

Focus on victims and the community: applying restorative justice principles to wildlife crime offences in South Africa

*Annette Hübschle, Ashleigh Dore and Harriet Davies-Mostert**

1 Introduction

This note introduces a pilot project that seeks to apply restorative justice principles to wildlife crime offences in South Africa. A local conservation NGO, 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 this innovative project in a harm landscape (wildlife crime offences) that is renowned for retributive and punitive approaches to justice. The project was launched in August 2019 and although the project team was still in the inception phase at the time of writing, team members have made great headway in developing a conceptual framework and implementation plan. This note explains why we think the time is ripe for environmental restorative justice in South Africa and how we plan to implement the pilot project; we also share lessons learnt for future initiatives and projects.

2 Restorative justice in South Africa

South Africa is internationally renowned for the application of restorative justice principles during and after its democratic transition, which ended decades of injustice and human rights violations of the apartheid regime (Skelton, 2013). The famed Truth and Reconciliation Commission (TRC) under the leadership of Archbishop Desmond Tutu offered South Africans a platform where the painful past was acknowledged and a new future was forged based on apology and

* Annette Hübschle is a senior research fellow in the Global Risk Governance Programme in the Law Faculty at the University of Cape Town, South Africa. Ashleigh Dore is the wildlife and law manager at the Endangered Wildlife Trust and heads the Restorative Justice Project, South Africa. Harriet Davies-Mostert is the head of conservation at the Endangered Wildlife Trust, the senior manager of the Restorative Justice Project, South Africa and a Fellow of the Eugène Marais Chair of Wildlife Management at the Mammal Research Institute, University of Pretoria. All authors are members of the Restorative Justice Steering Committee of the Wildlife Crime Restorative Justice Project undertaken by the Endangered Wildlife Trust under the WWF South Africa Khetha Programme and supported by USAID.

Contact author: Ashleigh Dore at ashleighd@ewt.org.za.

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forgiveness (Tutu, 1999). While there are divergent views on the successes and failures of the TRC (Malotane Henkeman & Whande, 2019; van der Merwe & Chapman, 2008), the TRC provided a point of reference for engaging with difficult questions about the nature of justice in post-conflict societies. Recognised as a theory of justice and firmly anchored in South Africa's Constitution, restorative justice continues to influence policy and legislation and animate public and official discourse (Batley & Skelton, 2019). The Constitutional Court, in particular, has embraced restorative justice jurisprudence. The Court's unique application of modern restorative justice concepts combined with the African philosophy of *ubuntu* has not only occurred in criminal justice contexts but also across a range of legal contexts (Skelton, 2013). However, restorative justice principles have not found any application in the environmental, conservation and wildlife crime spheres in South Africa where retributive justice and command-and-control approaches dominate.

3 Wildlife trafficking and criminal justice responses in South Africa

South Africa is the third most biodiverse country in the world. It is recognised for high levels of endemism and is home to over 88,000 known species (Skowno et al., 2019). However, the country's rich biodiversity hangs in the balance due to a number of interconnected threats ranging from climate change, pollution and overexploitation to land-use change and habitat loss (IPBES, 2019). Since the turn of the millennium, overexploitation of wildlife species through illegal hunting and harvesting has become a serious concern to conservationists, law enforcers, regulators and affected communities (South African Police Service, 2016). For example, more than 8,200 rhinoceros were illegally hunted between 2010 and the time of writing this note in November 2020 (Department of Environment, Forestry and Fisheries, 2020). Illegal fishing has led to the overexploitation and reduction of critical stock levels of many marine species, including the coveted sea mollusc abalone (Isaacs & Witbooi, 2019). In light of South Africa facing the risk of losing more than 50 per cent of its cycad species by the mid-2020s, the South African National Biodiversity Institute (SANBI) has declared a 'South African cycad extinction crisis' (Williamson et al., 2016: 772). Given that the world has entered the sixth mass extinction (Kolbert, 2014), many other species of fauna and flora face an uncertain future in South Africa and beyond (United Nations Office on Drugs and Crime, 2020).

