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Towards environmental restorative justice in South Africa: How to understand and address wildlife offences

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1. Introduction

South Africa is one of the most biodiverse countries in the world. Beyond a multitude of endemic species of fauna and flora, it is home to biodiversity hotspots such as the Cape Floristic Region, the Succulent Karoo and parts of the Maputaland-Pondoland-Albany landscape. Human activities such as deforestation, illegal hunting, unsustainable harvesting and overfishing, pollution and climate change are affecting these species and biodiversity hotspots as well as the broader socio-ecological landscape (IPBES, 2019). Conserving these natural wonders brings a barrage of historical baggage going to the core of conservation paradigms, mentalities and practices.

Like elsewhere in the Global South, South Africa has a painful conservation history that is deeply intertwined with the colonial and apartheid regimes. Indigenous Peoples and Local Communities (IPLCs) lost land, natural resource user rights including hunting rights as well as access to cultural and ancestral sites during colonisation. Local people were evicted from their land to make space for the new settler economies which included the reservation of land and forests that were exclusively earmarked for wildlife conservation or hunting by the colonial elite. Dowie (2009) estimates that more than 14 million Africans were evicted during the colonial period. Protected areas – one of South Africa's key conservation tools – were designed to provide a sanctuary in which certain species of wildlife could prosper, free from all human interference (Carruthers, 1993). Conservation benefits schemes and income were inequitable, privileging economic and political elites. While the powerful and connected strata of colonial society benefited from the conservation economy, local communities bore most of the costs and only few found sustainable employment in or near protected areas. Conservation and nature management became tools for economic and social exclusion of IPLCs who, being grouped in communities, had no land ownership and hence no land rights. Conservation also became a tool for colonial governments to exert administrative control over remote areas (Dlamini, 2020). Legitimate livelihood strategies of IPLCs such as hunting or harvesting wildlife were criminalised under the banners of conservation and wildlife protection.

It is against this background that this chapter explores the history and legacy of conservation in South Africa first before delving into structural and other drivers of wildlife offences in current times. By using the analytical lens of 'harm landscapes' or 'harmscapes' (Berg and Shearing, 2018), we consider restorative justice as an appropriate approach to addressing wildlife offences and the underlying harmscapes that continue to affect South Africa. It is the overall conclusion that restorative justice is an appropriate response not only to achieve justice for the victims of individual wildlife offences but also to address broader structural injustices in South Africa.

2. The history and current context of conservation in South Africa

The following section delves into the history of conservation in South Africa. Although there have been fundamental changes to the overarching conservation paradigm – from fortress conservation to community-based approaches – conservation practices have struggled to keep apace.

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Prior to European colonization in 1652, the use of wildlife was regulated in several ways: areas were demarcated for specific purposes and the use of wildlife[2] was determined by cultural norms and religious and spiritual beliefs. People were banned from hunting or using totem animals and valuable products (like elephant ivory and leopard skin) were given to the rulers at the time (Dlamini, 2020).

The scales tipped towards overexploitation of the still abundant wildlife shortly after the European colonizers arrived in South Africa. Colonial settlers introduced firearms, agricultural technologies and access to overseas markets. Ultimately the increasing commodification of wildlife led to its overexploitation (Carruthers, 1988). The early colonial settlers survived through hunting, which served the purpose of land clearance, income generation and provision of meat to avoid slaughtering their own livestock. MacKenzie (1988: 7) argues that the colonial frontier "was also a hunting frontier and the animal resource contributed to the expansionist urge" where hunting was "ritualized and occasionally a spectacular display of white dominance." Although local people and colonial settlers both contributed to the decimation of wildlife numbers, colonial regulators stamped local people and their cultural heritage as intrusive and destructive and chose to preserve what was left of the "wilderness" without local influences (Meskell, 2012: 117).

Colonial-era laws and regulations were employed to explicitly criminalize poaching, an act that was associated with IPLCs who often used hunting and fishing as means of subsistence. Meanwhile colonial settlers were free to carry on with hunting. The first colonial administrator, Jan van Riebeeck, decreed the first anti-poaching law delineating hunting restrictions in the area of the Cape colony a mere five years after landing at the Cape of Good Hope in South Africa. According to Roman Dutch law, wild animals had the status of *res nullius.* According to this legal principle whoever captured or killed a wild animal, owned it if they were in possession of the right permits. The hunting or harvesting of wild animals would therefore not amount to theft and once captured or killed, the wild animal remained the property of the hunter or captor (Couzens, 2003). However, the objective of van Riebeeck's *Placaat* of 1657 was to rein in hunting by indigenous people and slaves. Subsequent laws further delineated who was allowed to hunt and who was proscribed from doing so; annual "close seasons" were introduced during which the hunting of certain species was proscribed and the hippopotamus, elephant and bontebok were declared royal game for which a special hunting permit was required.

