Restorative justice for environmental crimes: who is the victim?

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Abstract: Restorative justice is a relational response to crime, alternative to traditional penal law solutions, that aims at restoring the harmful consequences of a crime and at reaffirming an idea of balance among parties involved in the offence. In recent times, restorative justice has attracted both scholars and legal practitioners’ interest regarding its use for a specific category of crimes, that of environmental ones. However, and despite of the emergence of a growing scholarship on this field, the issue of who is the victim of such crimes from a restorative justice lens has received scant attention, the discussion on this topic appearing limited to generic and catch-all definitions. This paper addresses this lacuna, discussing a conceptualisation of environmental victimhood that aims at “graining nature” into the restorative justice narrative, i.e. at capturing the inherent connection existing between the humane and the natural dimension. Building upon a green criminological understanding of environmental harm, this article argues that the label “environmental victimhood” for restorative justice purposes enshrines a peculiar concept of vulnerability that refers to the affected community violated in the enjoyment of its milieu.

Keywords: restorative justice; environmental harm; green criminology; environmental victimhood; milieu.

Abstract: La giustizia ristorativa propone un approccio relazionale al crimine, alternativo rispetto alle sanzioni penali tradizionali, che persegue l’obiettivo di riparare le conseguenze da reato e di riaffermare un ideale di equilibrio tra le parti coinvolte nell’offesa. Recentemente, la giustizia ristorativa è stata oggetto di attenzione, sia in dottrina che in sede istituzionale, relativamente al suo impiego per una specifica categoria di delitti, quelli ambientali. Tuttavia, e nonostante l’emergere di studi in questo settore, la questione specifica su chi sia la vittima di questi crini, tema di rilevante importanza ai fini ristorativi, non ha ricevuto un’adeguata attenzione, rimanendo la risposta ancorata a definizioni di vittima ambientale generiche e non meditate sulle peculiarità dell’approccio ristotativo. Questo articolo affronta questa lacuna, proponendo una concettualizzazione di vittima ambientale che innesti nella prospettiva della giustizia ristorativa l’elemento naturale, ovverosia che catturi la connessione inerente tra la dimensione umana e quella naturale. Muovendo da un’analisi del danno ambientale da una prospettiva di criminologia verde, l’articolo sostiene che il termine
“vittima ambientale” ai fini della giustizia ristorativa racchiude un concetto peculiare di vulnerabilità, che rimanda alla lesione del rapporto tra la comunità lesa e il proprio milieu.

1. Restorative justice: a human based justice for environmental crimes?

Restorative justice is a holistic response to crimes that attempt to develop solutions alternative to traditional retributive and utilitarian criminal law sanctions.\(^1\) It promotes a relational approach to justice, based on dialogue among parties involved in the criminal offence, for the purpose of collectively understanding the wrong committed, redressing the violations, and healing social relationships. Restorative justice has gained momentum in the last decades worldwide, both in the frame of an extensive scholarship\(^2\) and of international legal sources.\(^3\) Most recently, the Council of Europe’s 2018 “Recommendation on restorative justice in criminal matters” (the Recommendation) adopted the following definition:4 “Restorative justice” refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the “facilitator”).”\(^5\)

In the last years, this spreading interest for restorative justice has led to exploring its potentialities beyond restorative justice’s traditional scope of application, originally rooted in intersubjective offences, to address another field of growing concern, that of environmental crimes. Also fostered by practical experimentation in New Zealand,\(^6\) literature in this field has flourished.\(^7\)

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2 Among the many, (Zehr, 1990); (Braithwaite, 1999); (Von Hirsch, et al., 2004); (Dignan, 2005); (Sullivan & Tiff, 2006); (Johnstone & Van Ness, 2007); (Van Ness & Heetderks Strong, 2015); (Gravrielides, 2019). In the Italian literature, see, inter alia, (Mannozzi, 2003); (Reggio, 2014); (Mannozzi & Lodigiani, 2017).

3 The most notable soft-law international documents on this topic are the United Nations Office on Drugs and Crime (UNODOC), Handbook on Restorative Justice Programmes (NY, 2006) and Council of Europe, ‘Recommendation of the Committee of Ministers to member States concerning restorative justice in criminal matters’ (2018) (see note 3).


5 Recommendation 2018, cit., §3.

6 The Sentencing Act 2002 (Sentencing Act) integrated RJ goals into NZ’s criminal justice system. Sentencing Act’s Section 7(1) ‘Purposes of sentencing or otherwise dealing with offenders’ outlines nine sentencing
The use of restorative justice in this field opens to promising expectations: an approach to justice that aims at righting the wrong by means of dialogue and cooperative confrontation among parties involved could unveil the nuanced social implications stemming from environmental offences. This could lead to developing remedies that go beyond traditional criminal ones, these latter being mainly focused on the punishment of the offender, and not structurally tailored for redressing the whole spectrum of consequences stemming from the environmental offence.\(^8\)

While restorative justice for environmental crime could unveil unknown potentialities, its application to such field of crimes however entails a challenging task that requires more than debating the (political) viability of its application to address certain conducts\(^9\) or addressing procedural issues related to its enforcement.\(^10\) It is rather a challenge that touches its foundational nature, that of being an approach to justice rooted in the human being’s dimension. Traditionally, restorative justice develops as a response to widespread disaffection for criminal law’s formalistic response to crime that disregards the relational side of the conflict.\(^11\) It thus arose as an alternative purposes, the first four are restorative in nature. They include: a) holding the offender accountable for harm done to the victim and the community by the offending; b) promoting a sense of responsibility or acknowledgment of the harm in the offender; c) incorporating the interest of the victim of the offence; and d) providing reparation for harm done by the offending. According to the 2012 NZ’s Ministry of the Environment report, between 1 July 2001 and 30 September 2012, restorative conferences were used in 33 prosecutions pursuant to the Resource Management Act: Ministry for the Environment (NZ), ‘A study into the use of prosecutions under the resource Management Act 1991: 1 July 2008 – 30 September 2012’ October 2013 <https://www.mfe.govt.nz/sites/default/files/study-into-the-use-of-prosecutions-under-the-RMA.pdf> accessed 30 June 2021.

7 Preston has been pioneering in advocating the use of restorative justice for such typology of crimes. (Preston, 2011). On restorative justice for environmental crimes, see also (Wijdekop, 2019).
8 (Hall, 2013)
9 The use of restorative justice for sexual violence, for instance, is very much debated. The UN “Handbook for legislation on violence against women” ST/ESA/329 and to a certain extent the Council of Europe Convention on preventing and combating violence against women and domestic violence (Council of Europe Treaty Series - no. 210), art. 48, exclude mediation or other alternative dispute resolutions for such criminal conducts.
10 In this respect, see “Per un modello di restorative justice in ambito penale ambientale” edited by Centro Studi "Federico Stella" sula Giustizia Penale e la Politica criminale (CSGP) Università Cattolica del Sacro Cuore in “La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti”, p. 124 ff, at https://www.researchgate.net/publication/320834136_LA_MEDIAZIONE_DEI_CONFLITTI_AMBIENTALI_Linee_guida_operative_e_testimonianze_degli_esperti.
11 From a traditional criminal justice perspective, crimes are conceived as being primarily individual’s acts of rebellion against the State’s legal order, for the protection of which a criminal justice system is established, thus legitimizing the reaffirmation of the State’s dominance over the offender by means of coercion and
solution, at time conceived as either complementary or radically irreconcilable,\textsuperscript{12} to traditional criminal law approaches, that promotes a human centred response to crime\textsuperscript{13} inspired by a punishments. From this perspective, the consequences of the criminal offence against human relations remain in the background, eventually relegated to civil judiciary remedies, such as the determination of pecuniary forms of compensation for plaintiff. This evolution was however in contrast with an idea of criminal justice for the protection of subjective rights, as suggested by Feuerbach and before him, Kant, as noted by (Padovani, 1984). The disregard for the humane dimension of crime following a process of formalization of legal goods, conceived as tools for ensuring the protection of collectivity, was also highlighted by (Liszt, 1888).

\textsuperscript{12} While the reference to restorative justice as being alternative to traditional criminal law systems is very spread in the relevant literature (see, for instance, the constant reference to the argument made by (Christie, 1977) according to whom restorative justice is alternative to the State appropriation of conflicts that belongs to parties), the understanding of what “alternative” means remains quite ambiguous. In this respect, the debate on such alternativity arounds two main polarisations, respectively enshrined by those who advocate for a holistic model of restorative justice, and those who support a maximalist approach. The first strand, which main representative is (McCold, 2000) shares the idea that restorative justice should develop autonomously beyond traditional criminal law elements and models. (Walgrave, 2000) is, on the contrary, the main exponent of the maximalist line of thought, according to which restorative justice should be more than an alternative way to deal with conflicts. It rather ought to address the whole criminal justice system by offering its own way to conceive crimes and to justify the reaction to it. This duality is well investigated by (Reggio, 2014), p. 109 ff. who declines the idea of alternativity into one of complementarity. For the author, restorative justice is not alternative to law and to its regulatory potentialities, but rather to an idea of law that attempts to regulate humane conflicts in abstract terms being impermeable to any considerations for the humane dimension itself (Reggio, 2014) p. 110. The relationship between criminal justice and restorative justice was also explored by (Mannozzi & Lodigiani, 2017), pp. 65 ff, who highlighted two different understandings of alternativity stemming from criticisms towards traditional penal systems. The first one, based upon needs to rationalise the recourse to criminal law options, read restorative justice as a mechanism of diversion, i.e. alternative to penal justice. A second understanding of alternativity highlights the role that restorative justice plays in turning the State’s power towards the empowerment of victims of crimes. This implies that restorative justice approaches are alternative to traditional sanctions, yet complementary to the overall structure of the penal system, since they imply the definition of a penal statute and the procedural ascertainment of facts and of the offender’s responsibility.