Environmental authorities have relied almost exclusively on criminal measures to compel compliance with wildlife and marine laws and regulations in South Africa (Herbig, 2008). Success is measured through the annual crime statistics released by the South African Police Service. Arrest and successful prosecutions are used as key performance indicators (KPIs) and assessment tools to indicate heightened conservation agency guardianship. To meet KPIs, environmental officers focused their activities on low-hanging fruit: local people who attempt to access natural resources that used to be common pool resources but are now protected behind fences (Herbig, 2008). However, the steep increase

in illegal rhinoceros hunting incidents in South Africa since 2008 has put immense pressure on the state to find effective responses that deter illegal wildlife hunting. There have been public calls for harsher punishment for wildlife offenders, even shoot-to-kill policies (Lunstrum, 2017).

At the ground level, conservation actors started implementing quasi-military and security measures which included but were not limited to the employment of military and security actors, strategies and technologies (Büscher & Ramutsindela, 2016). While some argue that green militarisation was required to deter armed and dangerous organised criminals from killing endangered wildlife (Hübschle & Jooste, 2017; Shaw & Rademeyer, 2016), others have pointed to the negative impacts on community-park relations and the active return to fortress conservation (Hübschle, 2017b; Ramutsindela, 2016). More than 1,700 suspected rhino poachers and traffickers were arrested between 2010 and 2016 (Rademeyer, 2016) and several hundred poaching suspects have been shot dead on protected land over the past decade in South Africa (Hübschle & Shearing, 2021). Yet, wildlife crime continues to be viewed as a low-risk and high-reward activity as many wildlife crime cases never make it to court or are struck off the roll due to insufficient evidence (Rademeyer, 2016). As traditional criminal justice responses have not been able to stem the tide against wildlife trafficking, the time is ripe for innovative new approaches.

4 Project design of the restorative justice project

The rationale for a pilot project that would apply restorative justice principles to wildlife crime offences was prompted by the realisation that the current approach to justice in the conservation space is punitive in nature, too narrow in its approach and too limited in its application. What is required is a new approach that works in tandem with the criminal justice system, addressing its inherent weaknesses and failings. The aim is not to replace the existing system but to strengthen it (Skelton & Batley, 2008). It is against this background that the Endangered Wildlife Trust (EWT) conceived this pilot project in the hope that restorative justice principles offer a more just and equitable approach.

The EWT is an environmental NGO in South Africa with specialist conservation programming that supports the conservation of species and ecosystems, and recognises the importance of local communities in conservation. Ashleigh Dore, the manager of the restorative justice project, is an environmental lawyer by training. The EWT partnered with Mike Batley of the former Restorative Justice Centre during the development and proposal stage of the restorative justice project in 2015. As a qualified social worker and restorative justice expert, Mike has played a pioneering role in introducing restorative justice principles into the South African criminal justice system and public discourse over the past two decades. Before the project received funding from USAID as part of the WWF Khetha Programme to tackle wildlife trafficking in Mozambique and South Africa, the EWT obtained crucial support from the South African government. Ashleigh Dore presented the project objectives at the Rhino

Conservation Laboratory,¹ a solutions-oriented workshop hosted by the Department of Environmental Affairs in 2016. The pilot project was included in the community empowerment work stream of Rhino Lab Action Plan. Although the pilot project officially commenced in August 2019, the project team conducted a scoping study in 2017 and 2018. The resultant initiation report provided a comprehensive literature review on restorative justice models and practices in South Africa and elsewhere in the world (Dore & Endangered Wildlife Trust, 2018).

The project team also explored the findings of empirical research conducted in South African correctional centres and local communities that analysed why individuals and communities participate in illegal wildlife economies and how the structural context of dispossession and marginalisation may facilitate poaching decisions (Hübschle, 2016, 2017a; Hübschle & Shearing, 2018; Moneron, Armstrong & Newton, 2020). Beyond poaching for the ‘cooking pot and pocket book’ (Kahler & Gore, 2012), individuals were driven by feelings of stress, disempowerment, anger, peer pressure and emasculation. 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, 2017a). Some convicted wildlife offenders were set on achieving social upward mobility and saw illegal hunting as a means to an end to political leadership, while some wanted to provide social welfare to community members. Structural violence, the generational pain of dispossession and marginalisation played a facilitating milieu (Hübschle & Shearing, 2018) while unhappiness with rule-makers and the perceived illegitimacy of the rules – echoing Hübschle’s concept of contested illegality (Hübschle, 2016, 2017b) – highlighted the distrust of past and present state authority. Moneron and colleagues (2020) categorised influencing factors that may lead to the commission of wildlife offences neatly into individual, community and societal factors. In addition to the abovementioned 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. These studies provide valuable information that must be considered if recidivism is to be constructively addressed. They also highlight that a purely punitive approach to justice is misplaced as it fails to tackle underlying structural and systemic factors.

