

# ENVIRONMENTAL HARM, CORPORATIONS AND TRANSITIONAL SETTINGS: WHAT OPTIONS FOR RESTORATIVE JUSTICE?

## *DAÑO MEDIOAMBIENTAL, EMPRESAS Y JUSTICIA TRANSICIONAL: ¿QUÉ OPORTUNIDADES PRESENTA LA JUSTICIA RESTAURATIVA?*

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*ABSTRACT: Connections between environmental degradation and conflict or repression are complex and varied. Armed conflicts destroy not only human lives but also wildlife and natural areas, while environmental destruction can also cause social unrest in which natural resources often contribute to the outbreak of strife. This article consists of a conceptual exercise seeking to explore how transitional justice might benefit from an environmental restorative justice approach and what are the opportunities of including corporations as one of the main actors involved in environmental harm within transitional justice. This article argues that in the absence of effective judicial mechanisms, restorative justice could serve to better engage with corporate environmental harm in transitional settings.*

**RESUMEN:** Las conexiones entre la degradación ambiental y los conflictos o regímenes represivos son complejas y variadas. Los conflictos armados destruyen no solo vidas humanas sino también la vida silvestre y las áreas naturales, mientras que la destrucción ambiental también puede causar malestar social en el que los recursos naturales a menudo contribuyen al estallido de conflictos. Este artículo consiste en un ejercicio conceptual que busca explorar cómo la justicia transicional podría beneficiarse de un enfoque de justicia restaurativa ambiental y cuáles son las oportunidades de incluir a las corporaciones como uno de los principales actores involucrados en el daño ambiental dentro de la justicia transicional. Este artículo argumenta que, en ausencia de mecanismos judiciales efectivos, la justicia restaurativa podría servir para abordar mejor los daños ambientales corporativos en entornos de transición.

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## I. INTRODUCTION

Connections between environmental degradation and conflict or repression are complex and varied. Armed conflicts destroy not only human lives but also wildlife and natural areas, while environmental destruction can also cause social unrest in which natural resources often contribute to the outbreak of strife.<sup>1</sup> Furthermore, repressive regimes have frequently used harmful practices of natural resource extraction closely linked to human rights abuses.<sup>2</sup> While empirical studies have largely examined and demonstrated these links, the environment-conflict nexus has often been under-explored within the field of transitional justice.<sup>3</sup> However, the trend is changing and emergent literature indicates an increased willingness to engage with environmental harm in transitional settings. Some scholars, for instance, have already explored the advantages of including environmental considerations in the transitional justice agenda,<sup>4</sup> while others have examined the potential of addressing environmental harm through some of the existing transitional justice mechanisms, such as memorials and truth commissions.<sup>5</sup>

Transitional justice experiences have proven that the field is capable of significant expansion, not only regarding the mechanisms and scenarios to which it applies, but also the actors involved.<sup>6</sup> Indeed, emerging literature is examining the suitability of including

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<sup>1</sup> GÓMEZ BETANCOURT, L., “The Rights of Nature in the Colombian Amazon: Examining challenges and opportunities in a Transitional Justice Setting”, *UCLA Journal of International Law and Foreign Affairs*, n° 25, 2020, pp. 41-83. International Committee of the Red Cross (2020). Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, endorsed by UN GA Res. 49/ 50. Geneva: ICRC, 1994, updated 2020.

<sup>2</sup> KENNEY-LAZAR, M., “Neoliberalizing Authoritarian Environmental Governance in (Post) Socialist Laos”, *Annals of the American Association of Geographers*, n°109, 2019, pp. 338-348.

<sup>3</sup> NATALYA CLARK, J., “Are there “Greener” Ways of Doing Transitional Justice? Some reflections on Srebrenica, nature and memorialisation” *International, Journal of Human Rights*, n°20, 2016, pp- 1199-1218; KILLEAN, R., and DEMPSTER, L., “Greening Transitional Justice?”, in EVANS, M. (ed) *Beyond Transitional Justice? Transformative Justice and the State of the Field (or Non-Field)*, London, Routledge, 2021.

<sup>4</sup> PELIZZON, A., “Transitional Justice and Ecological Jurisprudence in the Midst of an Ever-Changing Climate” in SZABLEWSKA, N., and BACHMANN, S., *Current Issues in Transitional Justice*, New York: Springer Series in Transitional Justice, 2015; HARWELL, E. “Building Momentum and Constituencies for Peace: The Role of Natural Resources in Transitional Justice and Peacebuilding”, in BRUCH, C., MUFFET, C., NICHOLS, S., *Governance, Natural Resources and Post-Conflict Peacebuilding*, London, Routledge, 2017. ONG, D. “Prospects for Transitional Environmental Justice in the Socio-Economic Reconstruction of Kosovo”, *Tulane Environmental Law Journal*, n° 30, 2017, pp. 217-272.

<sup>5</sup> CLARK, N. note 3; CUSATO, E., “Back to the Future? Confronting the Role(s) of Natural Resources in Armed Conflict Through the Lenses of Truth and Reconciliation Commission”, *International Community Law Review*, n°19, 2017, pp.373-400.

<sup>6</sup> KILLEAN, R., “Environmental Restorative Justice in Transitional Settings”, in PALI, B. and FORSYTH, M. (eds) *The Palgrave Handbook of Environmental Restorative Justice*, (Palgrave Macmillan, Forthcoming

non-state actors, particularly corporations, in transitional justice processes.<sup>7</sup> Corporations often develop their activities in territories affected by armed conflict or authoritarianism, usually benefiting from those special situations, related human rights abuses and environmental degradation.

The link between a healthy environment and human rights is undeniable,<sup>8</sup> as well as it beyond dispute that such harm can and does occur as a result of the activities of corporations. Business involvement in environmental harm under conflict is multifaceted. Companies can contribute to environmental damage but also to financing and perpetuating the conflict, which feeds the vicious cycle of environmental harm.<sup>9</sup> Moreover, as a result of globalisation, transnational corporations are one of the largest contributors to environmental degradation.<sup>10</sup> While corporate involvement in environmental damage can be found in most conflicts around the world, transitional justice processes barely addressed these considerations. However, innovative uses of transitional justice mechanisms have started to approach this issue in order to provide remedies for victims.

Besides retributive justice mechanisms, traditionally preferred in transitional justice contexts, restorative justice tools have also gained significance.<sup>11</sup> There is a well-developed literature exploring the options and limitations of pursuing restorative justice in transitional contexts,<sup>12</sup> as well as emerging literature examining how an environmental restorative justice agenda could have a positive impact in environmental protection and inclusiveness of indigenous groups in transitions.<sup>13</sup> On the other hand, there is also growing literature examining which frameworks could serve corporations to provide effective remedies for human rights abuses and how corporations could be integrated in transitional justice processes.<sup>14</sup> However, there is an urgent need to generate dialogue

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2022); ZUNINO, M., *Justice Framed: A Genealogy of Transitional Justice*, New York, Cambridge University Press, 2019, p.108.