\textsuperscript{13} Zehr, one of the main proponents of modern restorative justice, argued that “crime is first of all an offence against people, and it is here where we should start” (Zehr, 1990), p. 182. Such focus on the human dimension, rather than on the public sphere embodied by the State, is common to the principal intellectual and philosophical strands that have nurtured the rise and the development of the restorative justice movement, namely the “civilisation”, the “Communitarian” and the “moral discourse” theses. Despite of their different roots and divergences regarding the role of individual in the restorative process, all of these movements promote a human centred response to crime, based on the personal acceptance of the other as an equal and on the free willingness in overcoming the violence enshrined by the crime The first movement

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superior ideal of balance among parties. Restorative justice aims at healing the social wounds related with the wrong by providing the offender with an opportunity to voluntarily repudiate his/her wrongful conduct and thus to reaffirm the inner value of the victim. 

criticises penal systems as too often disinterested in victims while focused on punishing the offender. Hence, the supporters of this thesis advocates for a “civilisation” of crimes, that is a reconceptualization of criminal offences in civil law wrongs and a substitutions of criminal law proceedings with civil law ones, in order to deal with offences by means of civil remedies, particularly restitutions or reparations by the offender for the victim. Collateral yet independent from the civilisation thesis, is the Christian Mennonite movement, to which (Zehr, 1990) himself belonged, that promotes informal methods of offences resolutions in which offender and victims are not against but together in talking about the offence and in resolving the harm. The values of healing and reconciliation among individuals are central for this movement. The communitarian thesis, which most notable exponent is (Christie, 1977), is also rooted in the critic to the State-centric penal system, for which the offence is against the State. However, the communitarian movement advocates abolitionist positions arguing that the conflict does not belong to the State, but rather to individuals. Therefore, differently from the previous strand, communitarianism expands the dualistic relation between the victim and the offender to embrace the social and moral implications that the offence has for the whole community. Community itself is considered as the main stakeholder of the conflict and the informal proceedings set to deal with such conflict are an opportunity not only to address individual concerns but also to revive communities themselves. Therefore, communitarians de facto substitute the control exercised by the State through criminal law with an informal social control by the community over its members. Finally, the “moral discourse” thesis includes all those who seek to develop a different set of sanctions to directly address offender’s own conscience. This movement indeed believes that individual’s conscience is a tool better suited than external punishment to control behaviour and thus it seeks to build upon this insight by engaging in normative or moralising dialogue with an offender as part of the response to a crime. Notable examples of such approach are the theory of reintegrative shaming by (Braithwaite, 1989), the communicative theory of punishment by (Duff, 2003) and the relevance of apology by (Tavuchis, 1991).  

(Braithwaite, 2003). In this respect, (Mannozzi, 2015), 137 suggests that the concept behind the term restoration can be traced back to the Italian jus-philosopher Del Vecchio’s work “La giustizia”, who theorised an idea of justice, alternative to retribution, based on reparation rather than on revenge (Del Vecchio, 1951), 198.  

(Van Ness & Heetderks Strong, 2015), 32 define RJ as justice that heals. The idea that restorative justice heals social wounds by promoting a superior idea of non-domination has been promoted by liberal scholars, most notably by John Braithwaite. (Braithwaite & Pettit, 2001); (Braithwaite, 2002); (Braithwaite, 2015). (Pettit, 1997) and (Braithwaite & Pettit, 1992) developed the republican theory of non-domination.  

From a restorative justice standpoint, crime is conceived in relational terms as an action through which the perpetrator conveys a message of domination, literal or symbolic, against its victim. In this respect, (Murphy, 2011), 29 points out that crime is precisely a message that reflects, at least symbolically, the offender’s belief or attitude to use victims, ‘in Kant’s language, as mere means or things to be exploited for the wrongdoer’s own selfish purposes – all without any regard for the victim’ rights as persons’. 

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When applied to environmental crimes, the challenge is “to grain nature” into the restorative justice human based discourse. This challenge does not entail an attempt to develop an idealistic conceptualisation of nature as an autonomous subject entailed to have a voice in the restorative process. This attempt would meet a twofold order of obstacles: that it would subvert restorative justice’s human beings-based nature; and that at the positive international law level the recognisance of nature as an autonomous subject of law has not yet been established. What is therefore at stake is a rather more delimited, yet foundational, task, that of conceiving the offence toward nature, i.e. the environmental crime, as an offence against humans’ capability to shape their own perception of and relation with a determined environment. In other words, the use of restorative justice for environmental crimes requires to shift the focus from the inter-individual relationships, those between the offender and its victim, toward an inter-individual relational realm that encompasses real subjects whose existence and livelihood is framed into and dependent upon their natural context.

This shift leads to the need to carry out an overall conceptual reassessment of the legal categories over which a restorative model of justice operates, among which the notion of victimhood constitutes a core moment. The victim, or to better say, individuals or groups of individuals’ status of vulnerability caused by the wrongful conduct, plays a central role in the restorative justice discourse. While restorative justice does not focus on the victim side only, however, as Van Ness and Strong noted that it is a process that ultimately empowers victims by

17 (Mannozzi, 2003), pp. 103 ff. and 342 ff. For the author, the recognition of the other’s inner value constitutes the ground for attempting to restore the intersubjective communicative dimension and thus to overcome the conflict.
18 The expression is borrowed by (Vinuales, 2018).
19 For a survey of the initiatives adopted worldwide concerning a “right of Nature”, see the recent study (European Parliament - Policy Department for Citizens’ Rights and Constitutional Affairs. Directorate-General for Internal Policies, 2021)
20 On the process of subjectification of nature, see (Heisenberg, 2015). (Heisenberg, 2001), p. 37 affirms that even in natural sciences, the object of nature is not anymore nature per se, but nature as seen through human lenses. (Irti, 2018) investigates the relation of law and nature as products of human subjectivities.
21 Following (Friskics, 2001) pp. 395, 406, ‘relational’ refers to multiple human interconnections permeated by a spirit of dialogue and immersed in a milieu of ambient meaning. On the concept of milieu, see later part V.
22 As recognised, for instance, by (Bolívar Fernández, et al., 2015) and (Hartmann, 2018).
23 (Burnside & Baker, 1994) As for instance, victims are not present in the traditional definitions of restorative justice, such as those of (Marshall, 1999), 5, “Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” and of (Bazemore & Walgrave, 1999), p. 48 “Restorative Justice is every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime”, both of them not naming the victims.
providing them with a forum in which they can have a voice: encounter, amend, inclusion and reintegretion are crucial components of such process of restoration of the relational balance between victims and offender undermined by the crime.\textsuperscript{24} This relevance of the victim notwithstanding, in the literature so far developed concerning restorative justice for environmental crimes scant attention has been paid to the notion of “environmental victims” for restorative purposes. For instance, Preston, when discussing who enjoys a \textit{locus standi} in the restorative conference, suggests that individuals, communities, Aboriginal people, heritage and the environment itself represented by spokesperson could claim the status of victim.\textsuperscript{25} Similarly, Hamilton refers to victims of environmental crimes as including humans (both living and future generation), the environment, communities (both Indigenous and non-Indigenous) and commercial operators.\textsuperscript{26} Justice Pain, a judge of the Land and Environment Court of New South Wales, Australia, referring to case law on restorative justice for environmental offences in Australia and New Zealand, wrote that victims of such offences could be the environment and those groups of people or individuals who interact with the damaged environment and who as a consequence of the offence are unable to interact with the environment.\textsuperscript{27} However, this article takes a stance against this vague categorisation of victimhood because it turns into a catch all, undefined umbrella notion that does not highlight the concept behind the peculiar label of “environmental victimhood”, thus undermining the possibility to tailor a restorative justice response to meaningfully empower such peculiar category of victims.

In light of this lacuna in the restorative justice scholarship for environmental crimes, the following analysis aims at providing a conceptual background to develop an autonomous notion of environmental victimhood for restorative justice. To this end, section 2 discusses victimisation on the base of the harm parameter, particularly focusing on difficulties in ascertaining environmental victimhood. Section 3 defends a green criminological approach for assessing environmental harm and it supports the argument by presenting the Ikebiry community case-study. Building upon a green criminological perspective, Section 4 develops two concurring sub-parameters to assess environmental harm. Section V then attempts a conceptualisation of environmental victimhood for a restorative justice approach. Section 6 concludes.

