¹¹⁸

4. Community Environmental Justice Forums: A Good Starting Point?

The caselaw from Australia, New Zealand and Canada shows that restorative justice interventions work well in cases of smaller scale environmental harm caused by local corporations. Although it is absolutely necessary to investigate the value of restorative responses to more serious environmental caused by large corporations (which is the topic of the next paragraph), in the words of criminologist John Braithwaite, "*we have to learn to walk before we can run and leap*".¹¹⁹

Building on good practices from the researched countries is therefore a good starting point. In particular, the Community Environmental Justice Forums (CEJFs), the alternative to prosecution for local environmental offenses used in the province of British Columbia, Canada, can serve as a template for the creation of localized environmental restorative justice pilot programs in IUCN partner countries. CEFJs can be created and implemented as a decentralized policy response to environmental offenses, operated by local or regional law enforcement. To summarize: CEFJs are restorative circles, led by a trained, impartial facilitator, that typically lasts 2 – 2.5 hours, in which the offending company (which takes responsibility for the offense), the community and the enforcement agency take part on a voluntary basis, and which results in a formal agreement that records the collectively agreed remedies and restitution.

Restorative justice pilots such as CEJFs do not necessarily require a basis in formal law: countless restorative justice programs have been successfully established without any new legislation.¹²⁰ Examples include the peace committees in Pakistan, the community-based mediation programs in Guatemala and the restorative justice programs that began in South Africa without any specific legislation to empower such work. Diversion, whilst not provided for in law, was achieved through discretion of the prosecutor. Such programs have been developed and run through a partnership between the prosecuting authority and non-governmental organizations.

Experience shows that the successful implementation of restorative justice programs requires strategic and innovative initiatives that build on the collaboration of (regional) government authorities, CSOs, communities, victims and (corporate) offenders.¹²¹ IUCN, with the help of restorative justice professionals, can play a key role in this process as a convener and bridge builder between all these parties and stimulate law enforcement professionals and community members to develop a personal sense of ownership over the programs as well.¹²² IUCN can facilitate the needed restorative justice knowledge transfer and training of law enforcement officers, local lawyers and facilitators who lead the CEJF. CEJFs can also create an opportunity for a transformation in the relationship between law enforcement agencies and CSOs and communities because they invite the CSOs and communities to assume an active role in responding to, and resolving, environmental offenses. This will strengthen their competence to monitor compliance with environmental legislation. Communities and CSOs are thus empowered to contribute to the enforcement of environmental laws. Through their participation in CEJFs they have an equal say in deciding appropriate remedies and restitution. In addition, they can inform the enforcement agencies when offenders do not comply with the CEJF restoration agreement.

Of course, the specific need for regulation of restorative programs like CEJFs needs to be researched per partner country and the design and operation

of CEFJs has to be adapted to the local (legal and cultural) context. In any case, policies and clear guidelines will be necessary to guide the programs, establish the necessary normative framework, and to ensure that participants in restorative processes are protected by appropriate legal safeguards.

The *2002 United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters* (attached as **Annex III**) in paragraph 11 stipulate that such guidelines should cover among others:

- (a) The conditions for the referral of cases to restorative justice programs;
- (b) The handling of cases following a restorative process;
- (c) The qualifications, training and assessment of facilitators;
- (d) The administration of restorative justice programs;
- (e) Standards of competence and rules of conduct governing the operation of restorative justice programs.

The guidelines for the Canadian CEFJs can serve as a starting point and source of inspiration for the design of policies and guidelines of CEFJs in IUCN partner countries.

Lessons learned about the development of restorative programs

The experience of restorative justice program development is that it is best when:

- 1. Programs are developed on a collaborative basis, involving where appropriate, criminal justice agencies, social service agencies, non-governmental organizations, community associations, and the private sector.*
- 2. Effective communication strategy is used to create an organizational environment that is amenable to collaborating in the development of restorative justice practices and to educate the community about this approach.*
- 3. Consultation takes place with stakeholder groups and advocacy groups in the community.*
- 4. There is clear agreement on the criteria to be used in referring clients to restorative justice programs.*
- 5. The victims of crime, including women who are victims of violence and persons from other "vulnerable groups", are given a true choice as to whether to participate in a restorative justice process.*
- 6. Training standards and oversight of volunteers, facilitators and mediators have been developed and agreed upon.*
- 7. An evaluative component is incorporated into every restorative justice program.*
- 8. Careful thought has been given to the resources required to sustain the programs. In the case of low-income countries, consideration is given to what can be done with little or no additional resources, building upon existing capacities.*

Source: UNODOC, *Handbook on Restorative Justice Programme*, p. 41

5. Restorative Justice and Large Corporations

Introducing Community Environmental Justice Forums as a restorative response to environmental offending by local corporations is a good place to start. However, many IUCN partners are dealing with serious environmental offenses committed by large corporations. Does restorative justice work to hold large corporations or multinationals accountable?

Australian criminologist Rob White is doubtful. He thinks that because corporations see payment of fines (imposed by law enforcement in response to environmental offending, FW) as simply part of the cost of doing business, there is little deterrent to refrain from environmental offending unless substantial penalties are put in place within a punitive context that can change corporate behavior. He thinks it makes sense to deal with individual offenders and small firms via restorative justice processes because the 'shared humanity' of such an encounter makes it more probable for a change of conscience and understanding, and change in behavior to occur.¹²³ Such is more difficult to achieve with larger corporations that are strictly governed by the financial bottom line.

Mediator Lawrence Kershen - selected by *Who's Who Legal 2018* as 'one of the world's leading mediators' - is more hopeful. He believes that restorative justice can work irrespective of the size of the company or the scale of the harm, provided that the company engages with the process. The CEO of a large company is as likely - or not - to have his/her conscience touched as that of a smaller company. Furthermore, a multinational has to have a local presence, and as such is embedded in a local and social reality. The key is to create a space for open, non-defensive communication where the disconnection between harmer and harmed is lifted and to find a way to bring the corporation to the table so they can begin considering their social and environmental responsibilities.

Kershen says:

"The fundamental question for me is what would persuade the directing mind(s) of the corporation to engage with a restorative process. It seems that the company needs both 'stick and carrot'. Plainly one 'stick' is the threat of or implementation of the criminal law. The threat of the consequences of a criminal prosecution, or the outcome of such a trial, could be tempered by the offer of a restorative justice process and participation in an restorative process can legitimately be taken into account in mitigating sentence.