<sup>7</sup> PIETROPAOLI, I., *Business, Human Rights and Transitional Justice*, London, Routledge, 2020; GARCÍA MARTÍN, L., *Transitional Justice, Corporate Accountability and Socio-Economic Rights Lessons from Argentina*, London, Routledge, 2019; MICHALOWSKI, S. (ed), *Corporate accountability in the context of transitional justice*, New York, Routledge, 2013.

<sup>8</sup> See for instance, UNITED NATIONS GENERAL ASSEMBLY, Resolution 76/300, 26 July 2022. Available at <https://digitallibrary.un.org/record/3982508?ln=en> (accessed 20 february 2023).

<sup>9</sup> GÓMEZ BETANCOURT, L. *supra* note 1, p.43.

<sup>10</sup> ROWLANDS, I.H., “Transnational Corporations and Global Environmental Politics” in JOSSELIN, D., WALLACE, W. (eds) *Non-state Actors in World Politics*, London, Palgrave Macmillan, 2001.

<sup>11</sup> LAMBOURNE, W., “Transitional Justice and Peacebuilding after Mass Violence”, *International Journal of Transitional Justice*, n° 3, 2009, pp. 28-48.

<sup>12</sup> See for instance, CLAMP, K., and DOAK, J., “More than Words: Restorative Justice Concepts in Transitional Justice Settings”, *International Criminal Law Review*, n° 12, 2012, pp. 339–360; MCEVOY, K., and NEWBURN, T., *Criminology, Conflict Resolution and Restorative Justice*, Hampshire, Palgrave Macmillan, 2003.

<sup>13</sup> FORSYTH, M., et at., “A future agenda for environmental restorative justice?”, *The International Journal of Restorative Justice*, n°4, 2021, pp. 17-40; KILLEAN, R., *supra* note 6.

<sup>14</sup> See for instance SCHORMAIR, M., and GERLACH, L. “Corporate Remediation of Human Rights Violations: A restorative Justice Framework”, *Journal of Business Ethics*, n° 167, 2020, pp. 475-493; KOSKA, G., “Corporate accountability in times of transition: the role of restorative justice in the South

between the field of transitional justice and environmental concerns about the nexus of post-conflict issues and corporate involvement in environmental degradation. Since many authors advocate for the potential of restorative justice to address environmental harm and corporate wrongdoings in a separate way, this paper explores how transitional justice might benefit from a restorative framework for corporate environmental harm in transitional settings.

This author acknowledges that transitional justice does not have a unique model and depends on the specific circumstances in which it is implemented. Therefore, this paper does not have the ambition to develop a specific nor exhaustive guide of restorative justice for corporate environmental harm in transitional contexts. Rather, this article consists of a conceptual exercise seeking to explore how transitional justice might benefit from an environmental restorative justice approach in which corporations are included as one of the main actors involved in environmental harm within transitional justice. This article argues that in the absence of effective judicial mechanisms, restorative justice could serve to better engage with corporate environmental harm in transitional settings. Similarly, it notes that it could provide for remedies focused on victim's needs.

In any case, this paper's aim is not to provide ultimate solutions but to begin to delineate the contours of how corporate restorative justice for environmental harm might look like. To do so, it mainly draws on literature related to transitional justice and business and human rights from an international legal perspective, but it also considers environmental justice, business ethics and criminology as relevant areas of study. It also relied on eco-centric perspectives that challenge the legal positivism approach to human rights and environmental protection. Literature coming from those fields was used to better understand the normative and social contexts in which corporate environmental harm take place and how remedies can be provided. It also considers lessons learned from past transitional justice experiences, as well as some insights coming from recent and ongoing transitional justice processes.

The article is organised as follows: the first section reflects on the linkages between environmental harm and conflict and how they have been conceptualised in transitional justice, while the second section examines how transitional justice might benefit by including an environmental restorative justice approach. The third section explains the intersection between corporate accountability, remediation and restorative justice. Since holding corporations legally accountable and ensuring appropriate reparations is a complex task, section four explores the opportunities that environmental restorative justice can offer to engage with corporate abuses. Drawing from some recent cases and past experiences, it seeks to provide an original contribution to the field of transitional justice by assessing how accountability and remedies for corporate environmental harm can be achieved through restorative justice mechanisms. It also argues that environmental restorative justice in these cases could work as an additional form of corporate accountability without excluding punitive actions when required.

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African Truth and Reconciliation Commission”, *Restorative Justice. An international Journal*, n° 4, 2016, pp. 41-67.

## II. ENVIRONMENTAL HARM AND TRANSITIONAL JUSTICE

Concerns about the protection of the environment have significantly increased in latest decades in the international legal sphere, where already some authors claim for a change of approach to international law towards ecocentrism.<sup>15</sup> There is also a growing interest in examining the possibilities that the attribution of legal personhood to nature and its elements can offer to face the world environmental crisis.<sup>16</sup> This has been demonstrated in 2017, when New Zealand, India and Colombia granted legal personhood to rivers in groundbreaking legal decisions.<sup>17</sup> Similarly in 2017, the Inter-American Court of Human Rights, in a landmark advisory opinion, derived an autonomous right to a healthy environment from Article 26 of the American Convention of Human Rights.<sup>18</sup> The court ruled that a healthy environment protects nature, conceiving the environment not only important for humans but also for the rest of living beings.<sup>19</sup> This decision, reinforced by its own rule of the case in February 2020, constitutes an unprecedented move in regional human rights jurisprudence.

In this context of growing environmental awareness, there have been also some notable advances in international criminal law. Prosecutor at the International Criminal Court (ICC) has expressed its intention to devote more efforts to cases involving environmental harm, as well as claims for an international crime of ecocide have been fostered amongst international legal scholarship.<sup>20</sup> The current UN Special Rapporteur on human rights and the environment, David Boyd, have labelled this new legal trend a “legal revolution” in the field of international law.<sup>21</sup> However, while there is also increased recognition of the need to protect the environment during conflict or in the context of peacebuilding,<sup>22</sup> the field of transitional justice has historically failed to meaningfully engage with environmental harm.<sup>23</sup>

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<sup>15</sup> DE VIDO, S. “A quest for an Eco-centric Approach to International Law: the COVID-19 Pandemic as Game Changer”, *Jus Cogens*, n° 3, 2021, pp. 105-117.

<sup>16</sup> VIAENE, L. “Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field”, *Asian Journal of Law and Society*, 2022, pp. 1–20.