\textsuperscript{24} (Van Ness & Heetderks Strong, 2015).
\textsuperscript{25} (Preston, 2011), 8, followed by (Stark, 2016), p. 449.
\textsuperscript{26} (Hamilton, 2021), p. 214 \textsuperscript{26} (Hadeel & Hamilton, 2019) p. 1466.
\textsuperscript{27} (Pain, 2018), p. 35. As it will be discussed later in this work, Pain’s reference to victims as those who ultimately could not anymore interact to the environment because of environmental harm is the closest to the conclusions reached in this paper.
2. Environmental victimhood: the harm perspective

As seen earlier, restorative justice does not conceive the offence in abstract terms, as an act of rebellion against the State’s legal order. Rather, it is a dialogical process that aims at bringing to surface the factual implications stemming from the wrong, at reaching a common understanding on how such implications have affected parties and at developing remedies to restore balance among parties. As such, restorative justice is inherently concerned with harm suffered by parties. In this respect, the relevance of harm for it is acknowledged by the Recommendation 2018’s definition, that instead of referring to the “victim-offender” labels, it relies upon the phrasing “those harmed by crime” and “those responsible for that harm”. Such reference to harm does not seem to serve only the purpose to affirm that crime can have significant impact beyond direct victims, such as on communities. It also seems to provide a specific legal parameter, i.e. the harm parameter, to assess victimisation: under the Recommendation’s definition, victims entitled to take part to restorative justice procedures are “those who have suffered harm caused by the perpetration of a crime”.

Although victimisation could be assessed on the base of several factors, the use of the harm criterion for this purpose is actually consistent with the definition of victim provided by the main international sources. In this respect, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, to date the most wide-ranging and influential document on the issue of victims’ rights at the international level, defines the notion of victims by stating that: “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” As this definition makes clear, “victim” is a legal term defined by the harm criterion, that, in broad terms, encompasses “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights”. The link between victim and harm is central also in the definition used by international human rights and

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28 On the dialogical nature of restorative justice, see (Reggio, 2014), particularly pp. 120 ff.
30 As noted by (Skinnider, 2011), pp. 31-41, victims can be assessed through the nature of the wrongful act, the nature of the harm, the extend of the damages suffered the scope of harm and by the nature of the perpetrator.
31 (Hall, 2013), 3.
humanitarian law instruments as well as international courts. For instance, art. 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines),\(^{33}\) refers to victims as to persons who have suffered harm as a result of a crime. In the judgment Prosecutor v. Thomas Lubanga Dyilo\(^ {34}\), the Chamber of the International Criminal Court echoes the somewhat broad definition of victim mentioned above by referring to the victim as ‘someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss’. Similarly, at the European level, Directive 2012/29/UE defines victim as: “a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence”. In light of these definitions, it could be inferred that the term “victim” refers to a concept of vulnerability caused by an undefined number of causes that go under the general parameter of “harm”.\(^{35}\) In White’s words, victimhood is precisely a factual assessment that should be carried out in light of “real world and of conflicts over rights”.\(^ {36}\)

However, and despite of a growing scholarship on environmental victimhood,\(^ {37}\) there is still uncertainty regarding the notion of environmental victim,\(^ {38}\) let alone an established definition.

\(^{33}\) UNGA Res. 60/147 (16 December 2005).

\(^{34}\) Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012, par. 14 ii)

\(^{35}\) The determination of victimhood on the base of the harm parameter requires to draw a line between the notion of “victim”, that belongs to criminological scholarship as it will be later discussed, and the rather different criminal procedural law label of the “passive subject of crime” The notion of the “passive subject of crime” refers to the holder of the legal good protected by the criminal law statute and violated by the culprit’s conduct: such holder could be a physical person as well as a juridical one, such as the State itself (Fiandaca & Musco, 2014), 185. Hence, the formal label of “passive subject of the crime” is determined according with the legislature’s selection of the legal goods worthy of penal protection, in this case the environment. While this different labelling is not acknowledged at the international level, however many European legal orders do distinguish in this way, among the other the Italian, German and French ones.

\(^{36}\) (White, 2008), 24.

\(^{37}\) (Williams, 1996); (Ruggiero & South, 2010) (Hall, 2013); (Hall, 2017); (Davies, 2018); (Varona, 2020).

\(^{38}\) In this respect, in 1996 Williams proposed a definition of environmental victims as those who suffered injury: “those of past, present, or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or psychosocial environment, brought about by deliberate or reckless, individual or collective, human act or omission”. This definition, based on the notion of injury, served the purpose to develop a legally enforceable notion at a time when there was no sufficient scholarship on environmental victimhood (Williams, 1996), 16. However, the injury parameter one, rather narrower than the harm one, appears ill-suited to define environmental victims not only in a restorative justice discourse focused on harm, but also against the aforementioned international consensus around the harm parameter.
of it at the international level. More in detail, the harmful processes and factors that lead to environmental victimisation seems to be characterised by an inherent invisibility that makes troublesome to grasp the concept of vulnerability enshrined by this form of victimhood, so undermining restorative justice capability to address and redress such vulnerability. Many factors seem to contribute to shade processes of environmental victimisation. To begin with, criminal phenomena of environmental impairment develop often in an undefined temporal and spatial dimension, undermining the perception of the individual as a victim. Criminal offences could produce effects phased in over time, so that a temporal gap between the perpetration of the offence and the victims’ perception of the harm occurs, hence undermining victims’ awareness regarding the origin of such harm. Furthermore, environmental crimes on a large scale are related with a widespread transnational harm, thereby fuelling a perception of diffuse victimisation that refers both to the society as a whole and, first and foremost, to the environment per se. While arguably the environment and the society could be considered as “victims” of environmental crimes, the allegedly diffuse character of such victimisation shifts the focus from individuals to abstract or collective entities, thus undermining a proper research on how environmental crimes affects individuals.

Secondly, even when environmental criminal misconducts are charged before courts, environmental victimisation does not easily come to surface in criminal law trials due to judicial difficulties regarding the ascertainment of criminal liability. As Skinnider noted, this is for many reasons, including: the fact that victims of environmental crimes may not be aware that an environmental crime has been committed, also considering potential temporal gaps between the

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40 The development of a notion of environmental victim as encompassing non-human biota is a research path most notably explored by (White, 2008).

41 This abstraction further undermines the perception of victimisation since the entitlement of such legal good usually does not belong to individuals, but rather to the State itself as the only subject with the power to trigger the judicial remedies on the behalf of the society as a whole. It is thus important to keep distinct the notion victim from the one of the “passive subject of crime” (see above note 35) because in case of a paralleling between the offended person and an abstract entity such as the State, from a victimology perspective, risks veiling the concrete dimension of environmental victimhood and thus vanishing efforts in recognise the identity of environmental victims veiling.
causation of offence and the perception of harm; a nexus between certain conducts and environmental law violations is often difficult to establish due to the often highly complex technical nature of environmental offence; the lack of scientific knowledge regarding the whole cascade effects stemming from an environmental offence could result in impunity for perpetrators, and thus in the consequent exclusion that victimhood has occurred.\textsuperscript{42} This procedural obstacles are all the more serious when asymmetry of power between victims and perpetrators is at stake, such as in the cases where the defendant is a powerful company, able to lift legal evidence and liabilities.\textsuperscript{43}

Lastly, and more radically, shades in the perception of environmental victimisation largely reflect uncertainty regarding what environmental crime ultimately entails.\textsuperscript{44} From a narrow legal perspective, environmental crime is a violation of criminal laws designed to protect the health and safety of people, the environment or both.\textsuperscript{45} However, such a formalistic approach presents a twofold order of criticisms, from a victim’s perspective. Firstly, traditionally environmental crimes have been enforced to sanction violations of administrative regulations.\textsuperscript{46} In such cases, the offence is not grounded in a substantial harmful dimension to the environment, the perception of harm and its victimisation resulting diluted in the technical administrative nature of the offence. Secondly, and above all, the choice of what is legal but should be illegal\textsuperscript{47} ultimately depends upon social, economic, and cultural factors that shape the political decision of criminalization and, more broadly, the axiological foundations of a certain society.\textsuperscript{48} In other words, the conception of what is ‘lawful but awful’\textsuperscript{49} largely varies according to the type of society in which the wrongful conduct occurs.\textsuperscript{50} As a result, processes of environmental victimisation would go underrated when