What of the 'carrots'? It might be that a director has a social conscience and wants to engage with an restorative process of his/her own volition, but I wouldn't rely on it! A factor that might encourage participation in restorative justice are a multinational's Corporate Social Responsibility department, which might apply some internal pressure. However, such departments are usually less influential - and well-funded - than the Marketing Department, which is inherently concerned with public image and perception. If they believe that the corporation's image is affected by an environmental issue, they are quick to act.

I believe the most potent public pressure can be corporate profitability – as reflected in directors' bonuses and its share price. If public concern about environmental harm is mobilized and grows, pressure to engage with a restorative process is increased because it affects the bottom line, profits and the share price. Indirectly the company's pension fund is also affected since it may be a significant shareholder in the company shares. So 'shareholder power' and the possibility of the public and institutions starting to divest themselves of investments in the offending corporation seems to have the greatest potential – as both stick and carrot - for influencing their participation in a restorative justice process."¹²⁴

Corporations do have every reason to maintain trust and right relations with their specific consumer bases and with the societies that contain and enrich them. A proactive approach to corporate social responsibility and the voluntary imposition of high standards upon themselves also supports a positive relationship with governmental bodies.¹²⁵

The language used will be critical in seeking companies' engagement in restorative justice - any hint that they are 'perpetrators' is likely to result in doors being slammed shut. A restorative justice professional, who worked more than 30 years in the chemical industry, recommends referring to „Responsible Care“: a well-established concept within the chemical industry which is the voluntary commitment by the global chemical industry to drive continuous improvement and achieve excellence in environmental, health and safety and security performance. Rephrasing restorative justice as Restorative Responsible Care, Restorative Environmental Care, Restorative Responsibility or Restorative Social Responsibility might improve the chance of a more cooperative response from the chemical industry.¹²⁶

Some see replacing the language of 'justice' with that of 'care' as a capitulation to the power of big business. Kershen on the other hand pragmatically says:

“If the price of engagement is omitting reference to restorative justice, I would willingly pay it - as long as the essential principles of restorative justice are present.”¹²⁷

Once the corporation is engaged and willing to take part in a restorative process, it is important that they hold a position high enough to take decisions, including concluding agreements, and to exercise control and follow-up of commitments. Other points of concern during the restorative process are preventing a power imbalance (and thus domination) between (representatives of) the victim(s) and the corporation (think of a big group of vocal victims in one room with a representative of a small company, or

the opposite: a strong presence of a powerful company and a small group of victims), and avoiding strategic or insincere apologies, which can lead to secondary victimization.¹²⁸

Restorative Justice for Bhopal?

A small group of Quakers committed themselves to bring justice to victims of the 1984 Bhopal disaster, which killed ten thousands of people. 34 years after the disaster, Bhopal remains contaminated and the abandoned factory is still leaking toxic waste into the environment and water supply. So far, no action through the courts has achieved justice for those affected in Bhopal, nor any clean-up of the site.

The Quakers started the **Action for Bhopal** and are trying to engage the current company, DowDuPont in a restorative process. These are some of the challenges they face:

- The various mergers and future splitting of the company makes it hard to trace responsibility - Union Carbide Corporation became a subsidiary of The Dow Chemical Company and in 2017 Dow Chemical merged with Du Pont to form DowDuPont;
- DowDuPont so far has not responded to the proposal for a restorative justice process;
- The Indian government has not been willing to help Action for Bhopal with their efforts;
- Survivor groups of the Bhopal disaster are apprehensive about the 'restorative' approach, probably because they feel it could let Dow off too lightly. They want Dow to be criminally convicted and think that deterrence will be important to prevent 'future Bhopals' from happening.

Source: email conversation on 5 May 2019 with Martin Wright from Action for Bhopal.

6. Conclusion

Over 80 countries use some form of restorative justice in addressing crime. Restorative justice works well in countries that lack a strong rule of law – which is the case for many IUCN partner countries - because absent a strong rule of law and centralized law enforcement, local traditions of conflict resolution gain importance and maintain their legitimacy. With its indigenous roots and open character, restorative justice can easily be integrated into these local conflict resolution traditions. In addition, restorative justice can help build the capacity of the justice system and strengthen the competence of CSOs and communities to monitor compliance with environmental legislation.

Community Environmental Justice Forums (CEJFs), the alternative to prosecution for local environmental offenses used in the province of British Columbia, Canada, can serve as a template for the creation of localized environmental restorative justice pilot programs in IUCN partner countries. CEJFs can be adapted to the local (legal) culture and implemented as a decentralized policy response to environmental offenses, operated by local or regional law enforcement. Successful implementation of restorative justice programs such as CEJFs requires strategic and innovative initiatives that build on the collaboration of regional government authorities, CSOs, communities, victims and (corporate) offenders. IUCN, with the help of restorative justice professionals, can play a key role in this process as a convener and bridge builder between all these parties.

Holding large corporations or multinationals accountable for environmental offenses through restorative justice is uncharted territory. IUCN can play a key role in engaging such companies with the restorative justice process by leveraging its political influence and mobilizing public concern.

The Action for Bhopal-case does show the many difficulties of engaging a multinational with a restorative justice process at this moment in time. The international gathering of criminologists and restorative justice experts who

met in Leuven on 26 April 2019 committed to exploring answers to overcoming these challenges in joint research efforts. The group is also interested in working with (local) cases and can be a future partner for IUCN in creating restorative justice models to be applied in the field.



Participants of the seminar on Restorative Justice, Environmental Harm & Ecocide in Leuven, 26 April 2019.

V CONCLUSION



"Donna Billick" by rocor is licensed under CC BY-NC 2.0

Conclusion

"Restorative justice is the pathway to a truly just future. The current adversarial legal systems permit or even promote destructive actions as long as they are compensated for in one way or the other. We have seen people applauding the polluter pays principle, for instance, whereas it is partially retributive and simply permits the polluter to carry on with business as usual. Restorative justice promotes a balanced and fundamental sense of seeking to maintain a balance in Nature leveraging on the interconnectedness of beings and seeing offenses as aberrations. In terms of ecological crimes, restorative justice can help offenders unlearn environmental bad behaviors, repair harms and not merely pay for such, and wake up to living responsibly and in less disruptive manners."