<sup>17</sup> The Parliament of New Zealand declared that the Whanganui River in Aotearoa to be a legal person in March 2017 (Whanganui River Claims Settlement). In the same month, the high court of Uttarakhand, India declared in the case of Mohd Salim v. State of Uttarakhand & Others (20 March 2017) the Ganga river and its main tributary to be accorded the status of living human entities. The Colombian Constitutional Court published in May 2017 ruling T-622/16 granted legal personhood to the Atrato river. Both the Indian and Colombian court rulings cited the legal precedent of New Zealand.

<sup>18</sup> Inter-American Court of Human Rights: OC-23/17 Advisory Opinion (Nov 15, 2017), and *Aboriginal Community of Lhaka Honhat v Argentina*, Series C No. 400, Merits, reparations and costs (Feb 6, 2020).

<sup>19</sup> OC-23/17 Advisory Opinion, para. 180.

<sup>20</sup> International Criminal Court, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016; Polly Higgins, Damien Short and Nigel South, “Protecting the planet: a proposal for a law of ecocide” *Crime, Law and Social Change* 59 (3) (2013): 251-266.

<sup>21</sup> BOYD, D., *The Rights of Nature: A Legal Revolution that Could Save the World*, Toronto, ECW Press, 2017.

<sup>22</sup> For instance, the International Committee for the Red Cross’s recently revised “Guidelines on the protection of the natural environment in armed conflict” (ICRC, 1994; 2020), and the UN International Law Commission’s draft principles on “Protection of the environment in relation to armed conflict” are due to be adopted in 2022.

<sup>23</sup> CLARK, K. *supra* note 3, p. 1199.

transitional justice has traditionally focused on victims of gross human rights violations and grounded in human rights law, criminal law and international humanitarian law.<sup>24</sup> To date, references to environmental harm are very limited within transitional justice mechanisms. Environmental harm, therefore, has been largely disregarded in transitional settings. Many authors note that this inattention is linked to the dominance of anthropocentric legal frameworks in transitional justice, in which violations of civil and political rights are often prioritised over socio-economic rights and other kinds of structural violence.<sup>25</sup>

Against this backdrop, critical scholarship has sought to challenge this dominant anthropocentric framework in transitional justice, calling for a greater examination of environmental harm perpetrated under conflict or repression and moving beyond that to recognise victims of environmental harm.<sup>26</sup> Indeed, environmental victimhood has recently received some recognition within transitional justice processes, although such recognition remains marginal. For instance, a memorial in Peru represents the ancestral goddess *Pachamama* to acknowledge the pain inflicted on Mother Earth by the conflict.<sup>27</sup> A further step forward was undertaken by the Colombia's Peace jurisdiction (JEP) in 2019, ruling that the territories belonging to the indigenous *Awá* and *Nasa* peoples, have been victims of the Colombia internal conflict.<sup>28</sup> The JEP asserted "to be seeking [environmental] reparation mechanisms and guarantees of non-repetition."<sup>29</sup> Given that the JEP promotes restorative justice practices which seek "truth through consciousness, reconciliation, healing and harmonization between victims and accused that allows for the strengthening of the community fabric, as well as the harmonization of the territory"<sup>30</sup> it seems that Colombia is applying an environmental restorative justice approach to its own transitional justice process, as noted by Killean.<sup>31</sup>

Restorative justice has the potential to incorporate eco-centric perspectives, as well as offering a significant contribution in ensuring the achievement of justice for victims of environmental harm.<sup>32</sup> According to Killean, environmental restorative justice might facilitate a more complete understanding of the harms of conflict, as well as enabling

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<sup>24</sup> TEITEL, R., "Transitional Justice Genealogy," *Harvard Human Rights Journal*, n° 16, 2003, p. 69.

<sup>25</sup> ROONEY, E., and NÍ AOLÁIN, F., "Transitional Justice from the Margins", *International Journal of Transitional Justice*, n° 12, 2018, pp. 1-8.

<sup>26</sup> CLARK, K. *supra* note 3, p. 1208; KILLEAN, R., and DEMPSTER, L., "Mass Violence, Environmental Harm and the limits of Transitional Justice", *Journal of Genocide Studies and Prevent – Special Issue on Environmental Degradation, Climate Change and Mass Atrocities*, forthcoming 2022.

<sup>27</sup> FALCÓN, S., "Intersectionality and the Arts: Counterpublic Memory-Making in Postconflict Peru", *International Journal of Transitional Justice*, n° 12, 2018, pp. 26–44.

<sup>28</sup> HUNEEUS, A., and RUEDA SÁIZ, P., "Territory as a Victim of Armed Conflict" *International Journal of Transitional Justice*, n° 15, 2021, pp. 210-229.

<sup>29</sup> See Press Release, JEP, Unidad de Investigación y Acusación de la JEP, "reconoce como víctima silenciosa el medio ambiente," Comunicado 009 (June 5, 2019) <https://www.jep.gov.co/SiteAssets/Paginas/UIA/sala-de-prensa/Comunicado%20UIA%20-%200009.pdf> (last accessed 20 February 2023).

<sup>30</sup> JEP General Regulation 2018, Article 44.

<sup>31</sup> KILLEAN, R. *supra* note 6 at 2.

<sup>32</sup> PALI, B. and AERSTEN, I., "Inhabiting a Vulnerable and Wounded Earth: Restoring Response-Ability", *The International Journal of Restorative Justice*, n°4, 2021, pp. 3-16.

fuller forms of redress.<sup>33</sup> Others have also argued that environmental restorative justice can be employed for a wide range of environmental crimes that cause harm.<sup>34</sup> Environmental restorative justice may even present opportunities to engage with post-conflict tensions between pursuing environmental exploitation for economic recovery, respecting individual and collective human rights and protecting nature.<sup>35</sup> Drawing from these ideas, next section reflects on how transitional justice might benefit by including an environmental restorative justice approach.

### **III. ENVIRONMENTAL RESTORATIVE JUSTICE IN TRANSITIONAL CONTEXTS**

Restorative justice is an evolving notion widely understood as a way of responding to wrongful behaviour by balancing the needs of the community, the victims and the offenders.<sup>36</sup> As an alternative to conventional justice system, the focus of restorative justice processes and outcomes is on redressing the harm caused by the offense and promoting healing over retribution. It also aims to prevent recurrence in the future by confronting the offender with its victim, which can lead to repentance and behavioural change.<sup>37</sup> Both restorative justice and transitional justice have mutually expanded and share similar values, such as truth, accountability, reparation, reconciliation, conflict resolution and participation. While restorative justice was created and usually used as an alternative paradigm to confront ordinary crime in societies, it has been increasingly invoked as a theoretical tool into transitional justice conceptions.<sup>38</sup>

Given that there is not a unique definition of restorative justice and that it is a field of ongoing development, this article considers restorative justice as a set of values and principles that guide restorative responses to wrongdoing. Multiple restorative processes have been developed and evolved according to different societal traditions and cultural idiosyncrasy. However, the basic restorative justice principles and the generic process scheme remain the same.<sup>39</sup> It could be differences regarding the facilitation of the dialogue or the degree of encouragement for participation but restorative justice is

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<sup>33</sup> KILLEAN, R. *supra* note 6 at 7.