\textsuperscript{42} (Skinnider, 2011), 24. See also (Croall, 2007), 81; (Korsell, 2001), 133.
\textsuperscript{43} (Benson & Cullen, 1998).
\textsuperscript{44} The international legal framework pays scant attention to environmental crimes and thus to relate victimhood. To date, the only direct international criminal offence regarding the environment is enshrined in Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, that prohibits the use of methods of warfare intended or may be expected to cause damage to the natural environment.
\textsuperscript{46} Regarding the different interactions between environmental law and criminal law, see (Lees, 2019).
\textsuperscript{47} The expression is borrowed by (Skinnider, 2011), 16.
\textsuperscript{48} Ibid. See also (Lynch & Stretesky, 2003), 218. On attempts to define environmental crimes, see also (Clifford & Edwards, 1998).
\textsuperscript{49} (Passas, 2005), 771.
\textsuperscript{50} In this regard, Western societies and their ways of production are still informed by the idea that progress and endless growth, as a corollary of capitalism, is desirable and inevitable (Bouverasse, 2017). Under such social constructs, certain polluting economic and above all industrial activities are conceived as a necessary
harmful, yet socially accepted, i.e. lawful, practises and activities are at stake\textsuperscript{51}. These activities are often backed by politics of “denial”, that is a range of strategies of neutralisation carried out by States and corporates to legitimise their activity while at the same time obfuscating, ignoring, or minimising social and environmental impacts connected with such activities. Natali, in the frame of a sociological analysis of a case-study concerning processes of environmental degradation that occurred in the Spanish region of Huelva due to harmful industrial activities, has highlighted how powerful enterprises managed to impose their own narrative, by developing successful communicative strategies to minimise victims’ perception of occurred environmental harm on their lives, and consequently to escape from their liability.\textsuperscript{52}

Such orders of obstacles in identifying environmental victims have contributed to fuel the idea that environmental crimes are often victimless\textsuperscript{53} and of minor social impact.\textsuperscript{54} This assumption must be rebutted for a restorative justice approach to environmental crimes to work. To this end, it should be observed that what is problematic in the aforementioned state of art regarding environmental victims is the link between the harm parameter and the formal label of “environmental crimes” conceived as the source of the harm. While the harm parameter is a foundational parameter for assessing victimhood, it is the link with positive criminal statute that has to be challenged, for the previous difficulties to be overcome and for a conceptualisation of environmental victimhood for restorative purposes to be achieved. This point will be discussed in the following paragraph.

3. Introducing environmental harm from a green criminological perspective: the \textit{Ikebiri} case-study

The foregoing considerations highlighted that shortcoming in bringing to surface environmental victimisation mainly reflect difficulties in assessing harm stemming from the positive perspective of criminal statute, i.e., the legal labels of environmental crimes. However, the legalistic perspective is only one possible way to define what “harm” entails in criminological terms. The other main path for defining “harm” is by adopting a broader socio-legal approach.

\textsuperscript{51} (Halsey, 1997) identifies a number of legal, yet environmentally disruptive activities such as the clear-felling of old-growth forests.
\textsuperscript{52} See (Natali, 2015), 136.
\textsuperscript{53} (Spapens, 2014)
\textsuperscript{54} See in more detail (Hall, 2014), 103.

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While the legalistic approach defines harm as the outcome of the perpetration of certain conducts proscribed by criminal law statutes, the socio-legal lens departs from State’s positive law definitions to assess harm as the outcome of social factors. In this respect, it should be noticed that Recommendation 2018’s definition of restorative justice, by referring to “those harmed by crime”, seems to identify in the positive law approach the definitional parameter for assessing “harm”. However, when dealing with the attempt to conceptualize environmental victimhood for restorative justice purposes, a formalistic approach to harm appears to be ill-suited. As seen earlier, environmental harm is a slippery slope where formalistic, procedural, political, and cultural issues all concur in undermining a clear-cut link between harm and the label of “environmental crimes”, thereby hampering restorative justice foundational purpose to focus on the factual dimension of crime beyond abstract approaches. Restorative justice’s goal “to put things right” means indeed redressing the offence on the base of a deep understanding of the underlying systemic factors standing behind the perpetration of the misconduct as well as the relational consequences stemming from such misconduct. A formalistic approach to environmental harm could hinder the understanding of both causes and consequences of the environmental offence, as such trumping a restorative justice approach. Therefore, a socio-legal lens appears to preferable for assessing “environmental harm” and its implications.

The studying of victimization derived from “environmentally destructive activities and omissions” is the goal pursued by green criminology scholarship. Green criminology is a discipline ‘broadly concerned with human rights, abuse of power, and human suffering irrespective of

55 In this respect, a socio-legal perspective allows to embrace also “systemic harm”, that is those social activities which are lawful, yet environmentally disastrous, such as the clear-felling of old-growth forests, thereby going beyond formal choices of criminalisation. One may argue that in such cases of systemic violence against nature a restorative justice conference would not happen since the very existence of an offence is denied by public authorities. This being true, developing a socio-legal analysis of the harm is however useful for at least two reasons. To begin with, it allows to reach a deeper understanding of the essence of the vulnerability characterising environmental victimhood, even when a narrow approach limited to positive law crimes is pursued. Secondly, the social acceptance of a certain conduct may change according to changing times. In such cases, the political choice regarding how to tackle past disastrous actions and their consequences is substantially between repressive vindicative approaches and reparative ones. When opting for these latter approaches, restorative justice would operate beyond formal criminal law pursuing social pacification objectives in a fashion similar to transitional justice mechanisms. In this hypothesis, the social-legal understanding of the harm is the only viable solution to address actions not considered as wrongful ab origine.

56 On green criminological scholarship, see, inter alia, (White, 2010); (Ruggiero & South, 2010); (Spapens, et al., 2014); (White & Heckenberg, 2014); (Natali, 2015); (Nurse, 2017); (Brisman, 2017); (Brisman & Nigel, 2020). For a critical view on ‘green’ criminology, see (Halsey, 2004).
whether the circumstances are within the ambit of law’,\(^{57}\) that offers an interdisciplinary critical lens through which examining environmental harm, understanding its social and political roots and its consequences in the social realm. A green criminological approach, thus, promises not to face the difficulties seen before regarding victimisation because it goes beyond a conception of harm based upon the continuum “legal-illegal” established by the State.\(^{58}\) On the contrary, State itself is under the critical lens of green criminology, since many ecological harmful activities are promoted by public authorities, often in complicity with powerful non-state actors such as trans-national corporations, and veiled under the formal label of lawfulness.\(^{59}\) As Skinnider notes “Many environmental disruptions are actually legal and take place with the consent of society”.\(^{60}\) This happens because ‘crime’, ‘civil wrongs’, ‘regulatory violations’ are social constructs that may be used in a functional way to preserve and, in fact, to promote ecological detrimental activities.\(^{61}\) From a restorative justice perspective, green criminology added value in investigating environmental victimhood lies in the fact that it allows to re-consider the offence against a collective good, the environment, not in formal terms, as an offence against the State, but rather as the outcome, or more likely the failure, of somewhat social mechanisms through which a society regulates its overall interactions with the natural dimension. In this fashion, green criminology constitutes a lens able to grasp nuanced and in-depth insights of the environmental harm, and hence to provide restorative justice with a defined picture of the wounded relational spheres, or, to better say, of the dimension of vulnerability inherent to environmental victimhood. A field that formalistic perspective of the harm would most likely risk leaving underneath the surface, since, in Harari wordings “the system is structured in such a way that those who make no effort to know can remain in blissful ignorance, and those who do not make an effort will find it very difficult do

\(^{57}\) (Williams, 1996).

\(^{58}\) In this regard, environmental harm from a green criminological perspective is a sub-category of the social harm approach elaborated by (Hillyard & Tombs, 2004). These authors contributed to develop the criminological scholarship by dis-anchoring the discussion on victimhood from the legal label of crime to focus on the harm perspective. By rejecting formalistic standpoints, the goal is to understand the social background from which the harm and the related victimisation stem. In this respect, the social harm approach conceives “harm” as a critical tool that enables to shed light on connections between processes of victimisation and the social dynamics triggered by power structures. In this perspective, they refrain from providing a clear-cut definition of harm, as ‘harm is no more definable that crime’ (Hillyard & Tombs, 2004), p. 20. Therefore, they advocate a broad notion of harm that encompasses physical harm, financial/economic harm, emotional and psychological harm, and also cultural safety concerns.

\(^{59}\) (Ruggiero, 2020). For (Lynch & Stretesky, 2003), the term ‘green’ precisely highlights legal but environmental harmful activities.

\(^{60}\) (Skinnider, 2011), p. 2.

\(^{61}\) (Gibbs, et al., 2010), p. 127, define the notion of ‘deep’ green perspective which construes environmental crime as any human activity that disrupts a biotic system.
discover the truth”. In a nutshell, by embracing a green criminological perspective, restorative justice could provide these vulnerable groups with a voice.