- Nnimmo Bassey, environmental activist and writer

Restorative justice is a process whereby all the parties with a stake in a particular offense come together on a voluntary basis to collectively resolve how to deal with the aftermath of the offense and its implications for the future. Its aim is to redirect or at least complement society's retributive response to crime and harm. A retributive system of justice is punitive in nature, with the key focus on using punishment as a means to deter future crime and to provide 'just deserts' for any harm committed. Rather than focusing on retribution, restorative justice:

- focuses on harms and consequent needs;
- addresses obligations resulting from those harms;
- uses inclusive, collaborative processes;
- involves those with a stake in the situation (victims, offenders, community members; society at large);
- and seeks to put right the wrongs.

The focus of restorative justice processes and outcomes is on redressing the harm caused by the offense, promoting healing over retribution. It also has an aspiration for the future: to prevent recidivism by confronting the

offender with its victim(s), which can lead to repentance and behavioral change. Restorative processes offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings.

In the context of this report, offenders are corporations that cause environmental harm. Studies show that offenders that take part in restorative processes are less likely to reoffend, and that restorative justice produces a high rate of victim satisfaction and offender accountability. Restorative justice is practiced in more than 80 countries around the world. Because of its indigenous roots, restorative justice reforms can build upon customary practices while putting in place legal safeguards to ensure equal access to justice, equity and fairness.

Restorative justice has much to offer as an alternative response to environmental crime. Traditional criminal law has an individualistic approach to crime and does not recognize many indirect or remote victims. Victims of environmental violations such as individuals, communities, indigenous people, future generations and the environment itself usually do not have a voice nor are their interests represented in the traditional criminal justice system. The offending company might pay off its 'ecological debt' through fines but is not reintegrated into the community. Animosity remains, though offenders and victims continue to live in- or make use of the same natural environment.

Restorative justice, on the contrary, has eye for the wider circle of people and communities affected by crime and gives a voice to victims who are impacted by environmental harm but who have traditionally been excluded from its resolution. Whether a restorative conference occurs as a part of, separate to or in place of formal legal proceedings, it presents the opportunity for a meaningful

dialogue between the offender, victim and community, as well as for the offense's collective resolution. Involvement in restorative processes strengthens community identity and resilience and empowers change from the bottom up, because it is a way for communities to develop social capital, social networks and civic interconnectedness. Participation in restorative process offers citizens the chance to mobilize their community to challenge systemic socio-economic and environmental injustice. It empowers citizens to exercise their rights to participation, remedy, and access to justice in environmental matters in a very direct way. It also strengthens the competence of CSOs and communities to monitor compliance with environmental legislation. It helps offending companies to grow in responsibility, to reintegrate, rehabilitate and regain the social license to operate. Because restorative justice de-escalates conflict, it also reduces the risk of environmental conflict leading to (lethal) violence against Environmental Defenders. Furthermore, restorative justice can help build the capacity of the justice system in countries with a weak rule of law. It also reduces prosecution costs and the backlog of cases in court.

In New Zealand, Australia, and Canada, restorative justice has been successfully applied to smaller scale environmental harms committed by local companies.

Caselaw from these countries shows a variety of restorative outcomes:

- Apologies;
- Restoration of harm to the environment and prevention of future harm;
- Compensatory restoration of environments elsewhere if the affected environment cannot be restored to its former condition;
- Payment of compensation to victims;
- Community service work; and
- Measures addressing future behavior, such as an environmental audit of the activities of the offending company or environmental training.

In New Zealand and Canada, trees and rivers have been recognized as victims of environmental crime in their own right and have been represented by indigenous organizations in the restorative process. This is possible, because restorative justice processes allow a wide range of cultural, emotional and spiritual values to be expressed and acknowledged. Thanks to this 'open' character, restorative justice is well suited to create space for eco-centric and indigenous approaches to what constitutes an environmental violation, who can be a victim of such a violation, and what restoration looks like. As such it allows for asserting the rights of nature – the subject of *IUCN World Conservation Congress resolution 100* - in a non-adversarial way.

On a practical level, Community Environmental Justice Forums (CEJFs) can serve as a template for the creation of localized environmental restorative justice pilot programs in IUCN partner countries. CEJFs can be adapted to the local (legal) culture and implemented as a decentralized policy response to environmental offenses, operated by local or regional law enforcement. Successful implementation of restorative justice programs such as CEJFs requires strategic and innovative initiatives that build on the collaboration of regional government authorities, CSOs, communities, victims and corporate offenders. IUCN, with the help of restorative justice professionals, can play a key role in this process as a convener and bridge builder between all these parties.

Holding large corporations or multinationals accountable for environmental offenses through restorative justice is still uncharted territory. IUCN can play a key role in engaging such companies with the restorative justice process by leveraging its political influence and mobilizing public concern. The 2019 Leuven gathering of criminologists and restorative justice experts can be a future partner for IUCN by creating restorative justice models to be applied in the field and by exploring solutions to the challenges of holding multinationals accountable in a restorative way.

In a time when adversarial environmental campaigns and litigation are blossoming, restorative justice offers an innovative response to environmental harm in line with IUCN's values such as collaboration, trust, nature conservation and restoration of social and ecological relationships. As such it is an excellent match to IUCN's diplomatic approach to natural resources conflicts and its role as a convenor and bridge builder between governments, businesses, CSOs and local communities.

Acknowledgement

I want to thank Polly Higgins, Mark Hamilton, Martin Wright, Lawrence Kershen, John Braithwaite, Fred H. Besthorn, Ivo Aertsen, Nnimmo Bassey, Manon Danker, Anneke van Hoek, Annemieke Wolthuis, John Ezenyinwa, Godian Ejiogu, Eileen Barker, Ingvild Hakkaart, Charlie Greene and Kim Wright for their support and their contribution to this report.

