

Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment

Eileen Skinnider¹

March 2013

**International Centre for Criminal Law Reform
and Criminal Justice Policy**
**Le Centre international pour la réforme du droit criminel
et la politique en matière de justice pénale**

1822 East Mall, Vancouver, B.C./C.-B
V6T 1Z1 CANADA
Tel/Tél: + 1 604 822 9875
Fax/Télé: + 1 604 822 9317

Email/ Courriel: icclr@law.ubc.ca <http://www.icclr.law.ubc.ca>



We are pleased to share this information and encourage you to use this document for your own research purposes. Please ensure that all credits are acknowledged when using all or any of the information in this document. Commercial reproduction is strictly prohibited.

¹ This paper is an update of the paper published by the International Centre for Criminal Law Reform and Criminal Justice Policy, Skinnider, E., "Victims of Environmental Crime – Mapping the Issues" (ICCLR: March 2011). Found on-line at www.icclr.law.ubc.ca/files/2011/Victims%20of%20Environmental%20Crime.pdf.

Introduction

Environmental crime is one of the most profitable and fastest growing areas of international criminal activity.² Often perceived as “victimless”, there has been little attempt to describe the actual prevalence and consequences of victimization as a result of environmental crime. The complexity of victimization – in terms of time, space, impact, and who or what is victimized – is one of the reasons why governments and the enforcement community have trouble in finding proper responses.³ This paper seeks to advance the discussion on this matter by looking at emerging forms of crime that have a significant impact on the environment and identifying the key issues and challenges from the perspective of the victims that require further study and action.

Within this paper, the terms “environmental crime” and “emerging forms of crimes that have a significant impact on the environment” are used interchangeably. Both terms are broad and open to debate as neither has a definition agreed to by the international community. The discussion guide, prepared for the thematic discussion of the twenty-second session of the Commission on Crime Prevention and Criminal Justice on this issue, mentions that both terms refer to “unlawful conduct that directly or indirectly harms the environment”.⁴ More will be said later about this definition and how it affects how we determine the range of victims.

Setting the context

Environmental crime affects all of society. It can have detrimental consequences on the economies and security of a country. For individuals, local communities and indigenous people, it may impact public health, livelihoods, and lower property values, as well as impacting on non-human species, nature itself, as well as future generations. It may cause many different types of harms or damages. Victims can suffer from various types of harm, discussed in more detail later in this paper, including: direct or indirect; point source or diffuse; individual or cumulative; local, trans-boundary or global; and short term or long term harm. The effects of a single offence may not appear significant but the cumulative environmental consequences of repeated violations over time can be considerable. The perpetrators might be individuals, collective groups, corporations, governments and organized criminal groups.

Take for instance, illegal logging. This unlawful conduct contributes to the process of deforestation and forest degradation, depriving forest communities and indigenous peoples of vital livelihoods, causing ecological problems like flooding, and is a major contributor to climate change, as up to one fifth of greenhouse gas emission stem from deforestation.⁵ In addition, it threatens biodiversity, undermines sustainable forest management, development and good governance and can be linked to armed conflict.⁶ Whether the illegal logging is part of the illicit trafficking in protected species of wild flora and

² According to the *International Crime Threat Assessment*, on-line <http://www.fas.org/irp/threat/pub45270index.html>.

³ See Environmental Crime and its Victims Conference, 17 & 18 September 2012, Book of Abstracts, ed. Toine Spapens, Marieke Kluin and Rob White, on-line www.environmentalcrimeseminar.com.

⁴ Discussion guide for the thematic discussion on the challenges posed by emerging forms of crime that have a significant impact on the environment and was to deal with it effectively. Note by the Secretariat. E/CN.15/2013/2, 12 February 2013.

⁵ See O’Hear, Michael, “Sentencing the Green-collar offender: punishment, culpability and environmental crime” (2004) 95: 1 *Journal of Criminal Law and Criminology*.

⁶ Tubbing, Anemike, from Book of Abstracts, *supra* note 3.

fauna involving organized criminal groups and corrupt government officials or a violation of regulations or permits by multinational logging corporations, the consequences of the environmental harm experienced by the victims is the same.

Effects, Issues and Challenges for Victims of Environmental Crime

The thematic discussion guide calls us to examine emerging trends and challenges regarding issues of criminalization and criminal justice to assist in developing possible responses, programmes, and initiatives to deal effectively with emerging forms of crime that have a significant impact on the environment. Taking this up from the perception of victims and victimization, this paper hopes to contribute to Member States' debate on how to define and respond to these emerging forms of crimes.