Protected areas have been used as a conservation method since the late 1800s (Paterson, 2007, p. 2). The establishment of game reserves and national parks involved the forced removal and exclusion of indigenous communities. By 1936, the enactment of the Native Trust and Land Act left indigenous people with only 13% of the total land area in South Africa.[3] The apartheid era began in 1948, ushering in a period of racial discrimination at a level South Africa had not experienced in her past lasting for the next 46 years. Apartheid reinforced the division of land approach started during the colonial period with a continued policy of exclusion (both in terms of access and benefit sharing). So-called fortress conservation (Brockington, 2002) was based on the premise that effective conservation within protected areas required the exclusion of IPLCs from that area. Commencing in the 1960s, the development of wildlife ranching contributed to the commodification and privatisation of wildlife in general; further entrenching property rights of the white elite while depriving black communities of the same. Through legislative changes in 1991, game ranchers were granted ownership over wildlife

[2] Wildlife is used in this chapter in its widest sense and includes wild animals, birds, reptiles and plants

[3] https://www.environment.gov.za/projectsprogrammes/peopleparks/southafrican_conservationhistory. The remaining 87% was allocated to European settlements and the being of conservation areas

and the right to derive income from consumptive and non-consumptive utilisation, such as the killing of wild animals for profit (Lindsey et al., 2007, p. 463).

The apartheid regime came to an end in 1994. While apartheid institutions have largely been dismantled, the old approach to conservation (fortress conservation) continues to permeate conservation practices and protected area management. Protected Areas which were created by forcefully evicting local people, remain intact. In fact, the rise of transfrontier conservation has led to the proactive expansion of cross-border conservation areas and the partial resettlement of resident communities to areas outside of protected areas.

The main objective behind the post-apartheid environmental framework legislation was to develop a human-centred approach to conservation. However, so-called "command and control" methods[4] are still the primary mechanism for enforcing compliance with wildlife laws (Kidd, 2002).

In the aftermath of the first free and fair elections in 1994, a new Constitution cleared the way for the transformation of institutional arrangements, policy frameworks and the apartheid bureaucracy. Environmental rights, sustainable development and use of natural resources became enshrined in the new Constitution (Republic of South Africa, 1996, p. 6). In the immediate period following the end of apartheid, several significant events impacted the Department of Nature Conservation, which became known as the Department of Environmental Affairs, which morphed into the Department of Environment, Forestry and Fisheries (DEFF) in 2019 and changed to the Department of Forestry, Fisheries and the Environment (DFFE) in 2021. The new Constitution opened the floor for the clearing of a store of draconian apartheid laws and institutions relating to all sectors of public and private life. Concurrently, the wildlife ranching, safari and game industries experienced massive growth as the end of apartheid enabled access to previously untapped international markets of hunters and tourists, who had boycotted the country in the past. The new environmental affairs bureaucracy transformed with many former public servants from the old regime opting out by accepting retrenchment packages, early retirement or job opportunities in the private sector (Hübschle and Jojo, 2021, p. 18). While the apartheid regime endorsed the notion of sustainable use by creating incentives for white landowners, the new democratic regime developed a legislative framework, the National Environmental Management Act 107 of 1998 (NEMA), which puts greater emphasis on sustainable use linked to community empowerment and social development as envisaged by the Constitution.

NEMA read with specific environmental management acts expanding conservation (specifically the National Environmental Biodiversity Act 10 of 2004 (NEMBA) and the National Environmental Management Protected Areas Act 57 of 2003 (NEMPAA) read with their regulations) create the framework legislation within which environmental protection, regulation and management operate. NEMBA, read with the Threatened or Protected Species Regulations, specifies a number of restricted activities in relation to listed species which include consumptive use. NEMA establishes the Environmental Management Inspectorate (EMI) to enforce the environmental legislation. It contains a list of principles, which apply to all organs of the state and must be considered in the enforcement of environmental law.

The provisions comply with international best practices and are widely regarded as progressive and socially just. However, public enforcement and oversight bodies are chronically underfunded and sometimes mismanaged (Rademeyer, 2016). This can have negative effects on oversight and accountability, which is particularly concerning in the current environment of increasing employment

[4] The "command and control" mechanism prescribes the legal requirement and then ensures the compliance through an array of enforcement mechanisms.

of paramilitary and military strategies, tactics, and military-trained staff in the broader conservation sector.