ANNEX I

Useful Online Resources

Centre for Justice & Reconciliation

<https://www.restorativejustice.org>

Community Environmental Legal Defense Fund

<https://celfd.org/>

Earth Protectors – Stop Ecocide

<https://www.stopecocide.earth/>

Earth Restorative Justice

<http://www.earthrestorativejustice.org>

The Environmental Peacebuilding Association

<https://environmentalpeacebuilding.org/>

European Forum for Restorative Justice

<http://www.euforumrj.org>

United Nations Harmony with Nature Initiative

<http://www.harmonywithnatureun.org>

ANNEX II

Restoration Order from the 2010 Ecocide Mock Trial

In The SUPREME COURT

Between:

Regina

- v -

Robin Bannerman & John Tench

Ancillary Orders pursuant to the Ecocide Act 2010

Upon the conviction of:-

Robin Bannerman, CEO, Global Petroleum Company

John Tench, CEO, Glamis Group

on 30th September 2010

In the Supreme Court

of counts 2 and 3 alleging Ecocide contrary to section 1(1) and 1(2) of the
Ecocide Act 2010

And upon hearing representations from counsel on behalf of the
prosecution and defence

IT IS ORDERED AS FOLLOWS:

Restoration Order¹

Robin Bannerman, CEO, & Global Petroleum Company following his involvement in the Restorative Justice Conference with the following participants-

- JESS PHILLIMORE – Representing Wider Humanity
- GERALD AMOS – Representing Indigenous Peoples
- PADDY BRIGGS – Representing Chairman of Global Petroleum Company Pension Fund
- ROGER COWE – Representing Chief Sustainability Officer, Global Petroleum Company
- CARINE NADAL – Representing the Earth
- PETER SMITH – Representing the Birds
- PHILIPPA DE BOISSIERE – Representing Future Generations

has reached an Action Plan/Outcome Agreement [The original is attached to this order] with the following conditions:-

Operations will be suspended

2. Working groups to be established to do the following:-
 - (i) To fund alternative energy sources including solar.
 - (ii) What went wrong + next steps. Reviews to include the intention to approach government. The CEO to be part of the review group.
 - (iii) Future projects of GPC-to have invited representatives onto a council of legal interests-public as far as possible-to include representatives for future generations and the Earth as appropriate.
 - (iv) Include on board of GPC a non-executive director with special responsibility for sustainability selected by a body external to the board e.g Forum for the Future.

¹ s.17 Ecocide Act: *Where any person, company, organisation, partnership, or any other legal entity has committed an offense under this Act a Restoration Order shall be made*
(specify restorative provisions to be undertaken by the defendant the company e.g. of the work needed to restore the territory to their former condition, any special treatment required, training timescale, planting timeline)

(v) Fund a University Chair to examine + research law of ecocide + advise on its impact on corporations and society generally.

(vi) Fund a centre for adaption for climate change.

The Action Plan/Outcome Agreement will form part of Restoration order imposed on Robin Bannerman.

Formal Restoration orders are imposed on Robin Bannerman and John Tench in the following terms:-

Robin Bannerman, CEO, Global Petroleum Company or such person in position of superior responsibility who might succeed Bannerman

&

John Tench, CEO, Glamis Group or such person in position of superior responsibility who might succeed Tench.

will undertake the restoration of the area marked on the attached map.

The restoration to include:-

the removal of all tailing ponds and restoration of the effected area to the condition which predated the pollution and damage.

Make clear efforts to promote the restoration of birdlife, fauna and wildlife within the effected area as it was prior to the pollution/damage caused.

Any appropriate action/recommendation made by the Environmental Investigation Agency.

The process of restoration to be subject to periodic review and enforcement by the Environmental Investigation Agency as set out below in para 6. The first review being 1st April 2013.

PENAL NOTICE: ANY BREACH OF THIS ORDER CAN BE PUNISHED WITH A FINE AND OR TERM OF IMPRISONMENT OF UP TO 2 YEARS.

Suspension of Operations Order2

Robin Bannerman, CEO, Global Petroleum Company or such person in position of superior responsibility who might succeed Bannerman

&

John Tench, CEO, Glamis Group or such person in position of superior responsibility who might succeed Tench.

shall cease all tar sand extraction operations within the area marked on the attached map on 1st April 2012 until further notice and/or variation by the court

3. Emergency Protection Order 3

Not applicable

4. Cost Order4

The Crown application for costs to be adjourned to be determined to a Special Costs Hearing to be heard on 1st July 2012 and linked to the dates set out in para 5 Finance Order.

² *[s.19 Ecocide Act: any person, company, organisation, partnership, or any other legal entity identified under a Restoration Order shall be suspended from operating until the territory has been restored to a level that is acceptable to an independent report, undertaken by the Environmental Investigation Agency.]*
(specify what person and/or company operations are to be suspended)

³ *[s.18. Ecocide Act, an EPO shall be made for the duration of any related proceedings and shall only be extinguished by either an acquittal or by an imposition of a Restoration Order.]*
(specify what emergency protection is to be put in place for any area territory that is to be placed under special protection)

⁴ *[s.17 Ecocide Act: Where any person, company, organisation, partnership, or any other legal entity has committed an offense under this Act a Cost Order shall be made]*

Finance Order⁵

The Court orders the adjournment of resolution and determination of a finance order and puts in place the following timetable:-

Crown to serve upon the defendants and defendant companies the following by 1st July 2012:-

- A full report setting out the anticipated cost of restoration of the damaged area.
- A full report setting out the reparation costs to tall those parties who have suffered loss as consequence of pollution of damaged area.
- A full report setting out in detail the costs of both the investigation and prosecution of these offenses.

The defendants to serve on the court and the prosecution by 1st September 2012:-

- A full response to the reports itemised above and identifying those figures which are agreed and those figures, which are disputed.
- All disputed figures to be identified and explanation provided why figure is disputed and where appropriate, alternative figures provided.

Case to be adjourned for final hearing of all financial aspects of this case by 1st November 2012

⁵ (specify the amount to be paid by the defendant and or the company, in order to assist the provisions of the Restoration Order. Finance can be a fine, a sum to be paid into a trust fund, an interim payment or a lump sum of money)

6. Determination by the Environmental Investigation Agency⁶

The EIA to undertake a review of the restoration order set out in para 1 above.

The review timetable is as follows:-

The EIA is to conduct a review of the restoration order imposed above in paragraph 1. and the first review will take place on 1st April 2013.

The EIA can conduct a review before the 1st April 2013 upon application to the parties and the court.

There will be a EIA review every 12 months after 1st April 2013 and conclude a final review on 1st April 2017 unless extended on notice to the parties and the court by the EIA

7. Enforcement notice⁷

No applicable

8. Earth welfare report⁸

The court directs that an Earth Welfare Report is prepared dealing with a review of the environmental impact of Tar Sand Extraction activity, but with particular emphasis on the Alberta tar Sands and the impact of any restoration activity pursuant to this court order. The parties before this court to give full co-operation in the preparation of that report.