1. The definition of "environmental crime" has implications as to the identification of the range of victims

According to the thematic discussion guide, from a criminal law perspective, environmental crimes are contraventions of pre-existing laws sanctioning illegal conduct with criminal penalties, typically based on environmental management regulations. It also calls on Member States to further debate as to how to define "environmental crime".⁷ This uncertainty in definition results in difficulty in categorizing victims neatly by type of victim and type of damage suffered.

In the literature, we see a range of approaches taken in defining "environmental crime":

- A narrow interpretation of environmental crime is that it covers only activities prohibited by current criminal law.
- Others suggest that the definition should also include any illegal activities or formal rule-breaking, whatever form the rule might be, so would include administrative and regulatory sanctions. This recognizes that given the influence of business interests over law and regulation, conduct that might be criminal in one jurisdiction might be dealt with lesser sanctions in others.
- Still others suggest that the definition should include activities which are "lawful but awful". This one recognizes the fact that many environmental disruptions are actually legal and take place with the consent of society.

Broadly defined, anyone or anything harmed by environmental disruptions may be seen as a victim. However, the extent that environmental harm is criminalized or sanctioned in law may have implications for who the authorities view as victims. By focusing only on violations of criminal or regulatory law, the number and type of victims studied are constrained. The victim, whether this is an individual, the "general public" or the "environment" is limited to the term applied in the specific context of the offence and how the offence is defined within the law. Criminal law generally focuses on individual victims whereas environmental legislation often describes the environmental harm as an offence against

⁷ The thematic discussion paper notes that: "[T]he challenges for States in collecting data on environmental crime are big, even when a clear and separate definition of the legal offence exists in national criminal law. However in many countries for instance, actions that have a significant negative impact on the environment fall primarily under administrative offences or environmental or health regulations and are therefore not reflected in crime statistics." See Discussion Guide, *supra* note 4.

public interest. From the perspective of the victim, the same kind of “harmful consequences” can result whether the offence is classified as a crime, a regulatory offence or negligent action.

Classifying what is an environmental crime will involve a complex balancing of communities’ interests in jobs and income with ecosystem maintenance, biodiversity and sustainability. The reality of our age is that much of the economy is based on the exploitation of natural resources. The regulatory regime has been formulated to assist industries in committing environmental damage within the legal limits and is not really formulated with victims in mind or to provide clear guidelines as to which concrete acts are to be regarded as punishable offences.⁸ Added to all this uncertainty is that our understanding of “harm” to victims is constantly shifting as scientific knowledge advances.

For example, in some jurisdictions, the laws permit a small amount of pollution that is considered “harmless” or manageable. Where it is difficult to distinguish between legal and illegal pollution, it is also hard to distinguish victims. For individuals or communities who suffer from the accumulation of small discharges of pollution, they might not be considered victims under the local law. Perhaps the increased involvement of organized criminal groups in polluting activities was not envisioned when State’s drafted their regulations. From a victim’s perspective does it matter if the river is being polluted by organized criminal groups disposing of toxic waste from meth labs or by the legal dumping by a corporation?

Some criminologists argue that many of the most serious forms of environmental risk come from “normal social practice”. For example, currently lawful practices such as using old oil tankers arguably create great risk from an ecological perspective. Perhaps with an increasing awareness and scientific knowledge of the environment and the impact of harmful practices, this will influence law reform in this field. However this raises the debate of crime versus social harm. There is a need for criminal justice systems to function with certainty in order to be fair and consistent. The question then is whether environmental harm can fit neatly into the existing criminal justice system.

2. The collective nature of this victimization

With environmental crime, the victimization is often serious, not so much because any individual victim was seriously affected, but because numerous victims were affected by the crime. Individual victims might lose very little but the accumulative effect to the community and the environment can be considerable.

The collective nature of this kind of victimization needs to be better understood, particularly with its implications for victims to seek assistance, support and redress which have predominately been developed for traditional crimes involving individual victims. Questions for further study include: can the traditional concept of individual victimization adequately incorporate the collective victimization often experienced by victims of environmental crime? Are the existing rights and remedies responsive to the particular needs and challenges experienced by collective victims of environmental crime? What are the

⁸ Du Rees, Helena, “Can Criminal Law Protect the Environment” (2001) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 109-126 and Bricknell, Samantha, “Environmental Crime in Australia”. Australian Institute of Criminology Reports, Research and Public Policy Series No. 109 (Canberra: Australian Institute of Criminology, 2010).