<sup>34</sup> See for instance, PRESTON, B.J. “The Use of Restorative Justice for Environmental Crime”, *Criminal Law Journal*, n° 35, 2011, p. 136.

<sup>35</sup> VARONA, G., “Restorative pathways after mass environmental victimisation: Walking in the landscapes of past ecocides”, *Oñati Socio-Legal Series*, n° 10, vol. 3, 2020, pp. 664-685.

<sup>36</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programs* (United Nations, New York, 2006), 6.

<sup>37</sup> PRESTON, B.J. *supra* note 34 at 16.

<sup>38</sup> See for instance AERTSEN, I., ARSOVSKA, J., ROHNE, H., VALIÑAS, M., and VANSPAUWEN, K., (eds.), *Restoring Justice after Large-scale Violent Conflicts*, Willan, Cullompton, 2008; HAYNER, P.B., *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001; HENHAM, R., “Towards restorative sentencing in international criminal trials”, *International Criminal Law Review*, n° 9, 2009, pp. 809–832; KELLER, L.M., “The false dichotomy of peace versus justice and the International Criminal Court”, *The Hague Justice Journal*, n°3, 2008, pp. 12–47.

<sup>39</sup> ROCHE, D., “Truth Commissions, Amnesties and the International Criminal Court”, *British Journal of Criminology*, n° 45, 2005, pp. 565-581.

conceived by practitioners as one single notion that can vary in its design due to the context, as well as it happen with the broad field of transitional justice.<sup>40</sup>

For the purposes of this article, we follow the five environmental restorative justice principles proposed by Forsyth et al., and Killean including: 1) an orientation towards healing and reparation of the damage; 2) the identification of harm and the offenders and those who have suffered harm, including other-than-humans, to include their participation in the process; 3) promoting engagement through dialogue and storytelling; 4) accountability to achieve relational justice between victims and offenders; 5) transformation by building new relationships and preventing recurrence in the future.<sup>41</sup> Although this is not an exhaustive list, it will serve to further develop the main attributes that environmental restorative justice may present to transitional settings with regard to corporations.

Environmental restorative justice is essentially oriented towards healing and restoration, creating an opportunity for existing regulatory traditions to better repair harmful practices and prevent future environmental damage.<sup>42</sup> Indeed, environmental restorative justice involves a participatory, problem-solving approach in which victims, community and offenders take part in resolving issues arising from the harm, as well as providing remedies for the environmental damages and preventing recurrence in the future. The design of environmentally conscious reparations could be a special asset in transitional justice. Environmental restorative justice can involve finding ways of restoring biodiversity and ecosystem health, taking into account the particular circumstances, cultures, values, inhabitants and potentialities of each situation.<sup>43</sup> Furthermore, environmental restorative justice programs can potentially enhance solutions which recognise the harmonious relationship between restoring natural environments and repairing the harm suffered by victims during the conflict.<sup>44</sup>

Regarding the principle related to identification, it should be noted that the existence of an identifiable victim is one of the critical elements for a restorative process to be successful. Environmental harm can affect to specific persons, but also members of the community, the biosphere and non-human biota.<sup>45</sup> An important value of environmental restorative justice is that it can be applied in cases in which there is no specific individual or direct harm for existing individuals. For instance, environmental restorative justice can be applied when the victim is the nature or the country's heritage.<sup>46</sup> Similarly, an environmental restorative justice approach might be more pertinent in cases involving victims and communities with particular affinities to their land and other-than-human

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<sup>40</sup> SCHORMAIR, M. and GERLACH, L. *supra* note 14 at 480.

<sup>41</sup> FORSYTH, M. et al. *supra* note 13 at 20. KILLEAN, R. *supra* note 3 at 4.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> LAWRY-WHITE, M., "Victims of Environmental Harm During Conflict" in STAHN, C., IVERSON, J., AND EASTERDAY, J. (eds) *Environmental Protection and Transitions from Conflict to Peace*, Oxford, Oxford University Press, 2017, pp. 367-395.

<sup>45</sup> PRESTON, B.J., *supra* note 34.

<sup>46</sup> HAMILTON, M., *Environmental Crime and Restorative Justice*. Palgrave Studies in Green Criminology, Basingstoke, Palgrave MacMillan, 2021.

victims.<sup>47</sup> Furthermore, remediation of environmental harm may require time and, in some cases, the negative impact and cost of remedies could be transferred to future generations. Environmental restorative justice could also apply for these cases according to emerging case law in national courts that recognises the rights of future generations to be represented in judicial proceedings.<sup>48</sup>

Dialogue is another key feature within the wide range of tools and processes used in restorative justice. Through dialogue between the offender, the victim and the affected community members, environmental restorative justice can create empathy amongst actors involved. Similarly, interactions between stakeholders could potentially contribute to mutual learning about the harm's impact and the conditions in which it occurred, providing an opportunity to address misunderstandings.<sup>49</sup> This is particularly important in transitional justice and peacebuilding contexts. Arguably, environmental restorative justice may present opportunities to engage with post-conflict tensions between protecting nature and human rights at the same time of pursuing environmental exploitation for economic recovery.<sup>50</sup> The focus on restoration and rebuilding community relationships after conflict could also serve to promote an important deterrent effect and advocacy for the environment.

Ultimately, environmental restorative justice in transitional contexts may present an effective mean for reinforcing the value of the environment, since transitions often follow moments of rupture which created space for rethinking previously rooted social structures.<sup>51</sup> Importantly from an accountability perspective, environmental restorative justice can widen the circle of those responsible for damage by raising awareness about systemic factors that lead to environmental harm. Ideally, this includes corporations. Through restorative justice tools such as dialogue and storytelling, linkages between environmental harm and business" involvement that may otherwise have remained invisible can be made public, contributing therefore to increase awareness of corporate responsibilities.

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<sup>47</sup> IZQUIERDO, B., and VIAENE, L., "Decolonizing Transitional Justice from Indigenous Territories" Peace in Progress 34 (2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/SR/IPAndJustice/22-LViaene.pdf> (last accessed 20 February 2023).