The NEMPAA sets out which areas are protected and, by extension, who has the mandate to protect and enforce compliance within these areas. It also specifically provides for the continued existence of South African National Parks (SANParks) as the management and enforcement authority for national parks. Even though the Act provides for co-management agreements with local communities and landowners, these provisions have not been implemented to the extent it was hoped. Of further importance is that the NEMPAA makes provision for the sustainable utilisation of protected areas for the benefit of people. Thus, natural resources should be accessible to local communities in protected areas as long as the ecological character of the area is preserved.

South African laws, especially the national framework legislation, specify communities as key constituencies; however, stewardship programmes have not been fully realised. Essentially the legislation is progressive on paper, but the enforcement mechanisms are contradictory to the NEMA principles and over-emphasise the command and control approach (Kidd, 2002, p. 24). The enforcement bodies and the implementation plans are also not adhering to the more inclusive conservation approaches mandated by the framework legislation and the Constitution. Meanwhile the judicial branches of government are not capacitated to oversee the framework legislation.

The new South Africa needed to constructively address a 400-year-old legacy of land dispossession and exclusion and, to do so, embarked on a massive land reform programme to redress past inequalities. Two key components of this land reform programme were, and continue to be, land tenure reform and land restitution (Patterson, 2011, p. 15). Land restitution claims settled in protected areas have failed to achieve an equitable balance between conservation and land reform imperatives (Patterson, 2011, p 15). IPLCs remain excluded from accessing and benefiting and have limited opportunities to participate in the management of the protected area where their land claim was successful (Patterson, 2011, p 15).

In showing the long and often difficult history of conservation in South Africa, it is essential to acknowledge “the danger of a single story” (Adichie, 2009). Although the establishment of protected areas often meant loss, exclusion and marginalisation for IPLCs, they were not victims of their destiny but learnt to live with different forms of deprivation and exclusion (Dlamini, 2020). As much as the apartheid regime and Parks Boards tried to hide black peoples’ heritage and right of belonging in the landscape, black people’s presence should not be reduced to fulfilling the role of poachers or labourers in conservation narratives. There were many different individual and community experiences of conservation in the landscape. Given the limited literature on indigenous conservation systems, mentalities and practices, several research projects are in the making to capture black history in the landscape (Hübschle and Jojo, 2021, p. 24).

3. Wildlife offences

While the South African government has made progress, implementation of socially just conservation programming has been slow due to both internal and external constraints. The legislative and policy prerogatives look great on paper, but more work needs to be done to affect implementation. As an example, the South African government statistics on the number of conservation crime prosecutions is used to indicate heightened conservation agency guardianship. A proactive approach would gauge high levels of voluntary compliance, which, according to Herbig (2008), would be a better indicator of success. The command-and-control approach also provides little incentive for local communities to protect the environment. Criminal measures and criminal sanctions are forms of punishment, yet they

do not encourage positive action. Civil and administrative measures focus on compelling persons to cease the harmful activity and to take measures to stop, prevent, remediate, or mitigate the harm. Traditionally, environmental authorities have relied almost exclusively on the criminal measures to compel compliance with wildlife and marine law contexts. The command-and- control approach requires well-resourced and capacitated enforcement authorities to be effective because the control functions are time-consuming and expensive. These mechanisms are also inflexible in that they do not allow discretion to tailor compliance to suit specific situations (Craigie, 2009). Recognising the weakness of the current command- and-control approach, restorative justice, discussed in part 6 below enables a more inclusive, flexible and people and harm -centred response to wildlife offences.

Wildlife offences are considered one of the leading threats to South Africa's wildlife. A wildlife offence can be defined as "*the taking, trading (supplying, selling or trafficking), importing, exporting, processing, possessing, obtaining and consumption of wild fauna and flora, including timber and other forest products, in contravention of national or international law*."[5] Wildlife offences include illegal wildlife hunting which refers to the harvesting, catching, extraction or killing of wildlife that is not authorized by the state or private owners of wildlife. The illegal killing of rhinoceros is a well-documented wildlife offence which does not only extend to the killing and dehorning of a rhino/rhinos but may include trespassing on private or public land, possession and use of a hunting rifle on protected land and the transport without valid permits of rhino body parts.