⁶ [s.20 Ecocide Act: The Environmental Investigation Agency shall determine whether appropriate restoration has been undertaken within the timescale set by the court, whether additional steps (such as the imposition or discharge of an EPO) are to be applied for, identify the nature of remediation outstanding and how best to implement.]

⁷ -[s.21 Ecocide Act: Where an Enforcement Notice has been ordered by a court, an enforcement notice shall be issued by the Environment Investigation Authority setting out the steps to be taken and specify the period within which those steps must be taken.]

⁸ [s.23 Ecocide Act: Where a territory has been identified as an area at risk of ecocide or has been named as a territory for the purposes of section 24, an Earth welfare report shall be ordered by the court.]

The report to be submitted on 1st April 2013 or such later date as requested by EIA on notice to the parties and the court.

9. Publicity Order.

Pursuant to section 8(4) Ecocide Act 2010 the court directs that a publicity order is imposed in the following terms:

The defendants and their linked companies to publish the fact they have been convicted and the sentences and ancillary order passed.

The full details of the Action Plan/Outcome Agreement reached by Robin Bannerman.

On the 1st April 2013 the same defendants and linked companies to issue a public notice setting out the extent to which the ancillary orders have been complied with and with and what action remains outstanding. Such notice to include in the case of Robin Bannerman the progress made in respect of the heads of agreement set out Action Plan/Outcome Agreement

Signed: Ian Lawrie QC

(Judge name)

Dated: 31st March 2012

ANNEX III

Basic principles on the use of restorative justice programs in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

The Economic and Social Council,

Recalling its resolution 1999/26 of 28 July 1999, entitled "Development and implementation of mediation and restorative justice measures in criminal justice", in which the Council requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating United Nations standards in the field of mediation and restorative justice,

Noting the discussions on restorative justice during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000, in relation to the agenda item entitled "Offenders and victims: accountability and fairness in the justice process",

Recognizing that the use of restorative justice measures does not prejudice the right of States to prosecute alleged offenders,

1. Takes note of the submission of the preliminary draft elements of a declaration of basic principles on the use of restorative justice programs in criminal matters, annexed to the present resolution;
2. Requests the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as the institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and the means of establishing common principles on the use of restorative justice programs in criminal matters, including the advisability of developing an instrument, such as the preliminary draft declaration annexed to the present resolution, and on the contents of this draft;

3. Also requests the Secretary-General to convene, subject to the availability of voluntary contributions, a meeting of experts selected on the basis of equitable geographical representation to review the comments received and to examine proposals for further action in relation to restorative justice, including mediation, as well as the possibility of developing an instrument such as a declaration of basic principles on the use of restorative justice programs, taking into account the preliminary draft declaration annexed to the present resolution;
4. Further requests the Secretary-General to report to the Commission on Crime Prevention and Criminal Justice at its eleventh session on the comments received and the results of the meeting of experts;
5. Invites the Commission to take action at its eleventh session, on the basis of the report of the Secretary-General;
6. Calls upon Member States, building on the results of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10-17 April 2000, to continue to exchange information on experiences in the implementation and evaluation of programs for restorative justice, including mediation.

Annex

Preliminary draft elements of a declaration of basic principles on the use of restorative justice programs in criminal matters

I. Definitions

1. "Restorative justice programme" means any programme that uses restorative processes or aims to achieve restorative outcomes.
2. "Restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender.

3. "Restorative process" means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.
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 justice programme.
5. "Facilitator" means a fair and impartial third party whose role is to facilitate the participation of victims and offenders in an encounter programme.

II. Use of restorative justice programs

6. Restorative justice programs should be generally available at all stages of the criminal justice process.
7. Restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.
8. All parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process. Participation should not be used as evidence of admission of guilt in subsequent legal proceedings.
9. Obvious disparities with respect to factors such as power imbalances and the parties' age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process. Similarly, obvious threats to any of the parties' safety should also

be considered in referring any case to and in conducting a restorative process. The views of the parties themselves about the suitability of restorative processes or outcomes should be given great deference in this consideration.

10. Where restorative processes and/or outcomes are not possible, criminal justice officials should do all they can to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and reintegration of the victim and/or offender into the community.

III. Operation of restorative justice programs

11. Guidelines and standards should be established, with legislative authority when necessary, that govern the use of restorative justice programs. Such guidelines and standards should address:

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

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

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

(d) The administration of restorative justice programs;

(e) Standards of competence and ethical rules governing operation of restorative justice programs.

12. Fundamental procedural safeguards should be applied to restorative justice programs and in particular to restorative processes:

(a) The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or

interpretation. Minors should, in addition, have the right to parental assistance;

(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 induced by unfair means to participate in restorative processes or outcomes.

13. Discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties.

14. Judicial discharges based on agreements arising out of restorative justice programs should have the same status as judicial decisions or judgements and should preclude prosecution in respect of the same facts (non bis in idem).

15. Where no agreement can be made between the parties, the case should be referred back to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

16. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Failure to implement the agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

IV. Facilitators

17. Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.

18. Facilitators should perform their duties in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. They should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

19. Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. They should be sensitive to any vulnerability of the parties.

20. Facilitators should receive initial training before taking up facilitation duties and should also receive in-service training. The training should aim at providing skills in conflict resolution, taking into account the particular needs of victims and offenders, at providing basic knowledge of the criminal justice system and at providing a thorough knowledge of the operation of the restorative programme in which they will do their work.

V. Continuing development of restorative justice programs

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

22. Member States should promote research on and evaluation of restorative justice programs to assess the extent to which they result in restorative outcomes, serve as an alternative to the criminal justice process and provide positive outcomes for all parties.

23. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular, rigorous evaluation and modification of such programs in the light of the above definitions.