“access to justice” mechanisms in place that can handle collective claims or representative claims on behalf of victimized groups?

Where the harm is not very obvious or direct, or the full impact is not felt until long after prosecution, are these “victims” accorded victim status in the criminal justice system? The challenge for victims includes convincing the authorities that the harm actually has taken place, quantifying the level and extent of harm, particularly the cumulative effect, and the causal connection to the illegal act. Further study is needed to explore new approaches by criminal courts in dealing with collective victimization, and whether jurisdictions allow for designated representatives of a community that has been harmed to have standing as victims in criminal cases. For collective victimization where the impact is felt and the harm complete, identification of all victims can pose a logistical problem. How do prosecutors ensure that the victims have been notified of their rights? How much “access” to the prosecutor should the victims have? As argued by American prosecutors, “if every victim in a large scale environmental case were given unfettered access to the government’s attorney at every stage of the case, criminal prosecutions could be significantly delayed and the government’s resources stretched thin”.⁹ What is reasonable in these cases to ensure victims’ rights but also avoid basic logistical problems?

Where the full impact to specific individuals is unknown, some courts, such as one in New Zealand, have classified the cumulative effect of victimization to the community as loss of enjoyment of the environment.¹⁰ Another example is from a criminal case in the Northwest Territories in Canada. Here the crime involved attempting to export four falcon eggs, the judge held that the community suffered loss when wildlife was harmed as in the community “wildlife is an essential feature of life and not only that it is a treasured resource to be conserved, husbanded, protected and fostered, so it can continue to provide sustenance for the body and for the spirit in future ages as it has in the past ages”.¹¹

In such cases, the remedies such as restitution orders in some jurisdictions envision collective victimization. Examples include: an order for restoration of any harm to the environment caused by the commission of the offence; payment of the costs and expenses incurred by a public authority in restoring any harm to the environment; costs for carrying out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit; payment of a specified amount to an environmental trust or a specified environmental organization for the purpose of a specified project for the restoration or enhancement of the environment.

The Rome Statute establishing the International Criminal Court might provide useful examples of how victims who have been collectively victimized might access reparations for the harms they suffer. Of interest, is the current work under way to develop a Convention of Basic Principle of Justice for Victims of Crime and Abuse of Power based on the UN Declaration.¹² The latest draft envisions victims as natural

⁹ Starr, Judson, Flack, Brian and Foley, Allison, “A New Intersection: Environmental Crimes and Victims’ Rights” (2009) Vol 23 No. 3 Natural Resources & Environment.

¹⁰ The Hon. Preston, Brian J., “Principled Sentencing for Environmental Offences” paper presented to the 4th International IUCN Academy of Environmental Law, White Plains, New York, 16-20 October 2006, on-line:

[www.lawlink.nsw.gov.au/lawlink/.../Sentencing%20.../Sentencing%20-%20New%20York%20\(updated\).doc](http://www.lawlink.nsw.gov.au/lawlink/.../Sentencing%20.../Sentencing%20-%20New%20York%20(updated).doc).

¹¹ Krey v R (1982)(NWT Terr. Ct).

¹² Following the UN General Assembly adoption in 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” a suggestion was made by some to develop a victim’s rights convention. Following that suggestion, the initiative was taken by

persons who, individually or *collectively*, have suffered harm in relation to victimization from violations of criminal law or abuse of power. The draft also specifically refers to environmental crime and calls of States Parties to legislate to include restitution to restore the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of the community (article 10(1)(b)).

This collective nature often reflects mass victimization which is not necessarily concentrated in time and space, impacting individuals at different times and different locations, often across borders. This collective victimization also has inter-generational implications. Environmental crime has been described as being of an abstract nature, more about future generations and what the environment will look like for them. Therefore future generations are seen as a category of potential victims. How would victims who do not yet exist get redress for harm that may not manifest itself concretely for many years? At least one case recognized future generation as plaintiff and authorized an action against the government of the Philippines, which was started by a lawyer claiming to represent future generations.¹³ Mr. Oposa brought an action to challenge the decision of the Department of the Environment and Natural Resources to grant a harvesting license to a company. He argued that with the current forestry scheme there would be no more forest in the Philippines and that future generations would not be able to benefit from this great natural resource and that this would result in a violation of the right to a healthy environment guaranteed in the Philippines Constitution. To represent the future generation he used his own children as plaintiffs and argued that they represented the future generations. The court agreed.