The Ikebiri case-study provides a meaningful example of the foregoing considerations. The Ikebiri community comprises several villages in the State of Bayelsa, settled alongside the Niger Delta (Nigeria). The Niger Delta is an area rich of fossil sites, particularly oil and gas, where some of the most powerful corporates in the oil-industry, such as Shell, Eni, ExxonMobil, Total, etc, have been operating since 1938. The exploitation of the area by oil-multinationals, in conjunction with a poor political system, often operating in complicity with such multinationals, have turned into a substantial lack of any environmental controls over the oil extraction operations, with consequent phenomena of diffuse severe pollution all over the Niger Delta. To date, the Niger Delta is considered one of the five places most polluted worldwide. Against this background, the Ikebiri case represents nothing but one of the many episodes of environmental abuses committed in that area. On 5 April 2010, an oil pipeline managed by the Nigeria Agip Oil Company (NAOC) – the local affiliate of ENI – exploded 250 metres away from the river located in the northern part of the territory belonging to the Nigerian Ikebiri community. To make things worse, the NAOC, in spite of having accepted responsibility for the spill, and having repaired the leak, did not carry out any cleaning-up operations but the burning of the contaminated area without the consent of the local community. This is common practice, although it is an inadequate, dangerous, and polluting method for cleaning up oil, the purpose of which, far from being the actual cleaning of the polluted area, is mainly to hide the presence of hydrocarbon on the surface of the soil. Thanks to this method, NAOC could assert that the lands were cleaned-up and thus it rejected community’s requests of proper bonifications of their lands. However, six years after the spill, the level of pollution in the soil was extremely high.

The pollution contaminated an area of nearly 43 ectaras of territory, threatening the life of the community members, as well as the community as a whole, which survival mostly relies on palm-wine tapping, canoe carving, fishing, farming, animal trapping and traditional medical practices. In fact, the contamination caused the extinction of most of the local species of fish and the destruction of the local flora and crops. Emilia Matthew, local resident of the Ikebiri community said: “I am sick, and we don’t know what to resort to when experiencing illness. Fishing, which has been our means of livelihood is now threatened; it is no longer productive due to the river being polluted by oil spills. The fish in our fishponds in the swamps/bush too have all been killed by crude oil. So, we have lost our fishponds. The vegetables we plant within the community, some of which are medicinal, and we use in treating ourselves are also affected by crude oil”.

62 (Harari, 2018), 225.
63 For a description of the facts and their background, see (Friends of heart Europe, 2017); (Business & Human Rights Resource Centre, 2017); (D’Ambrosio & Di Pierri, 2018).
64 (Keating, 2017).
Besides the relevance of this case for its implications in terms of litigation and of liability of the parental for the misconducts of the subsidiary, this case is also relevant for the purposes of this analysis as it highlights the difference between a formal approach and a socio-legal one in assessing environmental harm and its related victimhood. From a positive law perspective, the NAOC management’s conduct was not criminalised, and the Nigerian governmental agency in charge of securing environmental standards – the Oil Spill Detection and Response Agency – did not take a position against the NAOC. As such, the overall conduct of the NAOC has been shielded under the label of “lawfulness”, and the harm dimension blurred, together with the consequential victimisation. However, when observing this case from the rather different socio-legal lens, that of the green criminology, the imagine is radically different. It is an imagine of victimisation stemming from systemic abuses and diffuse violence, of State’s complicity with corporates harmful activities, of communities’ powerlessness and of prevarication of the strongest over the weakest. In other words, from a green criminological lens, the environmental harm dimension is starkly identifiable in its impact on the community and its intimate connection with the contaminated territory. The following discussion has for object precisely this dimension of the harm and the parameters to assess it.

4. Assessing environmental harm

Building the notion of environmental victimhood by relying upon the green criminological understanding of environmental harm, makes it cardinal to firstly determine what environmental harm entails. To this effect, one cannot rely upon the subjective perception of individuals only. While dialogue with affected parties constitutes one of the restorative justice’s central tenets, to make the notion of environmental victimhood legally enforceable and judicially workable, environmental harm has to be assessed on the basis of certain verifiable parameters. In this respect, environmental conventions have long been firm in recognising a broad notion of the “environment” as an autonomous interest to be protected. Thus, for instance, Principle 21 of the

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65 The Ikebiri’s King successfully filed a lawsuit against ENI before Italian courts, thus forcing Eni to reach an out-of-court compensatory settlement. For a highlight of the main phases of this case, see (Studio legale Saltalamacchia, 2019) and (Friends of the Hearth Europe, 2019).

66 A factual and objective assessment of the harm allows to develop a rational dialogue among parties, reducing the risk to turn the restorative justice conference into a mere emphatic dialogue. Emphatic dialogue, while relevant for restorative purposes, brings with it the risk that a party, by developing a successful narrative, could impose its own view over the other parties, and ultimately over the public ascertainment of facts, in the absence of a factual objective base working as a parameter of rationality. In this sense (Reggio, 2014), 123. See also, (Reggio, 2008), 169.

Stockholm Declaration and Principle 2 of the Rio Declaration make explicit reference to a duty to control transnational “damage to the environment”. Similarly, the 1995 Washington Declaration of Protection of the Marine Environment from Land-based Activities urges for “effective action to deal with all land-based impacts upon the marine environment”, including “physical alteration and destruction of habitat”.\(^\text{68}\) In the same spirit, article 3 of the 1991 Antarctic Protocol aims at protecting the “ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic value”\(^\text{69}\) while the 1992 Climate Change Convention requires duties to control adverse effects on the “composition, resilience or productivity of natural and managed ecosystems”\(^\text{70}\).

Their different fields of application notwithstanding, such conventions not only share a common understanding that the environment enjoys an own inner value, but they also point towards the need to adopt a holistic ecosystem approach, emphasizing the need to consider the natural system as a whole, rather than in its individual components.\(^\text{71}\) As stated by studies conducted by the UN Environmental Program (UNEP)\(^\text{72}\) and the International Law Commission (ILC)\(^\text{73}\), the notion of environment “covers at least air, water, soil, flora, fauna, ecosystems, and their interaction”. Therefore, when assessing victimisation from an environmental harm perspective, a twofold entangled dimension has to be considered, namely the social and the ecosystem one. In light of this, environmental harm can be legally established on the basis of two different and concurring criteria, respectively a physical and a legal one: the environmental degradation and the violation of human rights.

### 4.1. The environmental degradation parameter...

For what concerns the physical parameter, this could be related to processes of environmental degradation.\(^\text{74}\) In 2009, the United Nation International Strategy for Disaster

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\(^{70}\) The United Nations Framework Convention on Climate Change (UNFCC), FCCC/INFORMAL/84 GE.05-62220 (E) 200705, 1992, Article 1(1).
\(^{72}\) UNEP, Rept. Of the Working Group of Experts on Liability and Compensation for Environmental Damage arising from Military Activities 1996.
\(^{74}\) The International Law Commission draft guidelines on protection of the atmosphere also refer to “atmospheric degradation”: ILC Rept. (2015) GAOR A/70/10, Ch V.
Reduction (UNISDR) defined the term “degradation” as “the reduction of the capability of the environment to meet social and ecological objectives and needs”. A non-exhaustive list of examples of human-induced environmental degradation includes a “land misuse, soil erosion and loss, desertification, wildland fires, loss of biodiversity, deforestation, mangrove destruction, land, water and air pollution, climate change, sea level rise and ozone depletion.” In this respect, it should be highlighted that the UNISDR recognises that “degradation of the environment can alter the frequency and intensity of natural hazards and increase the vulnerability of communities” (emphasis added). Vulnerability is further defined as “the characteristics and circumstances of a community, system or asset that make it susceptible to the damaging effects of a hazard”. Even if this definition frames vulnerability in the broader context of natural hazards and climate change, it is however noteworthy since it highlights that the processes of physical degradation trigger social and collective implications.

In other words, the preservation of the environment and the sustainability of human livelihood are two strictly interdependent factors.

The UNISDR definition, though, falls short in explaining how to assess when “the reduction of the capability of the environment to meet social and ecological objective” occurs. In other words, it is unclear what is the required threshold of serious or significant degradation for the physical parameter of environmental harm to be met. In this regard, at the international level the required threshold has ranged from “serious injury” to “significant or equivalent” formulations, to a lack of any reference to a severity threshold, to attempts to develop a threshold of severity based on a “balance of interests between the sovereign right of states to develop (...) and the duty to prevent transboundary interference”. From a restorative justice perspective, however, what seems to be relevant is not the identification of a determined quantitative threshold of intensity of the degradation, i.e. the “how much” of degradation is necessary to impact social and ecological objectives; but rather the implications of such environmental impairment on the ecosystem, that is

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77 The “Train Smelter” case, concerned with civil liabilities issues, referred to “serious” injury (AJIL (1941) 716. Also, the 1992 ECE Convention of the Transboundary Effects of Industrial Accidents, article 1, refers to “serious injury”.
80 This attempt was proposed by (Lefeber, 1996), p 86-7. This proposal has not been accepted at the international level. Furthermore, and for the purposes of this paper, while an equitable use of the territory could be a desirable restorative outcome, it seems ill-suited to build the notion of environmental victimhood, as it shifts the focus from a duty to prevent environmental harm into a duty to exploit territories equitably.
the “how” of the harm. The task is thus to determine a holistic conception of environmental degradation based on a qualitative threshold.