<sup>48</sup> For instance, the 2018 Colombian Supreme Court decision on the case *Future Generations v. Ministry of the Environment and Others*; or the 1993 Philippines Supreme Court decision *Oposa v. Factoran* No. 101083, 224 S.C.R.A. 792 (1993).

<sup>49</sup> FORSYTH, M. et al. *supra* note 13 at 31.

<sup>50</sup> KILLEAN, R. *supra* note 6 at 14.

<sup>51</sup> BELL, C. and O'ROURKE, C., "The People's Peace? Peace Agreements, Civil Society and Participatory Democracy", *International Political Science Review*, n° 28, 2007, pp.293-324; GHECIU, A., and WELSH, J., "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction", *Ethics & International Affairs*, n° 23, 2009, pp. 121-146.

#### IV. CORPORATIONS, ENVIRONMENTAL HARM AND TRANSITIONAL JUSTICE

The negative impacts that corporate activities can have under conflict and repressive regimes have been largely documented.<sup>52</sup> Consequently, businesses have been progressively called upon to engage with human rights and environmental issues. Given the state-centered conception of international law, corporations as entities are not liable for human rights violations or environmental degradation at international legal sphere. Over the last decades, however, several voluntary normative frameworks have been created to regulate corporate behaviour. While these instruments are not legally binding, they aim to create standards of good practice. The UN Guiding Principles (UNGPs), endorsed by the UN Human Rights Council in 2011, have become the authoritative framework in this sense within the institutionalised field of Business and Human Rights. The UNGPs promote a framework based on the states’ duties to protect, the corporate responsibility to respect and the victims’ right to access remedies.<sup>53</sup> Therefore, the Guiding Principles reinforce the idea that corporations have the responsibility to respect human rights, including rights whose enjoyment is threatened by environmental harm. Similarly, the Guiding Principles also make clear that States have the legal obligation to protect against such harm from corporate activities.

The corporate responsibility to respect implies not only a “do no harm” standard, but also active duties, such as to conduct their operations within the due diligence requirement. Accordingly, businesses require that companies take tangible and measurable steps to “become aware of, address and prevent human rights impacts”.<sup>54</sup> Corporate responsibilities also include the provision of effective remedies for corporate abuses such as the adoption of corporate-based grievance mechanisms by which affected parties can lodge complaints and seek redress for rights infringements.<sup>55</sup> According to the Guiding Principles, remedy is constituted by a process of providing access for grievances to be made regarding human rights abuses and by substantive outcomes that counteract and offer restorations for the harms done.<sup>56</sup> However, even if the Guiding Principles pay more

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<sup>52</sup> See for instance BOHOSLAVSKY, JP., and RULLI, M., “Corporate Complicity and Finance as a “Killing Agent” The Relevance of the Chilean Case”, *Journal of International Criminal Justice*, n° 8, 2010, pp. 829-850; TRIPATHI, S., “Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards” *Politorbis*, n° 50, 2010, pp. 131-142; ZERK, J., *Report prepared for the Office of the UN High Commissioner for Human Rights* “Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies”, 2013; MARES, R., “Corporate and State Responsibilities in Conflict-Affected Areas”, *Nordic Journal of International law*, n° 83, 2014, pp. 293-345.

<sup>53</sup> UN Human Rights Council, *Report of the Special Representative for the Secretary General Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. UN Doc. A/HRC/17/31 (21 March 2011).

<sup>54</sup> *Ibid.* para 56.

<sup>55</sup> *Ibid.* para 59.

<sup>56</sup> UNITED NATIONS, *The corporate responsibility to respect human rights: An interpretive guide*, HR/PUB/12/02, 2012, Available at [https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf) (last accessed 20 February 2023).

attention to the right to remedy than previous policy frameworks, it remains a general orientation with unspecific principles and much space for interpretation.<sup>57</sup>

Remediation in the context of business-related wrongdoings is a complex and challenging task. Since the ICC jurisdiction is limited to natural persons, corporate accountability and remediation for human rights violations have been in some cases pursued through transnational civil litigation, particularly under the US Aliens Tort Statute (ATS) by application of the “aiding and abetting standard”. In the case *Doe v. Unocal Corp.*,<sup>58</sup> the company Unocal was sued by Myanmar citizens for aiding and abetting national military forces in committing serious human rights abuses, “in the context of oil and gas extraction operations and building of a pipeline”. Similarly, a Canadian oil company, Talisman, was sued by the Presbyterian Church of Sudan for collaborating with the Sudanese government in violation of human rights and war crimes committed under the armed conflict in Sudan.<sup>59</sup> While the US Court of Appeals dismissed this second case on the grounds that the plaintiffs had not “established Talisman’s purposeful complicity in human rights abuses”, in the Unocal case on the other hand, found that there was sufficient evidence to hold Unocal liable under ATCA.<sup>60</sup>

There are also examples of ATCA litigation relating to environmental harm in transitional settings. The case *Sarei v. Rio Tinto*,<sup>61</sup> indeed, involved allegations that the mining exploitation of copper in Papua New Guinea destroyed the environment, promoted racial discrimination and facilitated the commission of crimes against humanity and war crimes.<sup>62</sup> Another relevant case concerns *ExxonMobil*’s role in employing the Indonesian military forces to protect its natural gas facilities in Aceh. The plaintiffs argued that the company should have taken appropriate measures after it became aware that Indonesian military forces at its service were committing serious human rights violations under the civil conflict in Indonesia. The case has been prolonged for more than 17 years, so victims are still waiting for justice. Although these cases demonstrate the possibility of bringing corporations at courts for human rights abuses and environmental harm in transition, they also highlight the legal complexities to achieve accountability and remediation. Despite

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<sup>57</sup> WETTSTEIN, F., “Normativity, ethics, and the UN guiding principles on business and human rights: A critical assessment”, *Journal of Human Rights*, n°14, 2015, pp. 162–182.

<sup>58</sup> *Doe v. Unocal Corporation*, US Federal District Court, 110F. Supp. 2d. 1294 (31 August 2000).

<sup>59</sup> *Presbyterian Church of Sudan v. Talisman Energy*, US District Court for the Southern District of New York, 224 f. Supp. 2d289 (19 March 2003).

<sup>60</sup> The US Court of Appeals stated that Unocal had knowledge of the human right breaches committed by the government of Myanmar before becoming a party to the joint venture between Unocal and the Myanmar government.

<sup>61</sup> *Sarei v. Rio Tinto*, US Federal District Court, 221 F. Supp. 2d 1116 (2002); 671 F.3d 736 (9th Circuit, (2011).