ANNEX IV

Incorporation of the Rights of Nature as the organizational focal point in IUCN's decision making (WCC-2012-Res-100-EN)

NOTING that countries are increasingly incorporating the Rights of Nature or of Mother Earth into their regulatory frameworks as a new paradigm for societies that recognize the right of nature and its constituent elements to exist and continually regenerate themselves;

RECOGNIZING that Ecuador is the first country in the world to incorporate the Rights of Nature into its Constitution as part of the legal, political and economic instrument of the State, which establishes in Article 71 "Nature or Pacha Mama [Mother Earth], where life is reproduced and exists, has the right for that existence to be respected entirely and for its life cycles, structure, functions and evolutionary processes to be maintained and regenerated";

RECALLING that the Peoples' World Conference on Climate Change and the Rights of Mother Earth held in Cochabamba, Bolivia, in April 2010, resulted in a Universal Declaration of the Rights of Mother Earth, announced and supported by indigenous peoples and social movements, who, as representatives of an active civil society call on their governments and the United Nations to include this topic in key debates such as those on climate change and biodiversity;

NOTING that global economies, especially those of developed countries, maintain production and consumption patterns that do not consider the limits of our planet, and that this has led not only to the incalculable loss of cultural diversity and any associated knowledge, but also to biodiversity loss, deterioration of ecosystems, environmental pollution, a decline in the quality and quantity of available water and a worsening of the problems related to global warming;

ALSO NOTING that, in addition to seriously impacting the environment, the current production and consumption model has shown itself to be

inadequate when it comes to combating poverty and improving the quality of life of most of the world's population;

CONSIDERING that in order to maintain the current production and consumption levels, many countries have increased their ecological footprint through the use of resources and lands beyond their borders, whilst other countries, especially those whose economies are based on the extraction of natural resources or the production of goods to meet foreign demand – often sumptuary – are sacrificing their natural heritage in order to do so, and that this has highlighted the differences and gaps between rich and poor countries;

NOTING that the quality of life of current and future generations depends not only on the health of nature, its constituent elements, functions and ecosystem services, but also on their capacity to regenerate;

ALARMED at the central importance given to economic growth in countries' policies and decision-making processes to economic growth, with little respect for the cycles and characteristics of nature, and, from an ethical point of view, without any promotion of humanity's shared responsibility in relation to the natural heritage; and

CONCERNED because the welfare of human beings is basically measured in terms of the level of a country's income or economic growth, without considering indicators that reveal how sustainable their economy actually is; The World Conservation Congress, at its session in Jeju, Republic of Korea, 6–15 September 2012:

1. RECOMMENDS to the Director General to initiate a process that considers the Rights of Nature as a fundamental and absolute key element for planning, action and assessment at all levels and in all areas of intervention including in all decisions taken with regard to IUCN's plans, programs and projects as well as in IUCN policy on rights;

2. URGES the Director General to initiate a dialogue for designing and implementing a strategy for dissemination, communication and advocacy concerning the Rights of Nature;

3. URGES IUCN Members to contribute to this effort by bringing forward their national experiences concerning the Rights of Nature as part of the process of developing a Universal Declaration of the Rights of Nature that contributes to a new philosophy of human well-being; and

4. INVITES the Director General and IUCN Members to promote the development of a Universal Declaration of the Rights of Nature, as a first step towards reconciliation between human beings and the Earth as the basis of our lives, as well as the foundations of a new civilizing pact.

State and agency Members of the United States abstained during the vote on this Motion for reasons given in the US General Statement on the IUCN Resolutions Process.

ENDNOTES

- ¹ Example borrowed from: Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, International Union for Conservation of Nature Academy of Environmental Law Colloquium 2016 Oslo Norway, 22 June 2016, p. 1
- ² United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programs*, United Nations: New York, 2006, p. 6.
- ³ Marshall, T. F., "The Evolution of Restorative Justice in Britain" in: *European Journal on Criminal Policy and Law*, no. 4, 1996, pp. 21-43, on p. 37.
- ⁴ White, R., "Indigenous Communities, Environmental Protection and Restorative Justice" in: *AILR* Vol. 18 no. 2, 2014/2015, pp. 43-54, on p. 44.
- ⁵ Zehr, H., "Doing Justice, Healing Trauma – The Role of Restorative Justice in Peacebuilding", in: *Peace Prints: South Asian Journal of Peacebuilding*, Vol. 1, No. 1, Spring 2008, pp. 1-16 , on p. 4.
- ⁶ Preston, B.P., "The use of restorative justice for environmental crime", in: *Criminal Law Journal*, 35(3), 2011, pp. 136-153, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822 on p. 21.
- ⁷ Christie, N. "Conflicts as Property" in: *The British Journal of Criminology*, no. 17, 1977.
- ⁸ UNODC, *Handbook on Restorative Justice Programme*, p. 11.
- ⁹ Hamilton, M., "Restorative Justice Intervention in a Planning Law Context: Is the 'Amber Light' approach to Merit Determination Restorative?" in: *EPLJ* no. 32, 2015, 32, pp. 164 - 177, on p. 174: "Schools and workplaces are fertile grounds for restorative justice intervention. In the school setting, restorative justice intervention is a way of providing teachers with proactive, rather than reactive, ways of dealing with misbehaviour which is not reliant on punitive intervention and fosters healthy communication. At the workplace, restorative justice interventions can help prevent conflict, repair relationships that have been harmed by conflict, and protect people whose health and safety are threatened by conflict."
- ¹⁰ UNODC, *Handbook on Restorative Justice Programme*, p. 6.
- ¹¹ Christie, N., *Conflicts as Property*, Zehr, H., *Changing Lenses: Restorative Justice for our Times*, Herald Press 2015; Zehr, H., *The Little Book of Restorative Justice*, Good Books 2015 and Braithwaite, J., *Crime, Shame and Reintegration*, Cambridge University Press 1989.
- ¹² Zehr, H., *Changing Lenses. A New Focus for Crime and Justice*, Scottdale: Herald Press 2005, pp. 108-110.
- ¹³ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, pp. 3-4.
- ¹⁴ Kershen, L., *The Role of Restorative Justice in the Criminal Justice Process*, presentation before the International Criminal Court, 2018. See: <http://doughty-street-chambers.newsweaver.com/International/1d732a2w2sp>.
- ¹⁵ Economic and Social Council of the United Nations, Resolution 2000/14: *Basic principles on the use of restorative justice programmes in criminal matter*, <https://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf> on p. 35.
- ¹⁶ Van Ness, D.W., *An overview of restorative justice around the world*, presented at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice Bangkok, Thailand, 18-25 April 2005, on p. 1.
- ¹⁷ Sherman, L.W. & Strang, H., *Restorative Justice: the evidence*, London: The Smith Institute 2007.
- ¹⁸ http://www.iirp.edu/pdf/RJ_full_report.pdf
- ¹⁹ Wolthuis, A. & Berger, M., "Herstelrecht in jeugdstrafzaken in Nederland, waar staan we?", in: *Tijdschrift Jeugdrecht in de Praktijk*, nr. 3, September 2017, pp. 25-32, on p. 27.
- ²⁰ Ibidem.