Following the scoping research and inception report, the project team assembled a steering committee that would assist and guide the team towards project implementation. The committee also advised on the conceptual framework and will provide feedback on the two major outputs of the pilot project: technical guidelines for the application of restorative justice processes to wildlife crime, and awareness-raising material. The brief for the steering committee was the inclusion of ‘critical friends’ which include government, NGO and academic experts. Clifford Shearing who was involved in the Community

1 Hosted by the Department of Environmental Affairs in August 2016, the Rhino Conservation Laboratory included government, private sector, NGO and community stakeholders who developed action plans to address the rhino poaching crisis.

Peace Process through the Zwelethemba model (compare with Shearing & Froestad, 2010) has been an invaluable mentor, sharing lessons learnt and advising on the conceptual framework.

5 Development of the conceptual framework

Before moving into the second phase of developing a conceptual framework, the project team first assessed the key outcomes sought by implementing restorative justice approaches to wildlife crime offences. These include creating an appropriate mechanism to voice and address harm and establish appropriate responses to address recidivism. With these outcomes identified, determination of the most appropriate conceptual framing for the project could be undertaken. The starting point of this determination for the pilot project was founded on the three conceptions for restorative justice identified by Johnstone and Van Ness (2013), namely: encounter, reparative and transformative conceptions.² Integrating and applying these conceptions allowed the project team to identify three conceptual frameworks, as discussed below.

The first framework developed was based on the transformative conception of restorative justice, seeking to use restorative justice to respond to structural injustice. Structural injustice is defined as when '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' (Batley & Skelton, 2019: 8). If restorative justice were to be applied under this framework it would be aligned to the approaches taken in conflict transformation and would seek to create constructive change processes that reduce violence and increase justice in direct interaction and social structures (Batley & Skelton, 2019). Due to its focus on structural injustice, this framework would require the pilot project to take a broad approach, recognising the harm (historical and current) suffered across the project landscape at a macro level, as opposed to individual harms and how these are addressed. Consequently, the application of this framework could be less effective in addressing the individual harm, which is a critical element the pilot project aims to achieve.

The second framework is more aligned with encounter and reparative conceptions of restorative justice, focusing on the application of restorative justice to specific offences. Under this framework, the application of restorative justice processes aims to make the criminal justice system more effective and responsive. Critically, this framework could address the following three perceptions and factors. Firstly, there is the misconception that environmental offences (and wildlife crime offences, specifically) are victimless. As the South

2 The 2019 review by Batley and Skelton provides a succinct overview of the three conceptions put forward by Johnston and Van Ness. The encounter conception brings together people with a stake in a crime or misconduct to discuss what happened, how it affected them and what needs to be done about it. The reparative conception recognises that crime causes harm, and a just response is needed to repair the harm. The transformative conception among other things acknowledges that systemic injustices must be addressed.

African approach to justice in wildlife crime cases is punitive in nature, it focuses primarily on the offender with little to no focus given to the harm caused by the offence. Our approach to justice robs victims of their voice and in so doing perpetuates the myth that environmental offences are victimless. Environmental crimes are not victimless offences: individuals and communities suffer immense trauma as a result of wildlife offences, and are often alienated, even persecuted or killed for their role in protecting wildlife or calling out fellow community members for their criminal roles.³ South Africa loses a piece of its natural heritage every time a wildlife offence takes place, and the biodiversity impacts are severe. One of the cornerstones of restorative justice is an acknowledgement of harm, thus addressing this damaging perception. Secondly, the aforementioned studies by Hübschle (2016, 2017a), Hübschle and Shearing (2018) and Moneron et al. (2020) have highlighted the impact of normalisation or contested illegality in responding to wildlife offences, specifically in addressing recidivism. Hübschle's research (2017a) has shown how various groups do not accept the law regarding the illegal hunting of rhinoceros for various reasons, including but not limited to perceived unfairness of the law or regulations, divergent social or cultural norms, for politico-historical reasons or for lack of economic benefit. One of the cornerstones of restorative justice is an acknowledgement of wrongdoing, thereby going to the heart of contested illegality. Thirdly, referrals to restorative justice programmes aim to reduce recidivism on the part of the offender.