To this end, it could be useful relying upon the so-called resilience approach as developed in the framework of the social-ecological system theory.\textsuperscript{81} According to this theory, a social-ecological system (SES) is the result of complex adaptive systems, characterised by dynamic interactions across scales, self-organization, and possible abrupt changes such as regime shifts.\textsuperscript{82} SES’ resilience is the capacity of such system to absorb disturbance and changes while still providing the society living therein with a set of desired essential ecosystem services, such as fresh water or favourable climate conditions.\textsuperscript{83} This theory has received an indirect support by the 2005 Millennium Ecosystem Assessment, which acknowledges the notion of ecosystem services as the benefits for humankind from a multitude of resources and processes supplied by nature.\textsuperscript{84}

Therefore, according with the social-ecological system theory, environmental degradation occurs when the ecological system’s resilience to changes is compromised together with its capacity to provide concerned populations with that ecosystem’s essential services. When this parameter is applied to the Ikebiri case, it is possible to conclude that an environmental degradation occurred, since the multiple and prolonged oil spill-overs over time have compromised the capability of the local ecosystem to restore itself to the \textit{ex-ante status quo} and thus to provide essential services, such as farmlands for the local population.

From a restorative justice perspective, this notion of physical degradation based on a qualitative threshold, constitutes a necessary premise for the assessment of the overall environmental harm, and the consequent victimhood, because it highlights the premises over which the second parameter, the legal impairment of the individuals’ sphere, should be tested. In the following sub-paragraph this criterion will be analysed.

4.2. \textit{...and the human rights parameter}

The human rights lens provides a legal parameter to ascertain when the environmental degradation, that is the ecosystem’s failure to provide any more certain essential services, amounts to environmental harm for environmental victimisation purposes. In this respect, aware that a legally enforceable definition of victimhood requires a legal parameter for being assessed, Hall discusses the impacts of environmental harm on individuals by referring to the impacts on the

\textsuperscript{81} (Walker, et al., 2004).
\textsuperscript{82} (Holling, 2009), 64; (Biggs, et al., 2015), 251.
\textsuperscript{83} (Walker, et al., 2004).
right to health and on economic and socio-cultural aspects. Similarly, Williams and White suggest connecting environmental victimisation to human rights violations and abuse of power. Connecting environmental victimisation to human rights is a growing trend in international law, which turning point was the 1972 Stockholm Declaration, principle 1 that states that “Man has the fundamental right to freedom, equality an adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations” (emph. added). Even if such principle has not yet been codified in an international treaty, the effects of environmental degradation over the human rights sphere have been long time recognised.

In this respect, the most developed approach to this matter is the greening of existing human rights, labelled by the UN Human Rights Council (UNHRC) as “human rights vulnerable to environmental harm”. This trend has been pushed forward by the UN Committee for Economic, Social, and Cultural Rights, forerunner in recognising the impact of environmental harmful conducts on the rights codified in the International Covenant on Economic, Social and

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85 (Hall, 2013), 27 ff.
86 (Williams, 1996) and (White, 2010) suggest referring to victims of abuse of power as defined by the UN “Declaration of Basic Principle of Justice an Abuse of Power” (A/RES/40/34), approved by the General Assembly in 1985 as ‘Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights’ §18.
87 (Birnie, et al., 2021), p. 269.
88 In this regard, discussing the recognition of an autonomous right to a healthy or sustainable environment, based upon the autonomous value of the environment and regardless of any link with the human sphere, goes beyond the scope of this article and thus it will not be addressed. Nonetheless, and for the sake of completeness, it should be recalled that to date the existence of such right is controversial, progresses in this way notwithstanding. Currently, it is recognised only by the 1981 African Charter o Human and People’s Rights, which article 24 claims for a “a general satisfactory environment favourable to people development”. In the notable case The social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland Case) ACHPR no. 155/96 (2002), the African Court in the notable imposed an obligation on the State to take reasonable measures “to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources” (§§52-53) and it called for “comprehensive clean-up of lands and rivers damaged by oil operations” (§69). More recently, the case Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v Argentina IACtHR, Case No. 400 (6 February 2020) is of great relevance, as the Intra-American Court of Human Rights for the first time found violations of Article 26 of the American Convention regarding the right to a healthy environment. Further on the topic of an autonomous right to a healthy environment, see (Boyle, 2012).
89 UNHRC Preliminary Rept (2012) 7-12.
Cultural Rights (ICESCR).\textsuperscript{90} Notably, the ICESCR enshrines those essential conditions granting individuals’ well-being.\textsuperscript{91} Therefore, while environmental concerns were not at stake when the ICESCR was drafted, the Covenant allowed for the emergence of an evolutive jurisprudence acknowledging the intertwined connection between the environment and the enjoyment of a decent livelihood. Indeed, while the Committee does not expressly refer to the right to a healthy environment, it has however recognized “the intrinsic link between the environment and the realisation of a range of human rights, such as the right to life, to health, to food, to water, and to housing”.\textsuperscript{92} The first recognition of such impact can be traced back to the early ‘90s when the Committee endorsed an extensive interpretation of the right to adequate housing as “the right to live somewhere in security, peace and dignity”, concluding that climate change or environmental degradation may render a surrounding environment inhabitable.\textsuperscript{93} This path has also been followed by the jurisprudence of the European Court of Human Rights which limited the recognition of a right to a healthy environmental insofar as other conventional rights are at stake.\textsuperscript{94}

The focus on the connection between human rights and environment has also led to a second approach that defends a collective dimension of the right to a healthy environment, according to which communities and people, rather than individuals, hold such a right. While this idea has not yet been adopted in an international treaty, undeniably human rights could also enjoy a collective dimension, in terms of the need to protect the dignity and the physical integrity of a group of people, as well as its civil, cultural economic political dimension. This collective dimension of human rights is a direct corollary of the conception of individual encompassed by human rights: not as an abstract entity, but rather as a living being placed in a net of human

\textsuperscript{90} See, for instance, progresses in this sense made by the U.N. Committee ESCR, General Comment no. 15 on the right to water (2002) §28; CESCR General Comment No. 14 on the right to the highest attainable standard of health (2000) §27. In the literature, this topic is addressed, \textit{inter alia}, by (Pillay, 2013).

\textsuperscript{91} For an in-depth analysis of the ESCRs see (Riedel, et al., 2014).


\textsuperscript{94} See, for instance, ECtHR, Judgement, App. no. 16798/90, Lopez-Ostra v Spain (09.12.1994, “51. Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health...”; ECtHR, Judgement, App. no. 41666/98, Kyrtaos v Greece, (05.22.2003), “52. Neither article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such”.

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relations. In this respect, the Human Rights Committee regarding the right of self-determination95 recognised that the collective dimension of human interactions constitutes a prerequisite for the enjoyment of individual guarantees. Many groups or collective rights have thus been recognised at the international level, such as the prohibition of genocide and the right to development. In this respect, the 1996 ICCPR and the ICESCR recognise that certain collective rights, such as the rights of indigenous people, are related with environmental concerns.96

This approach seems to be better tailored than the previous individual based one for addressing the Ikebiri case, since what was ultimately at stake was not a mere sum of individual human rights violations, but rather the right of the community as a whole to enjoy a decent level of livelihood in the inhabited territory. Discussing harm in the concrete world of conflicts and rights, as White indicated, should suggest zooming out and embracing the whole factual situation, in its systemic and collective dimension, to assess the overall harm caused by environmental degradation. Coherently with this holistic view, the following paragraph will discuss a conceptualisation of environmental victimhood for restorative justice purposes.

5. A conceptualisation of environmental victimhood for restorative justice

As seen above, the green criminological understanding of environmental harm is a complex one, routed in two different yet strictly related criteria: the environmental degradation, that is the ecosystem’s failure to adapt to exogenous damaging factors and thus to provide essential services; and the human rights impact, declined as the impact over groups or individuals’ juridical sphere. Environmental harm is thus built upon the connection between two different dimensions, the natural and the social one: without the occurrence of one of these two dimensions, environmental harm, as here understood, would not occur. In this respect, one can refer to this notion of environmental harm as “ecological harm”, an expression developed by Mares to encapsulate in the notion of harm a philosophical understanding of socio-ecological relations based on ecocentrism.97 Ecocentrism supports the idea that “humans and their activities are inextricably integrated with the rest of the natural world in communal or communal-like arrangements”,98 and it defends an idea of social justice as intrinsically related with ecology.99 Whilst ecocentrism does not dismiss human needs,

95 “The right of self-determination is of particular important because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”. HRC, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 183, §1
96 Such as, common article 1(2), and ICESCR article 25 and ICCPR article 47.
97 (Mares, 2010). On ecocentrism as a philosophical framework related to human/environment nexus see (Halsey & White, 1998).
98 (Brian, 1994) 71-72.
99 On the interconnected themes of ecology and environmental justice, see (Nesmith, et al., 2021).
such as economic ones, it attempts to strike a fair balance between an instrumental use of nature for human purposes and biocentric conceptions of nature as enjoying an inner value. Hence, ecological harm precisely refers to the failure of developing non-exploitive relations between human beings and the non-human realm, being ecological destruction and human misery intrinsically intertwined.\textsuperscript{100} Arguably, environmental victimisation is the outcome of such failure.