It is not only South Africa's megafauna that is threated, in fact due to the diversity of wildlife offences taking place in South Africa one can make the distinction between syndicated wildlife offences (those offences motivated or facilitated by organized criminal syndicates, operating internationally or nationally within South Africa) and non-syndicated wildlife offences (offences not perpetrated by organized criminal networks, these include, for example, snaring for personal consumption or retaliatory killing of wildlife due to human wildlife conflict) (Hübschle et al., 2021, p. 147). What must also be noted is that wildlife offences (both syndicated and non-syndicated) seldom take place in isolation and are often accompanied by offences relating to organized crime, interpersonal violence and animal welfare.[6]

Responses to disrupt rhino poaching have been likened to fighting a "war on poaching" (Duffy, 2014; Hanks, 2015) as military and paramilitary personnel, training, technologies, and partnerships are used in the pursuit of conservation efforts. Several hundred poaching suspects have been killed on private and public conservation land since 2010 (Hübschle, 2016). Why then, at the risk of being killed, do people still participate in wildlife offences?

[5] https://cites.org/eng/prog/iccwc/crime.php

[6] This legislative framework includes:

- For wildlife offences: National Environmental Management Biodiversity Act 10 of 2004, read with the Convention on International Trade in Endangered Species Of Wild Fauna and Flora Regulations published in Government Notice R173 in Government Gazette 33002 and the Threatened or Protected Species Regulations published in Government Notice R152 in Government Gazette 29657 (read with Lists of Critically Endangered, Endangered, Vulnerable and Protected Species, published in Government Notice R151 in Government Gazette No 29657), Marine Living Resources Act 18 of 1998 (read with its regulations) and provincial legislation that includes but is not limited to: Cape Nature and Environmental Conservation Ordinance 19 of 1974, Nature Conservation Ordinance 8 of 1969 (Free State), Nature Conservation Ordinance 12 of 1983 (Gauteng), Nature Conservation Ordinance 15 of 1974 (KwaZulu-Natal), Kwa-Zulu Nature Conservation Act 29 of 1992, Limpopo Environmental Management Act 7 of 2003, Mpumalanga Nature Conservation Act 10 of 1998, Northern Cape Nature Conservation Act 9 of 2009, North West Transvaal Nature Conservation Ordinance 12 of 1983
- For offences relating to interpersonal violence and organized crime: Criminal Procedure Act 51 of 1977, Firearms Control Act 60 of 2000 and Prevention of Organised Crime Act 121 of 1998
- For animal cruelty offences: Animals Protection Act 71 of 1962.

4. Pathways to poaching and the notion of contested illegality

Having introduced wildlife offences above, Duffy and colleagues (2016) point to the importance of context when considering illegal hunting: The shooting of wildlife may well be illegal in a protected area but once the wild animal breaks loose and crosses into communal or private land its killing might not only be legal but life-saving. This ties in with the notion of contested illegality developed by Hübschle (2016; 2017) during the course of her fieldwork on the illegal rhino horn economy. While interviewing people who were engaging in illegal economic activities linked to the illegal wildlife trade, it became clear that many did not accept the label of illegality imposed upon their activities. Rural hunters legitimized bushmeat poaching in protected areas by putting forth cultural and economic justice reasons for their offences. In their eyes hunting was as much a rite of passage as it was an expression of cultural conventions, practices and traditions, which are however often not recognised in statues books and Western societies. Others rejected outright the label of illegality, arguing that hunting was not an illegal activity as they were hunting on land that used to belong to them but had been taken away by colonial settlers, the state or private investors. Game farmers and wildlife professionals legitimized breaking the law or exploiting regulatory loopholes by criticizing the rule-makers who were seen as illegitimate rulers who were overreaching. They also critiqued the rules per se in terms of fairness and impact on conservation and their own economic objectives. Meanwhile traders and consumers of illegally harvested wildlife were often aware of the illegality attaching to their activities but did not accept prohibition due to cultural and social legitimacy of wildlife consumption and use. It was thus socially acceptable to break the rules. Scholars have long looked at the interface between legality and illegality and the blurred boundaries between what is considered legal or illegal, licit or illicit, and legitimate or illegitimate (Josiah McC Heyman, 2013; Josiah McConnell Heyman and Smart, 1999; Van Schendel and Abraham, 2005; Hall, 2013). Moreover, these boundaries while situated in time and space are also geographically, socio-politically, economically, and culturally mediated; and that processes of delimiting these boundaries differentially impact social groups along axes of race, gender, caste and class. In fact, the production and regulation of these boundaries affect and transform the (natural) environments (and nonhuman actors) that mediate their possibilities as licit or illicit activities.

Contested illegality of traditional hunting activities aside, there are a variety of reasons why local people deliberately engage in what is undisputed illegal wildlife hunting, trade and trafficking. These include: The lack of sanctions and penalties for illegal activities and hence limited disincentives not to engage in poaching, trafficking or trade; limited benefits from wildlife stewardship and hence limited incentive to conserve wildlife rather than poach it; human-wildlife conflict and the associated high cost of living with wildlife and/or near protected areas resulting in resentment towards conservation and motivation to undermine it; limited alternative ways to make a living and meet basic needs (Roe and Booker, 2019).