The project team and steering committee found that the second framework spoke to the harm caused by wildlife crime offences and constructively addressed recidivism. Consideration was then given to combining the first two frameworks and thereby creating a third framework. Stauffer (2015) and Henkeman (2012) hold that by concentrating on justice in interpersonal interactions, there has been a tendency to overlook structural injustice and the need for systemic change. Stauffer proposes to balance restorative justice as 'interpersonal, social service practice' and a 'framing paradigm for systemic change' by understanding restorative justice as a social movement (Batley & Skelton, 2019: 9). Stauffer identifies three tasks necessary to achieve this. First, form individual and institutional alliances to support the strategic, organisational and logistical requirements of durable change. Secondly, develop and sustain strong localised practice. Lastly, ensure collaboration between individuals and organisations to drive transformation of the system as a whole (Batley & Skelton, 2019).

After due consideration of the frameworks, as well as the current challenges in achieving justice for wildlife crimes and the identified outcomes the pilot project sought to achieve, the second framework was selected as the primary conceptual framework, with the goal of exploring and moving into the third framework as the project develops and relationships, specifically with people and communities in the project area, are built.

3 The Thin Green Line Foundation (2020) reported that suspected poachers had killed 189 rangers in Africa between 2009 and 2016.

6 Project implementation

Once the conceptual framework had been developed, the next activity involved confirmation of the implementation process for the pilot project, which is designed to take place in two broad phases: foundational and operational. Under the foundational phase of the pilot project, technical guidelines with minimum standards informed by comprehensive stakeholder engagement will be developed. This includes focus groups with at least seven stakeholder groups: prosecutors and law enforcers; community representatives; NGO representatives, practitioners and academics; private and public wildlife and reserve owners and private security representatives; various relevant government departments; commercial operations including tourism and hunting operators and the judiciary. An ethical review and clearance process is underway to ensure that the project team adheres to strict ethical standards in their interactions with the stakeholders and others.

All preliminary research by the project team indicates that there is no recorded instance of restorative justice being applied to wildlife cases in South Africa. Therefore, detailed guidelines on the implementation for restorative justice are required to ensure *inter alia* that due process is followed, the processes are not abused, human rights are upheld and justice is served. Once the guidelines have been drafted, they will undergo an external review process. Thereafter, an extensive awareness-raising initiative will be undertaken to ensure that all stakeholders understand the concept correctly. The team will also address preconceived notions of restorative justice including that it is a soft approach to justice and that it will be used to allow offenders to evade their just desserts.

Under the operational phase of the pilot project, due to take place from June 2021 to June 2022, the team will actively seek appropriate test cases to apply restorative justice approaches to wildlife crimes. In preparation for this phase, we have developed case study examples in recognition that South Africa experiences both syndicated and non-syndicated wildlife offences. Thus, restorative justice approaches need to be appropriately applied to the wide variety and increased severity of wildlife offences. Over the operational phase, we seek to test these case study examples and thereby create a substantial body of precedents, guiding the use of restorative justice in future wildlife crime offences (and other environmental offences) in South Africa.

7 Conclusion and the way forward

This note sought to share details of the nascent stages of an innovative pilot project to apply restorative justice principles to wildlife crime offences in South Africa. The idea is to share lessons learnt throughout project implementation and to integrate feedback and critiques. The conceptual framework, technical guidelines and awareness-raising materials will be living documents and thus can be amended to fit specific contexts. We hope that the approach will find wide application in South Africa and beyond in future projects and initiatives. Once the

pilot project is complete, we plan to share our insights and experiences in a future article.

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