These considerations allow to reach a first conclusion: the environmental victim can be defined as a person or a group of persons who experience a jeopardy of their legal sphere due to processes of environmental degradation. In this regard, discussing environmental victimhood from this peculiar perspective, the one of environmental/ecological harm, implies a problem of legal labels and of concepts behind such labels. Particularly, a distinction must be drawn between the labels “victims of environmental crimes” and “environmental victim”. Environmental victim, from an ecological harm perspective, ontologically reflects the ecological connection, a nexus indeed, between the environmental degradation and the violation of the human sphere as enshrined by this form of harm. Environmental victimisation occurs in so far as the environment is degraded. On the contrary, the notion of “victim of environmental crimes” reflects an anthropocentric notion that focuses on the human sphere only, i.e. on the victim, concerning which the environmental degradation is not a constitutive element, but rather an external and fungible factor.

To make this point clearer, one could think at the difference that elapses between the example of victimisation offered by the Ikebiri community, and a victim affected by a whatsoever unlawful environmental conduct, an arson involving an industrial site for instance, irrespective of a phenomenon of degradation in the sense seen earlier. The core difference between these two examples, and the labels they relate to, lies in two distinct conceptions of vulnerability. “Victim of an environmental crime” generically refers to an idea of vulnerability that develops and exhausts its scope in the human dimension only, regardless of any peculiar characterisation of the harm. Following the previous example, the harm caused by the arson and by the related toxic smoke is not qualitatively different from the harm caused by a fire occurred in an apartment due to the negligence of the tenant. In both such cases, the offence does not call for an effort in determining a link with the victim and the natural background. Conversely, the vulnerability enshrined by the notion of “environmental victim” refers to the human relation with the surrounding environment, and thus it develops both internally and externally the human dimension as to embrace environmental harm’s ecological perspective. In sum, environmental victims are such because their livelihood is harmed by phenomena of environmental degradation.

This line of reasoning receives support by the wording itself of the label “environmental victimhood”. The adjective “environmental” qualifies the term victimhood in a way that points

\textsuperscript{100} (Halsey & White, 1998) 356.

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toward the philosophical understanding of human-nature relations based on ecocentrism and hence it rejects readings based on anthropocentrism as a philosophical understanding of human-nature relations antithetical to ecocentrism. In other words, ‘environmental’ adds a further ecological dimension to the anthropocentric one enshrined by the term ‘victim’. If this duality is not grasped, then discussing about an ‘environmental victim’ would lack of semantic coherence and of epistemic strength. One may reject such understanding of victimhood by opting for a mere anthropocentric view. But in this case, there would be no reason for discussing about “environmental victimhood”: “victim” would be sufficient on its own, so to deal with “victims of (environmental) crimes”,101 not “environmental victims”.

Against these background considerations, it is now possible to discuss a conceptualisation of environmental victimhood tailored for restorative justice purposes. Restorative justice, as earlier mentioned, is an approach to justice factually based, that focuses on the real existing individuals and on how the offence has impacted on their real life. In this respect, the above definition of environmental victim as a person who experiences a jeopardy of his/her legal sphere due to processes of environmental degradation is descriptive of the victimisation process by providing a picture of the relation between humans and the environment. However, such picture does not grasp the essence of this relation, the comprehension of which is essential for a restorative justice approach to fulfil the objective to restore a superior ideal of balance among parties. To achieve such a comprehension, one should leave aside for a moment the dualistic perspective between humans and the environment, to zoom into the humans’ side only, not however conceived in abstract terms, but as real living entities constituting a unicum with nature. In other words, one must focus on the concept of milieu.102

5.1. Environmental victim: restoring the community

The milieu differs from the cumbersome notion of “environment”. In broad terms, milieu is a meaningful concept rich of significance that does not merely refers to the physical nature, but to the individual’s perception of him/herself in connection with the surrounding natural reality.103 More in detail, there are different understandings of milieu, depending on the perspective from which the phenomenon is observed. From an external perspective, milieu tends to be equated with the surrounding natural environment, in which the human agent is considered to be an interconnected yet distinct entity who benefits in various ways from the surrounding “ecosystem

101 Environmental is here in brackets to stress the fungible nature of such positive qualification of crime or, more generally, offence.
102 A deep analysis of the concept of milieu goes beyond the scope of this study. To this end, reference is made to the organic and recent work of (Droz, 2022) to whom general reference is here in after made.
103 (Naess, 2009), 7.
services” provided by the natural dimension. However, this external perspective fails in understanding that from the internal perspective of the living agent such environment is precisely the reality, in which such agent lives and operates and that it shapes, and it is in return shaped by. This intimate connection between humans and the natural systems as being a *unicum* represents the internal perspective, that of the living human agent. Such perspective is meaningfully captured by the work of the Japanese philosopher Watsuji Tetsuro for whom the *milieu*[^104] is anchored in individual’s subjectivity.[^105] In Watsuji’s words, “What we usually think as the natural environment is a thing that has been taken out of its concrete ground, the human milieu-ity, to be objectified. When we think at the relation between this thing and the human life, the relation itself is already objectified. This position thus leads us to examine the relation between two objects; it does not concern human existence in its subjectivity. On the contrary, this subjectivity is what matters in our opinion. Even if medial phenomenon is here constantly questioned, it is as expressions of human existence in its subjectivity, not as the natural environment”.[^106]

From this internal perspective, the *milieu* is “the natural environment as seen and inhabited by subjective phenomenological agents”, in which the individual subjectivity develops itself in dialogue with others and with the surrounding natural world.[^107] Therefore, the *milieu* is at the same time both the outcome of individual subjectivities and their determining factor. It’s the outcome because intertwined multiple subjectivities shape the natural surroundings by means of their existences, practises, habits, and activities, thus creating their own medial imprints.[^108] It’s the determining factor because it represents the medial matrix (from Latin: mater/mother) that surrounds, informs, shapes, and guides the phenomenological agents living within it and experiencing it. In summary, conceiving the milieu as being both imprints and matrix goes beyond mere abstractions inherent in the generic notion of “environment” to catch the intertwined and dynamic relations informing humans as natural beings, as the concept of *milieu* mirrors an imagine

[^104]: Fūdo in Japanese.

[^105]: (Watsuji, 2004)

[^106]: (Watsuji, 2011), p. 204. Translation provided by (Droz, 2022), p. 34. The work of (O’Neill, et al., 2008) goes in the same direction, stating that “There is no such things as the environment. The environment – singular-does not exist. In its basic sense to talk of the environment is to talk of the environs or surroundings of some persons, being or community. To talk of the environment is always elliptical: it is always possible to ask: “whose environment”. This is also the position taken by (Droz, 2022) to whom this analysis refers.

[^107]: (Droz, 2022), p. 35. The author refers to it as a social dimension that mediates the human agent and its spatiotemporal environmental dimension

[^108]: (Droz, 2022), p. 38 defines collective imprints as the whole of the consequences of the actions (and indications) of the individuals that are part of a specific group. In this respect, individual actions are ontologically collective because they rest on collective significations and values and more concretely on tools and usages pertaining to a specific and cultural group.
of nature shaped by humans, who, in return, determine their own collective and individual subjectivity through such activity of shaping.  

This understanding of milieu from an internal perspective allows restorative justice approaches for environmental crimes to go beyond references to an abstract notion of “environment” to address victims’ existence in their subjectivity, in their concrete existence constituted by the sum of multiple relational processes of determination of human beings’ own identity, not only in relation with the others human beings, but also in relation with the natural surroundings. In short, it provides an imagine of human’s existence as constructed not in a vacuum, but rather intertwined within “medial relations”, that is within multiple relations with others and with the milieu, happening within, in Frisk’s words, the “relational milieu of actual concrete being with others”, in which relation refers to physical, sensorial action experiences with living beings, human and non-human alike. This zoomed-in perspective allows to highlight where the environmental victimhood vulnerability actually lies. As the milieu encompasses the natural surroundings in which a phenomenological human agent lives and develops his/her identity, the relations between human beings within and with their milieu are sensible to those human conducts that are detrimental for those natural surroundings. From an external and dualistic perspective, this refers to the processes of the environmental degradation seen before, in which the pollution is an exogenous driver that affects the socio-ecological system. From an internal perspective, the environmental offence resulting into the aforementioned notion of ecological harm is a violent driver that affects the medial matrix and results into a prevarication over victims’ capability to interact within and with their milieu and to shape it. It is in this capability to affect the relational realm constituting the milieu that the essence of such environmental violence lies. Environmental victimisation is thus a social and dynamic process that refers to the impairment of human agents’ capacity of interaction with and within their milieu, due to a brutal force generated by the environmental offence and resulting into what was earlier labelled as “ecological harm”.