Protected areas and environmental policies under the fortress conservation paradigm define exclusionary rights which grants tourists and scientists (powerful and influential actors) access whereas the original inhabitants of the area are stamped as intruders. Once livelihood strategies that are reliant on protected natural resources are diminished, local people must seek out alternatives. These alternatives often do not align with the existing skillsets of IPLCs who have been historically and traditionally been engaging in certain forms of livelihoods. Such alternatives may not always be viable – for example, farmers might have to deal with predators attacking livestock or wildlife crop-raiding plantations. Fishers may have to expand their fishing operations to more dangerous maritime zones

or move elsewhere. The loss of livelihoods is often cited as a motivation to join illegal poaching, logging or fishing operations. However, we must be careful of monocausal fallacies such as the hypothesis that poverty leads to poaching – the so-called conservation poverty hypothesis. Especially in South Africa, members of wealthy farming communities, wildlife veterinarians and professional hunters have been involved in rhino poaching networks (Hübschle, 2017; 2019).

Local people are not just incentivised to engage with IWT because of frustration or anger at the negative impacts they face from conservation. The incentives for local people to participate in illegal wildlife, forest and fishing economies may sometimes outweigh benefits from legal equivalents and alternative livelihood strategies. In such cases, the profits linked to illegal activities may be greater than legal alternatives or the profits exceed what is earned from existing conservation benefit and rural development schemes (Roe and Booker, 2019). As an example, a single rhino hunt can earn a rhino poacher more than the average annual income of rural citizens in southern Africa (Hübschle, 2016).

Scholars have started to acknowledge the historical context of land expropriation, loss of natural resource use rights, contested illegality as well as the forced removals during colonial times to explain why IPLCs may support or engage in poaching economies in southern Africa (Hübschle, 2016; Hübschle, 2017; Hübschle & Shearing 2018; Moneron, Armstrong & Newton, 2020). Beyond poaching for the "cooking pot and pocket book" (Kahler and Gore, 2012), convicted poachers in South Africa cited feelings of stress, disempowerment, anger, peer pressure and emasculation leading to poaching decisions. While younger poachers (late teens to late twenties) espoused anomic and individualistic desires, older offenders wanted to take care of their families and the community (Hübschle, 2017). Some convicted wildlife offenders wanted to achieve social upward mobility and used illegal hunting to attain political influence or provide social welfare to community members. Structural violence, the generational pain of dispossession and marginalization played a facilitating milieu (Hübschle & Shearing 2018: 32) while unhappiness with rule-makers and the perceived illegitimacy of the rules (contested illegality) highlighted the distrust of past and present state authority. A study undertaken amongst convicted wildlife criminals in Namibia found that some were driven by curiosity as they were previously unaware of the species and wanted to find out more about it (Prinsloo et al., 2021). Moneron and colleagues (2020: 26) categorised influencing factors that led to the commission of wildlife offences among convicted wildlife criminals in South Africa neatly into individual, community and societal factors. In addition to the earlier factors, the study identified a skewed perception of risk and the provision of employment to others as key individual drivers while opportunism and peer pressure were added to the list of community drivers.

5. The harm landscape associated with wildlife offences in South Africa

Having contextualised wildlife offences as experienced in South Africa and why these offences are committed, this part considers the harm experienced as a result thereof. Berg and Shearing (2018) coined the concept of "harmscapes" (harm landscapes) to capture the notion that contemporary risks and associated harms require a departure from traditional crime and justice models. Contemporary harmscapes are characterized by both radical uncertainty and unpredictability (Mutongwizo et al., 2021, p. 2). Building resilience – "resilience policing" – has become inevitable in humanity's quest to deal with crises that are difficult to predict including harms associated extreme weather events, pandemics, and terrorism (ibid). We loosely apply the concept of harmscape in the context of wildlife offences to demonstrate how harms resulting from the exclusionary legacy of conservation, the

commission of wildlife offences and responses thereto are multifaceted, inter- and intragenerational, even circular.