-
- ²¹ Preston, B. J., *The use of restorative justice for environmental crime*, p. 3.
- ²² Ibidem, p. 8.
- ²³ Hamilton, M., *Restorative Justice Intervention in a Planning Law Context: Is the 'Amber Light' approach to Merit Determination Restorative?*, p. 173.
- ²⁴ Hamilton, M., "Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection Context: Conspicuous Absences?" in: *EPLJ* no 31, 2014, pp. 352-367 on p. 358.
- ²⁵ Hamilton, M., *Restorative Justice Intervention in a Planning Law Context: Is the 'Amber Light' approach to Merit Determination Restorative?*, p. 176.
- ²⁶ Hamilton, M., "Restorative Justice Conferencing in an Environmental Protection Law Context: Apology and Corporate Offending", in: *Internet Journal of Restorative Justice*, 5 Year Celebration Special Issue, 2017, ISSN (online): 2056-2985, pp. 13-21.
- ²⁷ Hamilton, M., "Restorative justice intervention in an Aboriginal cultural heritage protection context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council", in: *EPLJ* 2019, draft received from the author.
- ²⁸ Ibidem.
- ²⁹ Ibidem.
- ³⁰ Hamilton, M., *Restorative Justice Intervention in a Planning Law Context: Is the 'Amber Light' approach to Merit Determination Restorative?*, p. 176.
- ³¹ Hamilton, M., *Restorative justice intervention in an Aboriginal cultural heritage protection context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council*.
- ³² Hamilton, M., *Restorative justice intervention in an Aboriginal cultural heritage protection context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council*.
- ³³ Hamilton, M., *Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection Context: Conspicuous Absences*, p. 361.
- ³⁴ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, pp. 4-6., Hamilton, M., *Restorative Justice Conferencing in an Environmental Protection Law Context: Apology and Corporate Offending*, pp. 13-21.
- ³⁵ Hamilton, M., *Restorative justice intervention in an Aboriginal cultural heritage protection context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council*.
- ³⁶ https://en.wikipedia.org/wiki/Restorative_justice.
- ³⁷ UNODOC, *Handbook on Restorative Justice Programme*, p. 20.
- ³⁸ https://en.wikipedia.org/wiki/Restorative_justice.
- ³⁹ UNODOC, *Handbook on Restorative Justice Programme*, p. 13.
- ⁴⁰ UNODOC, *Handbook on Restorative Justice Programme*, pp. 9-11.
- ⁴¹ Examples borrowed from Hamilton, M., "Restorative justice activity" orders: Furthering restorative justice intervention in an environmental and planning law context" in: *EPLJ* no 32, 2015, pp. 548-561, on p. 551.
- ⁴² Hamilton, M., "Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond" in: *EPLJ*, 25, 2008, pp. 263-271, on p. 270.
- ⁴³ White, R., *Indigenous Communities, Environmental Protection and Restorative Justice*, p. 50.
- ⁴⁴ *Chief Executive, Office of Environment and Heritage v Clarence Valley Council*, [2018] NSWLEC 205, p. 36.
- ⁴⁵ <https://newint.org/features/2016/05/01/make-ecocide-a-crime/>.
- ⁴⁶ Ibidem.
- ⁴⁷ Ibidem.
- ⁴⁸ <https://www.theguardian.com/environment/2019/apr/25/polly-higgins-obituary>
- ⁴⁹ Interview in Sharon Blackie, *If Women Rose Rooted*, September Publishing 2016, p. 56.
- ⁵⁰ Email conversation 7 May 2019.

-
- ⁵¹ <https://celdf.org/rights/rights-of-nature/>.
- ⁵² Ibidem.
- ⁵³ *Encyclical Letter Laudato Si' of the Holy Father Francis On Care for Our Common Home*, http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.
- ⁵⁴ <https://celdf.org/rights/rights-of-nature/rights-nature-timeline/>.
- ⁵⁵ Preston, B. J., *The use of restorative justice for environmental crime*, p. 12, 14, 22 and 23.
- ⁵⁶ <https://earthrestorativejustice.org/articles/rj-and-rights-of-nature>.
- ⁵⁷ See Table 3 on the CEJF cases in Canada BC, provided by Mark Hamilton, on p. 72.
- ⁵⁸ Preston, B. J., *The use of restorative justice for environmental crime*, p. 14.
- ⁵⁹ Hamilton, M., *Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond*, p. 270.
- ⁶⁰ White, R., *Indigenous Communities, Environmental Protection and Restorative Justice*, p. 44.
- ⁶¹ Ibidem.
- ⁶² F. H. Besthorn: "Restorative Justice and Environmental Restoration - Twin pillars of a just global environmental policy: hearing the voice of the victim" in: *Journal of Societal and Social Policy*, Vol. 3., no. 2, 2004, pp. 40-45.
- ⁶³ Visit <https://elemental-journey.com/> for more information on The Work that Reconnects.
- ⁶⁴ Aertsen, I, presentation at the *Seminar on Restorative Justice Responses to Environmental Harm and Ecocide*, held in Leuven on 26 april 2019.
- ⁶⁵ Hamilton, M., *Restorative Justice Conferencing in an Environmental Protection Law Context: Apology and Corporate Offending*, p. 9.
- ⁶⁶ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, p. 14.
- ⁶⁷ Ibidem.
- ⁶⁸ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, pp. 14-16.
- ⁶⁹ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, pp. 14-16.
- ⁷⁰ Hamilton, M., *Restorative Justice Conferencing in an Environmental Protection Law Context: Apology and Corporate Offending*, pp. 10-11.
- ⁷¹ Hamilton, M., *Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond*, p. 269.
- ⁷² Environmental Canterbury Regional Council, *Resource Management Act Monitoring and Compliance Section, Guidelines for implementing Alternative Environmental Justice*, ISBN: 9781927222317, August 2012.
- ⁷³ Ibidem.
- ⁷⁴ <https://www.ecan.govt.nz/get-involved/news-and-events/2017/illegal-clearing-of-land/>.
- ⁷⁵ Ibidem.
- ⁷⁶ Wynn Williams Lawyers, *Compliance, monitoring and enforcement by Regional Councils: a report for the Minister for the Environment*, <http://www.horizons.govt.nz/HRC/media/Media/Agenda-Reports/Environment-Committee-2018-12-06/18100%20Annex%20C%20Compliance%20Monitoring%20and%20Enforcement%20Report.pdf>, p. 15.
- ⁷⁷ White, R. "Reparative justice, environmental crime and penalties for the powerful", in: *Crime, Law and Social Change An Interdisciplinary Journal*, Volume 67 Number 2, pp. 117-132 on pp. 119-121.
- ⁷⁸ *Garrett v Williams* (2007) 151 LGERA 92; [2007] NSWLEC 96.