From this connection between the concept of milieu and the one of environmental victimhood, two corollaries follow. In the first place, such victimhood enjoys collective nature, since the milieu is the place of intersubjectivity, where people meet and contribute to shape it by common interactions: the milieu is both the result of humans’ ways of life and what makes human life

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109 (Droz, 2022), p. 44 refers to a dynamic cycle in which the phenomenological agent leaves medial imprints on the milieu. The whole of such imprints (i.e. the Community/Society) shapes and changes the milieu, creating a medial matrix. In turn, this matrix determines how the agents interacts within the milieu. This process reflects the never-ending interactions between the individual and the external reality.

110 (Gergen, 2011).

111 (Friskics, 2001) 391, 395; 406.

112 (Hall, 2013), p. 3 refers to environmental victimization as an active social process.
possible. In Droz’s words, “the milieu is at the interface between the subjectivity of the individual phenomenological agent and the communality of the society or group that shares and influences it”. The milieu is precisely the outcome of the convergence of imprints of multiple individual agents interacting with each other and with the milieu. Therefore, individual human beings, communities and their surroundings are on the same continuum, and they cannot be separated one from the other, as they all are constitutive components and outcomes of the same milieu. From this, it is possible to infer a second corollary, that of the local scale in which environmental victimhood occurs. Every milieu is shaped differently from the others, as subjectivities develop differently and uniquely according to different collective significations and values pertaining to locally rooted real life cultural, social, and economic backgrounds. This feature differentiates the milieu, as an active and dynamic human experience, from an abstract understanding of environment as a static stage for human actors.

In light of these considerations, the notion of environmental victim for restorative justice purposes mirrors a process of diffuse victimisation that, ordinarily, can be identified with a local community settled on a certain degraded territory due to human ecologically harmful activities. Whereas community here refers to the convergence of different subjects’ experiences with their milieu as a single entity, i.e. the “community”. Following the case-study of this paper, the whole

113 (Droz, 2022), p. 36. Humans are intrinsically relational because as (Neisser, 1991), p. 198, writes “our assumptions about ourselves form a web of beliefs drawing their meanings from one another and providing each other with mutual support”.

114 (Droz, 2022), p. 45.

115 As (Droz, 2022), p. 47 clarifies, affirming the local nature of milieus does not amount to deny their global interdependence, that can be assessed by means of different scales of analysis, such as geology, climate, human settlements, land-use, but also scales of governance and regulation etc.

116 In this sense, it should be specified that although a physical community represents the paradigmatic case of victimhood, such as the Ikebiry one, “community” is not used here in a quantitative parameter, as to require a minimum number of components for it to be considered as such. Rather, it refers to a single entity, an autonomous system making one with its milieu. As such, and for the sake of the argument, this conception of the “community-milieu” rapport is applicable even to the quite remote hypothesis of a hermit being the only inhabitant of the degraded territory who develops a rapport of communality with his/her milieu. In this analysis, “community” thus indicates this communal rapport between the humane dimension and its nature, and it is precisely this rapport that restorative justice seeks to protect. This rapport is at stake even when the perception of harm is not equally shared by the members of a physical community, and even in the case in which some of these members are complicit in the determination of the harm (on how members of the same affected local community perceive differently the harm, see the sociological analysis of the community of Huelva carried out by (Natali, 2015). Indeed, a phenomenon of diffuse victimisation, such as the environmental one, pervades the whole networks of relations that constitute a community, regardless of the perception of its single components, thus affecting the community as a whole and consequently its common
Ikebiry community hold the status of victim, from a restorative justice lens, since the environmental offence hampered their milieu and in doing so, their capability to build their own collective and individual identities.

This understanding of environmental victimhood represents a shift from an external, and merely descriptive, ground of analysis of the dualistic relation existing between humans and the environment, towards an internal, and prescriptive, lens that sheds light on individual freedom to constitute its own identity by interacting both with the social dimension and the natural surroundings. This conceptualisation of environmental victimhood does not deny the importance of scientifical and legal assessment of the environmental/ecological harm, as seen before. However, from a restorative justice perspective, this external evaluation has to be followed by the human centred understanding of meanings and values that characterise the relation between the victim and its milieu. The diffuse victimisation phenomenon is unique, what changes is the lens through which observing this phenomenon: restorative justice requires the internal lens to understand the communal essence of such form of victimisation. Graining nature into the restorative justice narrative, the starting objective of this paper, does not intend to add an exogenous abstract element, the environment, alongside the human sphere, rather it means to look into human beings as phenomenological agents in the process of developing their identity within the natural reality and thus to consider the human victim as a human agent that makes one with nature. This common dimension is the milieu.

6. Conclusions

Understanding the concept of vulnerability characterising environmental victimhood is crucial for developing a restorative justice approach tailored on this specific category of victims. Nevertheless, so far, there is scant literature on this topic. Therefore, this article has proposed a conceptualisation of the notion of “environmental victim” for restorative justice purposes. In pursuing this goal, the foreground analysis has investigated the notion of environmental victimhood by relying upon a green criminological understanding of harm, in order to bypass shortcomings in ascertain environmental victimhood when framed along the continuum legal-illegal. A green criminological approach investigates the socio-legal background of harm, so to rapport with the natural dimension. Encompassing the communal consequences stemming from processes of diffuse victimisation is the goal that restorative justice aims at fulfilling.

Therefore, from a restorative justice perspective, the missing recognition of a collective right to a healthy environment does not impeaches the conceptualisation of environmental victimhood as the community settled on the degraded territory. In this respect, the legal parameter works as a parameter to objectively assess the qualitatively severity of the environmental degradation over the livelihood of human beings, not to delimit the status of victim.
bring to surface episodes of diffuse victimisation otherwise remaining beneath the surface. This was the case of the Ikebiri community, severely jeopardised by “lawful but awful” oil extractive activities in its enjoyment of the territory over which it is settled. The analysis then discussed two different but concurrent criteria to assess when the “environmental harm” actually occurs, namely the environmental degradation, read in conjunction with the theory of socio-ecological system, and that of the human rights threshold. Said parameters result into a qualified notion of “environmental harm”, that of “ecological harm”, based upon the philosophical understanding of socio-ecological relations based on ecocentrism, for which “humans and their activities are inextricably integrated with the rest of the natural world in communal or communal-like arrangements”.

On this ground, the paper distinguished between “environmental victim”, as the outcome of such complex notion of harm, and the rather neutral label of “victim of environmental crime”, highlighting that the concept of vulnerability underpinning the former category is based upon a deep entanglement between the humane and the natural sphere. From this first conceptualisation, the study then moved toward a more meaningful and nuanced understanding of the sense of such human-environment relation from a victim perspective, with the aim to highlight the relational realm that restorative justice ought to heal. In this sense, by adopting an internal perspective, the analysis argued that environmental victimhood’s vulnerability lies in the capability to develop a nexus with nature. Restorative justice for this category of victims is about redressing the prevarication over a community’s capability to interact within and with its milieu and to shape it. Accordingly, it was proposed a definition of “environmental victim” - the “community” – that mirrors the rapport of communality constituting the milieu, this being both the outcome and the matrix of subjects’ existence.

Although this communal notion of environmental victimhood seems to grasp the inner sense of vulnerability behind such category of victims, the issue to keep distinct this communal understanding of victim, paradigmatically represented by the physical community, from the constant reference to the abstract notion of “community” in the restorative justice narrative, rises. Community, in the restorative justice scholarship, represents a “proteiform entity”119, somewhen declined in physical terms - the territorial community - or in relational terms – the group to which both the victim and the offender belong.120 It is therefore clear the risk of overlapping the reference to the community with the notion of victim shared in this study. Future

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118 (Harris, 1998), p. 66.
119 (Reggio, 2008), p. 95.
120 (Esposito, 2010) revitalises the concept of community by emphasising the etymology of community “com munus”. The author thus departs from identity-based conceptualisation of community to embrace a sense of community centred on “with”, of “being with other”. In Esposito’s words, “The munus is the obligation that is contracted with respect to the other and that invites a suitable release from the obligation. The gratitude that demands new donations” (p. 5).
research should therefore address this issue by attempting to provide a meaningful conceptualisation of community for restorative purposes that does not merely reproduce the communal notion of victim, but rather attempts to “grain nature” in the systemic social factors that leaded to the perpetration of the environmental crime. In this respect, restore the community from the ecological harm would also imply to address the juridical categories that allowed the harmful activity to occur, and to reconceptualise them in a way consistent with the idea of the environment being humanity’s “common home”.

Bibliography


121 Here, reference is obviously to Pope Francis’ Encyclical Letter “On Care for Our Common Home” (2018) at https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html. The protection of environmental victims through a restorative justice lens would be part of a more complex project of pacification of our society, of which environmental protection represents one of the main challenges. In this respect, reference is to (Ferrajoli, 2021).


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