<sup>62</sup> While the Court stated that it had jurisdiction to hear the majority of the claims, it dismissed the case in entirety, based on the political question doctrine. The Court stated that if the judiciary would rule on the merits of the case, it would judge the policy of Papua New Guinea during the civil war and thereby tread on the exclusive domain of the executive branch of the government, which has the prerogative to decide on foreign policy. For a detailed analysis on this case see DONEFER, C., “Sarei v. Rio Tinto and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act”, *Northwestern Journal of Human Rights*, n° 6, 2008, pp. 155-175.

the occasional out-of-court financial settlement in the Unocal case, no one has resulted in adequate remedies for victims to date.

Post-conflict situations pose even more difficulties. The obstacles faced by victims in transitional contexts are aggravated due to the inherent difficulties of those situations, commonly related to dysfunctional judicial systems, corruption and a weak rule of law.<sup>63</sup> In the absence of effective judicial mechanisms with regard to corporate-related human rights abuses and environmental harm, next section explores how environmental restorative justice can help to foster corporate accountability and effective remedies for victims of environmental harm in transitional contexts. To do so, we follow the five principles already proposed for environmental restorative justice. While remediation and transitional justice as itself depend on the specific circumstances, it is argued that restorative justice represents a promising approach to meet accountability requirements, as well as to deliver reparations focused on victims' needs. Indeed, transitional justice literature notes the importance of restorative approaches to corporate accountability in conflict-affected territories, stressing the need to further operationalise frameworks such as the UNGP.<sup>64</sup>

## V. CORPORATIONS AND ENVIRONMENTAL HARM IN TRANSITIONAL CONTEXTS: WHAT OPTIONS FOR RESTORATIVE JUSTICE?

Restorative justice is called on to address both the past by holding perpetrators to account whilst facilitating the conditions for a peaceful future by reconciling societies and to do so without jeopardizing the transition.<sup>65</sup> Restorative justice approaches therefore have the capacity to reinforce peacebuilding efforts, offering a flexible means of resolving conflict both at individual and community level. However, and without refuting the qualities and potential of restorative justice, this author agrees with those who argue that restorative justice should not be used as a substitute to, but rather as a complement of, transitional justice,<sup>66</sup> particularly regarding corporate accountability and remedies.

Some authors already argue that a restorative justice approach to corporations can be effective in regulating and punishing corporate entities.<sup>67</sup> Arguably, restorative justice is the most common form of corporate regulation. Already in some areas of environmental protection, corporations are offered the opportunity to participate in an informal process

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<sup>63</sup> PIETROPAOLI, I. *supra* note 7 at 205.

<sup>64</sup> PAUL, G., and SCHÖNSTEINER, J., "Transitional Justice and the UN Guiding Principles on Business and Human Rights", in MICHALOWSKI, S. (eds) *Corporate Accountability in the context of Transitional Justice*, London, Routledge, 2013, pp. 73-92.

<sup>65</sup> TEITEL, R., *Transitional Justice*, Oxford University Press, Oxford, 2000.

<sup>66</sup> See for instance, CLAMP, K. and DOAK, J. *supra* note 12 at 7; UPRIMNY, R., et al. *Justicia transicional sin transición? Verdad, justicia y reparación para Colombia*, Bogotá, DeJusticia, 2006, pp. 109-138.

<sup>67</sup> ROCHE, D., "Dimensions of Restorative Justice", *Journal of Social Issues*, n°62, 2006, pp. 217- 227; GOODSTEIN, J., and BUTTERFIELD, K., "Extending the Horizon of Business Ethics: Restorative Justice and the Aftermath of Unethical Behaviour", *Business Ethics Quarterly*, n° 20, 2010, pp. 453-480.

focused on repairing the harm and preventing future offences in order to avoid prosecution.<sup>68</sup> According to Schormair and Gerlach, who already proposed a framework for restorative remediation of corporate human rights abuses as a corporated-based grievance mechanism, “through restorative dialogue, companies can repair the harm, regain legitimacy amongst stakeholders as well as transform their business practices to avoid future human rights violations”.<sup>69</sup>

Braithwaite, the most active scholar in articulating the links between corporate accountability and restorative justice, has demonstrated that a restorative approach to abuses can be superior to a punitive approach.<sup>70</sup> In fact, he has developed a theory called reintegrative shaming, which is a two-step process: first a corporation is publically shamed for an abuse, and second the offending company is reintegrated back into the community as a reward for change. Departing from the premise that corporations do have moral agency, Braithwaite argues that shaming the individual and the collective can motivate businesses to impose sanctions and reform internal processes to change corporate behaviour.<sup>71</sup> Therefore, a restorative justice approach could provide a scheme for transitional justice to engage effectively with corporate abuses in pursuing the goals of truth, accountability, reparations and reconciliation. Restorative justice can be also suitable for corporate abuses because the corporation can be clearly identified as the offender.<sup>72</sup> In this sense, Gabbay demonstrates that adding restorative justice practices to the public response “is not only appropriate and theoretically justified but technically possible and pragmatically useful as well”.<sup>73</sup> Given the difficulties found to achieve corporate remedies through litigation, this paper argues that restorative justice in these cases could work as an additional form of accountability.

According to the principles previously adopted for environmental restorative justice, identification is a key element. Truth and Reconciliation Commissions (TRCs), which are the most characterised as restorative in nature amongst transitional justice tools, could serve to identify the harm, as well as victims and offenders. TRCs provide a public forum for victims and operate at interpersonal level, so they allow victims and offenders to meet to dialogue.<sup>74</sup> While most of TRC have traditionally focused on state’s responsibility,

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<sup>68</sup> *Ibid.*, ROCHE, D. at 227.

<sup>69</sup> SCHORMAIR, M. and GERLACH, L. *supra* note 14 at 1.

<sup>70</sup> BRAITHWAITE, J., *Crime, Shame, and Reintegration*, Cambridge, Cambridge University Press, 1989, pp. 126-127; BRAITHWAITE, J., *Restorative Justice and Responsive Regulation*, Oxford, Oxford University Press, 2002, pp. 30-31; BRAITHWAITE, J. and FISSE, B., *Corporations, Crime, and Accountability*, Cambridge, Cambridge University Press, 1993, pp. 141-145.

<sup>71</sup> *Ibid.* 1989 at 126–127.

<sup>72</sup> CHISTE, K.B., “Retribution, Restoration, and White-Collar Crime”, *Dalhousie Law Journal*, n°31, 2008, pp. 85-121.

<sup>73</sup> GABBAY, Z.D., “Exploring the Limits of The Restorative Justice Paradigm: Restorative Justice And White-Collar Crime”, *Cardozo Journal of Conflict Resolution*, n° 8, 2007, pp. 440-441.