The graphic violence that goes hand in hand with the commission of some wildlife offences (most notably rhino poaching) is often cited as a leading cause for the escalation in enforcement responses. In South Africa's Kruger National Park, 90% of a ranger's duties used to relate to conservation-related tasks and 10% of their time would be dedicated to enforcement activities. With the onset of the rhino poaching crisis in the late 2000s, rangers started dedicating more of their time to anti-poaching related duties while conservation duties took up less of their time (Hübschle and Jooste, 2017). This change in priorities was in response to the real problem of rhino poaching but could also be attributed to a more militarized approach with military and private security professionals at the helm in the Greater Kruger landscape which also includes private reserves and commercial farms (Annecke and Masubelele, 2016). In recent engagements with stakeholders in and around the Kruger National Park, conducted under a pilot project on applying restorative justice to respond to wildlife offences in South Africa, two of the authors were able to qualify the wide degree of harm resulting from wildlife offences.[7] A key take home is that wildlife offences are not "victimless". Victims can be divided into three board categories, people, wildlife and the society as a whole.

The people victimized by wildlife offences are diverse and include private wildlife owners, rangers, law enforcement officials, community members and broader South African society. The harm suffered by people includes and intimidation (threats of personal violence , intimidation and death threats made against community members, rangers and private wildlife owners), harm due to trauma (including the mental health impact of living in a state of perpetual conflict), and financial and material losses to owners of wildlife (this includes the loss of the animal itself due to poaching but also the costs of fence repair, protection services and veterinary care). These harms occur as a direct result of the wildlife offence itself but there is also harm that occurs because of the offence being committed, this is illustrated by the following example:

When poachers trespass into a protected area, they usually have to cut fence lines (South Africa utilizes a fence system to establish ownership over wildlife and to prevent disease spreading from wildlife to domestic stock and vice versa). These dropped fences allow wildlife to migrate between protected areas, commercial farms, villages and towns posing danger and harm to lives and livelihoods. Linked to this harm is the potential for greater conflict between communities and protected areas due to increased (and often unresolved) human wildlife conflict. Other forms of associated harm include the spread of zoonoses and infectious animal diseases. Finally harm of living near organized criminal syndicates, increased exposure to criminal behavior and social harm (such as illegal gambling associated with certain wildlife offences) needs to be considered.

The second category relates to harms to wildlife and the environment. To illustrate this harm, we use the current rhinoceros poaching crisis as an example. South Africa lost 8682 rhinos between 2010 and 2020 . Kruger National Park used to be home to the greatest number of rhinos in the world. Less than 3000 rhinos survive there. First responders provide accounts of traumatic crime scenes with rhinos on rare occasions surviving poaching events. The harm to the animal also extends to the calves who may not be poached themselves but are left orphaned and unborn embryos that are not carried to term – the gestation period for rhinos is 16 months.

[7] The Endangered Wildlife Trust, under the World Wide Fund for Nature (WWF) South Africa Khetha Programme and supported by the United States Agency for International Development (USAID), is piloting a project that seeks to apply restorative justice approaches to wildlife offences in South Africa (The Restorative Justice Pilot Project).

Beyond syndicated wildlife offences, non-syndicated offences such as snaring also result in widespread harm to wildlife and the broader ecosystem. This hunting method, prohibited in South Africa, is non-discriminatory meaning any animal who runs through the snare line is impacted. Snaring has resulted in the illegal killing of critically endangered and endangered species. This form of hunting is considered cruel and unethical as the trapped animal often takes hours to strangle to death (if the neck is caught), gets attacked by predators and/or scavengers, or bites off its own legs to free itself.

In addition to harm to the individual animal there is also wider harm to the environment that must be considered when wildlife offences occur. The poaching of keystone species (such as rhino and elephant) removes the ability of these individuals to support "habitat architecture" (Van de Water et al, 2021, under review). Further, the environment plays a key role in informing climate change adaptation and mitigation by providing ecosystem services. When wildlife numbers are severely impacted (or eradicated) the ability of the environment to fulfil these functions is jeopardised (Van de Water et al, 2021, under review).

The third victim category is society as a whole. A recent paper has qualified 16 categories of benefits from elephant conservation specifically that illustrate how society suffers harm as a result of wildlife offences (Van de Water et al, 2021, under review). These benefits include: employment opportunities, spiritual and cultural benefits, social benefits, the facilitation of learning and inspiration, provision an intergenerational legacy and the facilitation of human wellbeing (both physical and psychological) (Van de Water et al, 2021, under review). The inverse of these benefits is the harm that society faces in their loss. Elephants across their range are described as decreasing and have gone locally extinct in two countries already, when they go extinct in an area, these benefits go with them.[8] While the example focuses on elephants it is submitted that this is equally applicable to other keystone species.

The harm landscape associated with wildlife offences is multifaceted, personal and intergenerational, creating great volumes of victims. It is important to note are the complex motivations driving individuals and communities to support wildlife poaching economies and the associated harmscape. Enforcement responses including green militarisation have added another layer of harm to the harmscape. To escape the cycle of violence, harms and trauma, the following section will consider how a restorative justice processes can provide a future-oriented alternative to retributive justice.