⁷⁹ *Chief Executive, Office of Environment and Heritage v Clarence Valley Council*, [2018] NSWLEC 205.

⁸⁰ Email conversation with Mark Hamilton, 26 March 2019.

⁸¹ *Ibidem*.

⁸² Victoria Environment Protection Authority, *Hallam Road Landfill* (Publication 1503; 2012), <https://www.epa.vic.gov.au/~media/Publications/1503.pdf>.

⁸³ British Columbia Ministry of Environment and Climate Change Strategy, *Community Environmental Justice Forums Policy*, 2012, p.2.

⁸⁴ British Columbia Ministry of Environment and Climate Change Strategy, *Community Environmental Justice Forums Policy*, 2012: <https://www2.gov.bc.ca/assets/gov/environment/research-monitoring-and-reporting/reporting/reporting-documents/environmental-enforcement-docs/cejf-policy.pdf>, p. 2.

⁸⁵ *Ibidem*, p. 2.

⁸⁶ British Columbia Ministry of Environment and Climate Change Strategy, *Community Environmental Justice Forums Questions and Answers*, <https://www2.gov.bc.ca/assets/gov/environment/research-monitoring-and-reporting/reporting/reporting-documents/environmental-enforcement-docs/cejf-qas.pdf>, p. 1.

⁸⁷ British Columbia Ministry of Environment and Climate Change Strategy, *Community Environmental Justice Forums Policy*, p. 3.

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*.

⁹⁰ *Ibidem*.

⁹¹ British Columbia Ministry of Environment and Climate Change Strategy, *Community Environmental Justice Forums Info Sheet*, 2012, p. 1.

⁹² <https://catalogue.data.gov.bc.ca/dataset/environmental-violations-database>.

⁹³ *Ibidem*, p. 2.

⁹⁴ *Ibidem*.

⁹⁵ *Ibidem*, p. 3.

⁹⁶ British Columbia, *Restorative Justice*, <https://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/environmental-enforcement-reporting/enforcement-actions/restorative-justice>; British Columbia, Natural Resource Compliance and Enforcement Database.

⁹⁷ British Columbia, *Quarterly Environmental Enforcement Summary* (1st Quarter 2010: January 1 – March 31).

⁹⁸ British Columbia, Natural Resource Compliance and Enforcement Database.

⁹⁹ British Columbia, *Quarterly Environmental Enforcement Summary* (2nd Quarter 2011: April 1 – June 30).

¹⁰⁰ British Columbia, *Quarterly Environmental Enforcement Summary* (3rd Quarter 2011: July 1 – September 30).

¹⁰¹ British Columbia, *Quarterly Environmental Enforcement Summary* (3rd Quarter 2012: July 1 – September 30).

¹⁰² British Columbia, *Quarterly Environmental Enforcement Summary* (2nd Quarter 2014: April 1 – June 30).

¹⁰³ British Columbia, *Quarterly Environmental Enforcement Summary* (2nd Quarter 2014: April 1 – June 30).

¹⁰⁴ British Columbia, *Quarterly Environmental Enforcement Summary* (2nd Quarter 2015: April 1 – June 30).

¹⁰⁵ British Columbia, *Quarterly Environmental Enforcement Summary* (2nd Quarter 2017: April 1 – June 30).

¹⁰⁶ Email conversation from 7 May 2019.

¹⁰⁷ Conversation on 26 April 2019. Rwanda created a multi-layered judicial system comprised of an international criminal tribunal for the most heinous criminals associated with the 1994 genocide, and the semi-traditional *gacaca* courts, which practice restorative justice on the community level.

Gacaca, literally “on the grass,” is a restorative system which allows perpetrators responsible for crimes including isolated murder and destruction of property during the genocide to decrease their prison sentences if they plead guilty, apologize, and agree to supplement their shortened jail time with community service. The use of gacaca courts in the aftermath of the genocide is not without criticism, however. Source: <https://www.motherjones.com/politics/2009/07/how-restorative-rwandas-justice/>

¹⁰⁸ UNODOC, *Handbook on Restorative Justice Programme*, p. 29.

¹⁰⁹ UNODOC, *Handbook on Restorative Justice Programme*, p. 30.

¹¹⁰ Van Ness, D.W., *An overview of restorative justice around the world*, p. 1.

¹¹¹ <http://www.id.undp.org/content/indonesia/en/home/presscenter/articles/2018/a-call-to-advance-restorative-justice-in-indonesia.html>.

¹¹² <https://www.iucn.nl/en/projects/community-monitoring-of-mining-activities-in-myanmar>

¹¹³ <http://probation.gov.ph/restorative-justice/>.

¹¹⁴ https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/ECN15_2017_CRP1_e_V1703590.pdf, p. 19.

¹¹⁵ *Ibidem*, p. 24.

¹¹⁶ <https://www.dejusticia.org/column/la-reconciliacion-a-traves-del-medio-ambiente/>.

¹¹⁷ https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html#_3.4._Uganda.

¹¹⁸ <http://www.unesco.org/education/edurights/media/docs/f7a7a002205e07fbf119bc00c8bd3208a438b37f.pdf>, see article 31.

¹¹⁹ Email conversation 2 May 2019.

¹²⁰ UNODOC, *Handbook on Restorative Justice Programme*, p. 56

¹²¹ *Ibidem*, p. 45.

¹²² *Ibidem*, p. 47.

¹²³ White, R., *Indigenous Communities, Environmental Protection and Restorative Justice*, p. 51.

¹²⁴ Email conversation from 7 May 2019.

¹²⁵ Aertsen, I, presentation at the *Seminar on Restorative Justice Responses to Environmental Harm and Ecocide*, held in Leuven on 26 april 2019.

¹²⁶ Email conversation from 8 May 2019.

¹²⁷ Email conversation from 9 May 2019.

¹²⁸ I. Aertsen, presentation at the *Seminar on Restorative Justice Responses to Environmental Harm and Ecocide*, held in Leuven on 26 april 2019.