<sup>74</sup> WEITEKAMP, E., et al. “How to deal with mass victimization and gross human rights violations. A restorative justice approach”, in EWALD, U., and TURKOVIC, K., (eds) *Large-Scale Victimization as a Potential Source of Terrorist Activities - Importance of Regaining Security in Post-Conflict Societies*, Amsterdam, IOS Press, 2006, pp. 217-241.

many of them have recognised corporate responsibility for wrongdoings in their final reports.<sup>75</sup>

The TRC in South Africa was the first one specifically engaged with corporate actors. However, there is consensus that the South African TRC failed to deliver justice for corporate abuses, particularly due to the limited time and organisation given to the Business Hearing and the failed reparation programme.<sup>76</sup> More recently, the Colombian TRC included in its mandate a framework to investigate the role of corporations in the internal conflict, which shows the change of trend within TRCs to include corporations in transitional justice processes. In its final report, indeed, the TRC acknowledges that some national and multinational corporations not only benefited from human rights abuses but, in some cases, they also promoted IHL, human rights violations and environmental harm for its own interests.<sup>77</sup>

The Colombian TRC makes interesting recommendations in this sense by claiming for an institutional effort to develop state policies concerning business and human rights, as well as a comprehensive regulation of business due diligence obligations regarding the protection and remediation for human rights and environmental abuses.<sup>78</sup> Therefore, by collecting information and testimonies, TRC have the potential to identify other-than-human victims, such as the environment as itself. This is particularly relevant for a corporate accountability perspective since nature is often one of the main victims of corporate abuses.

Since TRCs operates as an open forum both for victims and offenders, it could help to advance participation and dialogue. Through restorative dialogue, linkages with environmental harm and corporate involvement that may be unnoticed can be made public, which contributes to create awareness of corporate responsibilities. This is particularly relevant in transitional contexts where corporations often take part in rebuilding economy and society, which offers the opportunity to engage with post-conflict tensions between protecting nature and human rights at the same time of pursuing environmental exploitation for economic recovery.<sup>79</sup>

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<sup>75</sup> KOSKA, G. *supra* note 14 at 45.

<sup>76</sup> ABRAHAMS, C., “Lessons from the South African experience” in MICHALOWSKI, S. (eds) *Corporate accountability in the context of transitional justice*, London, Routledge, 2017, pp.153–173; BERNARD-NAUDE, J. “For justice and reconciliation to come: the TRC archive, big business and the demand for material reparations”, in DU BOIS, F. and DU BOIS-PEDAIN, A., (eds) *Justice and reconciliation in post-apartheid South Africa*, Cambridge, Cambridge University Press, 2008, pp. 175-205.

<sup>77</sup> COLOMBIAN TRC, Final Report, June 2022, pp. 209, 393, 623. Available at <https://www.comisiondelaverdad.co/hay-futuro-si-hay-verdad> (last accessed 20 February 2023)

<sup>78</sup> *Ibid.* p.875. These recommendations include: “el deber de las empresas de: (i) realizar análisis periódicos, transparentes e independientes sobre los impactos en derechos humanos, ambientales y territoriales que se puedan derivar de su actividad y las de sus cadenas de suministro; (ii) realizar análisis del impacto de sus transacciones sobre tierras, de manera que no aumenten el riesgo de generar conflictos socioambientales o de concentración de tierras y acaparamiento territorial; (iii) analizar el riesgo de agudizar conflictos; (iv) verificar que los medios de seguridad pública y privada a los que acudan no escalen conflictos o hagan que las comunidades queden desprotegidas; y (v) reparar los daños que causen o, incluso, adelantar la restitución inmediata de bienes y tierras, cuando sea del caso”.

<sup>79</sup> KILLEAN, R. *supra* note 6 at 14.

Given that restorative justice relies on dialogue between victims and the offender, both have to be willing to participate in the process. In the context of corporate wrongdoings, this can be done by conferencing, or organising specific Business Hearings within TRCs, learning from past experiences. Specifically regarding environmental harm, Boyd proposes “sentencing circles” and “community impact panels”, which provide the space for active community participation, dialogue and corporate accountability.<sup>80</sup> Restorative dialogue and the adoption of restorative agreement reparations presents an opportunity to repair governance structures within the company that caused harm, and ideally signals the virtues of lifting standards across that industry overall.<sup>81</sup>

Restorative justice also represents a suitable starting point for a deeper investigation of the corporate abuses committed, as well as the structural elements of conflict and to achieve accountability and relational justice. To this aim, it would be essential to disentangle business individual and collective responsibility in order to successfully address corporate wrongdoings.<sup>82</sup> Corporations can be differently involved in human rights abuses and environmental harm. Therefore, corporate responsibilities can be firstly addressed with a restorative justice approach which can lead to further legal accountability when required. It may also contribute to reinforce the obligation to provide actions to seek justice and remediation. Colombia and the JEP could serve to illustrate how corporate accountability can be approached through restorative justice in this sense.

The JEP provides a forum to bring forward cases involving corporate actors (individuals) during the conflict under this Conditionality Regime, which obliges those who apply for the benefits to make a specific, planned and clear commitment to the realisation of victim’s rights. Benefits include avoid a trial and prison and access to softer sentences. However, after extensive debates, the Colombian Constitutional Court decided to limit the JEP’s jurisdiction to corporate actors only if they voluntarily agree to it or approach it through a formal petition process. Therefore, business actors should voluntarily accept JEPs jurisdiction to take part in the transitional justice process, which it may often result in corporate impunity. However, the JEP recently announced that it would consider opening three new “macro cases,” in which examining the role of “terceros”.<sup>83</sup> This means that the JEP may consider the role of economic actors like multinational companies

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<sup>80</sup> Sentencing circles are open to all members of the community who feel affected in one way or another, and in consultation with public prosecutor or judge, a sentence can be proposed. A community impact panel consists of the offender(s), community representatives, a trained facilitator and possibly a police officer. Boyd also warns of limitations of these approaches when applied to cases of environmental crime, which can include power imbalances in the group, an insufficient or incomplete assessment of the environmental impact by individual community members, a lack of uniformity in sentencing and the risk of double jeopardy. BOYD, C., “Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?”, *William & Mary Environmental Law and Policy Review*, n° 32, 2008, pp. 483-512.

<sup>81</sup> FORSYTH, M. et al. *supra* note 13 at 35.

<sup>82</sup> KOSKA, G. *supra* note 14 at 59.