6. The usefulness of restorative justice approaches to wildlife offences

"*The inefficiency of our criminal justice system, and disturbing overcrowding and lack of rehabilitation in our prisons can truly be termed a crisis*." (Cameron, 2020, p.52) These are the words of Justice Cameron, a retired justice of the Constitutional Court of South Africa following his investigation into the crisis of criminal justice in South Africa. As with many jurisdictions globally, South Africa relies on a predominately retributive justice system. Cameron's research shows the progression of retribution in the justice system during the apartheid regime and into the new democratic era of South Africa. Under the apartheid system prisons were referred to as "universities of crime" and the death penalty was used regularly (at its height more than three times a week) (Cameron, 2020, p. 33). In the late 1980s South Africa began reconsidering its approach to crime and punishment, starting with a shift in mandate to corrections and rehabilitation, to a flurry of policy documents in the mid-to late nineties advocating a restorative approach (Cameron, 2020, p. 33; Batley, 2006, p. 120–126). Unfortunately, this was not to become an entrenched approach in the new South Africa. In the late 1990s, due to an escalation in crime across South Africa, a "tough on crime" approach was adopted (Cameron, 2020, p.

[8] https://www.iucnredlist.org/species/181008073/181022663

39). War terminology became common parlance (similar to the response of war on poaching discussed above), with the former Minister of Safety and Security stating *"…criminals have obviously declared war against the South African public (*Cameron, 2020, p. 39*).*" The consequences of the tough on crime approach include prison overcrowding: When Cameron (2020, pp. 41-42) was writing his report in 2020, there were over 160,000 prisoners in South Africa with more than 18,000 prisoners serving life sentences. South Africa has one of the highest rates of incarceration but also one of the highest recidivism rates in the world (estimate range from between 60–90%). Cameron concluded that "*[a]fter formal apartheid, the alleged 'crime wave' led to our dumping a restorative justice approach and embracing a punitive one. The 'tough on crime' approach led to an increase in the prison population — but without a matching increase in infrastructural and institutional capacity, and with utterly no benefit regarding crime. The result has been overcrowding. We are essentially shoveling prisoners into a funnel and they are not being rehabilitated*. (Cameron, 2020, p.45).

The solutions proposed by Cameron include adopting a restorative justice approach that gives victims an increased role in criminal proceedings (although Cameron limited this to sentencing) (Cameron, 2020, p. 68). Restorative justice, although not the dominant approach, has found application in South Africa through legislation, court judgments and sentencing frameworks, specifically holding that sentences must "*consider the interests of victims" (*including improved provision for victim involvement) and with the same framework proposing a sentence of reparation (including elements of restitution and compensation) (Hübschle et al., p. 142; Cameron, 2020, p. 69).[9] Globally and in South Africa there are calls to address the harm that the environment suffers in environmental crime. Compensation orders have been available for environmental offences since 1998 through the inclusion of section 34(1) of the NEMA which provides:

> *"Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused* (*Kidd, 2003, p. 58)."*

There are other similar provisions found in South African legislation relating to water, forests and heritage and these are important because they are aimed at remediation of environmental damage (Kidd, 2003, p.58). Certain legislation in South Africa, such as the National Heritage Resources Act, also provides for reparation orders, requiring the offenders to carry out the reparation him or herself (Kidd, 2003, p.59). Therefore, the legislative framework providing for reparation exists within the environmental legal framework and by applying this, with the broader view of restorative justice and together with the principles of engagement, empowerment of all participants through dialogue and problem solving, a more appropriate, effective and enduring resolution to wildlife offences can be found (Kershen 2019, p. 47–50).

As has been well documented in the restorative justice literature the conventional Western paradigms for approaching crime - whether of retribution for its own sake or in the belief that it will deter the individual or other potential offenders from committing crime, and of rehabilitation have clearly become inadequate for responding to crime generally, but all the more so in cases of environmental

[9] The South African Law Reform Commission in their discussion paper "A New Sentencing Framework" (2000) provided that sentences must "*consider the interests of victims, victim impact statements, informing victims of the release or sentence of their accused and other mechanisms*." (Cameron, 2020, p. 69)

(and specifically wildlife) offences. It is submitted that this is the case because these approaches are too narrow, that by focusing only on the offence they fail to properly include the voice of the victims and the broader community, they fail to properly consider harm and (in the case of the retributive paradigm) they rely excessively on imprisonment and fines as the predominate sanctions. Seeking to address this problem, the Restorative Justice Pilot Project was launched in South Africa to explore the application of restorative justice approaches to wildlife offences (both syndicated and non-syndicated as discussed above).[10] By applying restorative justice in this context, the Restorative Justice Pilot Project seeks to confirm who the victims of environmental harm are, what harms have been suffered, and who should have a voice in restorative processes. This is illustrated by the following case example:

> Three people (under the age of 18) are apprehended in a protected area with dogs. Dog hunting is a prohibited form of hunting in South Africa but has a long history as a hunting practice by local communities. The dogs were confiscated and euthanised and the offenders charged with trespassing.

The inadequacies of the retributive approach becomes clear with this case study: the harm (direct and associated) that occurs due to dog hunting is not addressed (specifically as the charges laid do not speak to this offence at all yet the dogs were confiscated), the victim of the offence nor community leadership are afforded an opportunity to participate in the proceedings, there is no opportunity to address the underlying reasons for the offence and there is no opportunity to engage on dog hunting specifically (thus perpetuating sentiments of contested illegality). A restorative justice approach would have addressed all of these elements.

Additional benefits of the application of restorative justice to respond to wildlife offences include identifying who, and on what basis, can speak on behalf of future or past generations and other non-human victims (animals, plants, rivers, land, places) and facilitating their involvement in the restorative justice process. Finally, and central to the aims of environmental law, as restorative justice facilitates reparation of harm, particular focus will be on the degree of environmental harm that may be repaired and restoration of the environment that may be facilitated through restorative justice processes.

At the launch of the pilot project, referenced above, given the historical context relating to conservation as discussed in part 2 and with due consideration to socio-economic realities in South Africa, dedicated thought was given to the most appropriate conceptual framing for the project. Drawing on the three conceptions of restorative justice articulated by Johnstone and van Ness (2013), three frameworks were identified, the first based solely on the transformative conception of restorative justice, the second seeking to make the criminal justice system more effective and responsive and the third a combination of the first two, addressing both dimensions by seeing restorative justice as a social movement (Hübschle et al., 2021, p. 145 – 146). Within this third framing consideration was given to the works of Stauffer (2015) and Henkeman (2013) who held that by concentrating on restorative justice as interpersonal interactions there has been a tendency to overlook structural injustice. Structural injustice is defined as: '*Disparities, disabilities and deaths result when systems, institutions, policies or cultural beliefs meet some people's needs and human rights at the expense of others* (Schirch, 2004, p.8)." Writers within the peacebuilding tradition have articulated the connection between structural injustice and personal, community and national destruction (Schirch, 2004, p. 9 – 24). This connection can be responded to with the understanding of conflict transformation which creates "*constructive change processes that reduce violence, increase*

[10] The Restorative Justice Pilot Project, supra footnote 6

justice in direct interaction and social structures and responds to real-life problems in human relationships" (Lederach, 2003, p. 14). Taken together in the context of wildlife crime, these concepts and approaches can create opportunities for acknowledgement and validation of historical harm and for problem solving that addresses the deep-rooted issues local communities adjacent to detected areas grapple with. Ultimately under the pilot project in its initial phases restorative justice approaches will be applied to individual harms, while at the same time the project team will address the three core requirements identified by Stauffer to enable a restorative justice to be applied as social movement. These three core requirements are: the formation of institutional alliances, the development of strong localised practice and finally creating mechanisms for collaboration that drive transformation of the system as a whole (Hübschle et al., 2021, p. 146). It is our considered view that restorative justice approaches be considered as an appropriate response to harms at the macro and micro levels of a landscape.

7. Conclusion

This chapter provided context to the history and legacy of conservation in South Africa, with specific focus given to the drivers of wildlife offences. Consideration was then given to the harm resulting from these offences, through the analytical lens of harmscapes. This chapter highlighted the impact of the "war on x" campaigns with specific reference to the war on poaching and the war on crime, calling for a more holistic, inclusive, harm and people centred approach to justice, which is facilitated by restorative justice. The chapter confirmed that addition to creating a more enabling and responsive justice system, restorative justice has the potential to address the structural injustices experienced today due to colonialism and apartheid. Ultimately, we have shown that restorative justice as an appropriate approach to addressing wildlife offences and the underlying harmscapes that continue to affect South Africa. We conclude with the following quote "[t]*hus, when any environmental issue is pursued to its origins, it reveals an inescapable truth – that the root cause of the crisis is not to be found in how [people] interact with nature, but in how they interact with each other - that to solve the environmental crisis we must solve the problems of poverty, racial injustice and war ...*" (Paterson, 2011, p. ii).

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