<sup>83</sup> Jurisdicción Especial Para la Paz en Colombia, “La JEP convoca a organizaciones de víctimas a participar en audiencias de observaciones sobre apertura de nuevos macrocasos”, Comunicado 002 -2022 <https://www.jep.gov.co/Sala-de-Prensa/Paginas/La-JEP-convoca-a-organizaciones-de-v%C3%ADctimas-a-participar-en-audiencias-de-observaciones-sobre-apertura-de-nuevos-macrocasos.aspx> (last accessed 20 February 2023).

in human rights violations and environmental harm. By revealing corporate involvement in abuses, it could foster corporate interest in voluntarily participating in this special process. According to Braithwaite and its theory of “reintegrative shaming” an important factor that makes this approach effective is its social embeddedness, given that the community will at first shows its disapproval, but it will be followed by gestures of reacceptance in the society. This is particularly relevant in transitional settings. In any case, I agree with Uprimmy and Saffon that restorative justice mechanisms should be additional to punishment in the most serious cases and should promote the assignment of responsibility on the perpetrator for the satisfaction of the rights to truth and reparations.<sup>84</sup>

On the other hand, reparations are a critical aspect of restorative justice process. Drafting and implementing an action plan with the participation of the offending corporation will be essential to ensure remediation.<sup>85</sup> In addition, non-monetary remedies would avoid disadvantaging shareholders and could provide a more sustainable solution after a conflict or period of oppression.<sup>86</sup> Specifically regarding environmental harm, community conferences offer the opportunity to the offender to directly apologise to victims and commit to design and implement actions to redress the harm. Conferences also can enforce the importance of compliance with environmental law and reduce the likelihood of recurrence. Ideally, reparations in this sense may include an obligation for the offending company to publicise the offence and its consequences, to carry out specified projects for restoration or the enhancement of the environment, to pay a specified amount to the Environmental Trust, or to organise a training course for its employees.<sup>87</sup>

Turning to the case of Colombia, the conditionality regime requires the offenders to formulate a concrete, programmed and clear compromise to restore victims. The add value of this formula is that victims can suggest amendments, formulate suggestions or reject the plan, so they have not only a passive role in the designing of reparations. While the judge acts as final instance of legitimation of the agreement, it offers a victim-centred approach to remedies which can be more adequate to victim’s needs.

However, and despite all the possibilities earlier mentioned, restorative approach to corporate environmental harm also presents some limitations. Difficulties can be related to the fact that environmental harm needs to be clearly connected to a wrongdoing by a corporation and the offender should be willing to participate in the process. Thus, in the context of corporate environmental harm, a clear assignment of responsibilities might be often difficult. This could be specially challenging in the context of multinational corporations if corporate obstructionism exists. It will be also crucial to consider the quality and strength of the relevant legal system, as contexts with weak legal systems leave victims with little alternatives to a company-based remediation mechanism.

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<sup>84</sup> UPRIMNY, R. AND SAFFON, M.P. “Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case” (unpublished manuscript, 2006).

<sup>85</sup> BRAITHWAITE, J. et al., *Pharmaceuticals, corporate crime and public health*, Cheltenham, Edward Elgar, 2014.

<sup>86</sup> KOSKA, G. *supra* note 14 at 60.

<sup>87</sup> AERTSEN, I. “Restorative Justice for Victims of Corporate Violence”, in FORTI, G., *Victims and Corporations. Legal Challenges and Empirical Findings*, Milano, Wolters Kluwer, 2018, pp. 235-258.

Therefore, a condition to engage in a restorative justice approach to corporate abuses is that the state must be able to support the use of domestic judicial mechanisms to enforce the law.

Furthermore, a restorative dialogue is simply not feasible in some cases, for instance, when the offender does not take responsibility for the wrongdoing. Reparations can be difficult to achieve if there is a lack of agreement on the basic facts concerning the wrongdoing, given that this should be reached between the parties before the actual remediation meeting can take place. Moreover, there could be cases in which victims might not feel safe to take part in restorative processes because they fear the offender might retaliate behind the scenes if they raise their voices publicly.<sup>88</sup> Therefore, mechanisms should remain impartial to provide a space for disadvantaged and marginalised groups to express their grievances and to provide additional support and resources for groups affected by corporate abuses to be able to participate effectively.<sup>89</sup>

Ultimately, the question if restorative justice is a suitable response to corporate environmental harm in transitional justice has to be answered on a case-by-case basis. Depending on the case and specific circumstances, a combination of restorative justice and court rulings may be more effective than either pursued separately. Since transitional contexts present unique opportunities for the reinvention of legal and political cultures,<sup>90</sup> careful consideration of the options that restorative justice poses to engage with corporate environmental harm is crucial to develop transitional justice strategies that adjust to the challenging world contexts.

## **VI. CONCLUDING THOUGHTS**

While environmental harm has been largely disregarded in transitional justice, recent developments in the field and emergent literature indicate an increased willingness to address environmental damage in transitional settings. Similarly, corporate involvement in environmental damage is a constant feature in most conflicts-affected zones although it has been barely addressed by transitional justice processes. In fact, how to address corporate accountability for environmental harm and guarantee remedies in a society that is transitioning from a period of conflict or authoritarian rule remains a challenging task. Since the potential of restorative justice to address environmental concerns and corporate human rights abuses has been pointed out, this article explored how environmental restorative justice can better engage with corporations in transitional justice contexts.

Departing from five basic principles of environmental restorative justice, this article illustrates the main opportunities of applying an environmental restorative justice approach to corporate abuses in transitional settings, as well as some limitations. It has been argued that restorative justice represents a promising approach to identify and

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<sup>88</sup> *Ibid.*

<sup>89</sup> KOSKA, G. *supra* note 14 at 60.

<sup>90</sup> SZOKE-BURKE, S., “Not Only “Context”: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights”, *Texas International Law Journal* 50, n°.3, 2015, pp. 466- 494.

recognise other-than-human victims, as well as to identify corporate offenders. Similarly, restorative dialogue can contribute to raise awareness of corporate responsibilities by revealing corporate environmental harm. Besides that, participation and dialogue within a restorative framework can help to promote an important deterrent effect in corporations and advocacy for the environment, which also serve to meet accountability requirements and further prosecutions when required. Finally, it argued that environmental restorative approach to corporate abuses can deliver reparations focused on victims’ needs in the absence of transitional mechanisms specifically designed for corporate accountability, which clearly hinders comprehensive reparations.

Each transitional justice process emerges in different circumstances and requires specific and tailored measures. However, this paper provides important insights into the opportunities of restorative justice can offer to corporate environmental harm in transitions. Transitional justice as field has shown capable of evolving to face different challenges and contexts, as well as to directly affect international norms. Including an environmental restorative justice approach to corporate abuses may serve to promote environmental consciousness into the entire regulatory sphere, as well as to bolster the development of corporate accountability mechanisms. Likewise, environmental restorative justice in transitional contexts may present an effective mean for reinforcing the value of the environment and to demonstrate that transitional justice can evolve and embrace the nature as a pivotal issue to allow life on Earth. Besides the didactic component, it seems that restorative justice has much to offer in providing a critical opportunity to capitalise the power of corporations in post-conflict situations.