3. Lack of self-identification as victims

The victims of environmental crime are not always aware of the fact that they have been victimized. Even when the individuals are aware of the impacts of environmental harm, they might not consider themselves as “crime victims” or report the harm to enforcement agencies. The victimization is often delayed with the victim becoming aware of the harm much later after the crime was committed or victimization might be repeated multiple times, meaning the harm is accumulated over time and from a number of acts. The direct victimization of the environmental crime may be experienced by non-human species, such as wildlife and their habitats, which is difficult to capture as well as causing time delay when it indirectly affects humans.

The fact that the damage may be difficult to identify as the damage might not be immediate or have a future impact, or may not be quantifiable in financial terms, adds to the lack of victim self-identification. If victims do not self-identify as crime victims, they might be limiting their remedies to civil law. If victims are not aware of the shifting societal and corporate values and new conceptualization of what is a “crime”, this too will limit their remedies. A question for further study: where victimization is

independent experts to draft the UN Convention on Justice and Support for Victims of Crime and Abuse of Power. For more information see Willem van Genugten, Rob van Gestel, Marc Groenhuijsen and Rianne Letschert “Loopholes, risks and ambivalence in international lawmaking: the case of a framework convention on victims’ rights” (2006) 37 Netherlands Yearbook of International Law, pp.109-154.

¹³ *Minors Oposa v Secretary of the Department of the Environment and Natural Resources*, Supreme Court of the Philippines, [G.R. No. 101083, 30 July 1993].

widespread and consequentially often unrecognized, how can individuals be taught to recognize their own and others victimization?¹⁴

As a result of the lack of victim self-identification, many forms of environmental crime are not reported by victims. This, as well as the fact that they are not easily observed or detected and do not make an obvious impact, creates great challenges for law enforcement agencies. Questions for further study include: for law enforcement officers in cases where victims do not self-identify, what pro-active criminal investigative strategies are available; what knowledge and skills are required for this type of investigation; and how to coordinate with other government agencies having specific tasks in this field?¹⁵

4. Victims are not sure about who victimized them or who is exactly responsible

Being able to identify the perpetrator is important for victim remediation insofar as it facilitates criminal investigations and allows victims to pursue civil recourse. Identifying the perpetrator in environmental cases and establishing criminal liability can be extremely difficult as the chain of causation from perpetrator to harm can be long and complex. Environmental crime can affect more than one country or be considered a global issue. This adds to the difficulties for the victims and law enforcement in identifying the perpetrators.

Transnational environmental crime involves transactions beyond one state and often include wildlife trafficking and the illegal trade in ozone depleting substances, the illegal dumping and transport of hazardous waste, illegal logging and timber trade and illegal, unreported and unregulated fishing. The environmental harm itself may be transnational in nature, for example pollution of a river that crosses international boundaries.

With increasing concern of organized criminal groups involved in transnational environmental crime, these crimes can also involve legitimate corporations and state officials in the illegal activity. The perpetrators can range from small scale opportunistic activity all the way to large scale organized criminal groups involving other crimes including, for example, money laundering, human trafficking and corruption. More research is needed to look at the victimization aspects of transnational environmental crime. Of particular concern is that this form takes advantage of developing countries that have less stringent environmental regulations than developed countries and that are undermined by underdevelopment, corruption, abuse of power and armed conflict. The citizens of poor countries are at particular risk from both organized criminal groups and the legitimate corporations.

Some environmental crime / harms can be global in nature, for example environmental crimes that contribute to climate change.¹⁶ The question of who are the victims and who are the perpetrators of climate change is an extremely complex one. If responsibility is extended to all who have had some causal role in producing a certain result, the victims might also be considered the perpetrators.

¹⁴ Pemberton, Antony, "Environmental victims and criminal justice: proceed with caution". See *supra* note 3.

¹⁵ Spapens, Toine, "Invisible victims: the problem of investigating environmental crime". See *supra* note 3.

¹⁶ Some reports note that climate change itself can cause criminal behaviour, mainly, the fraudulent and collusive behaviour associated with the establishment of carbon offset and trade emission schemes.

Therefore criminal law must be clear as to what behaviour is illegal as it “cannot render the whole society guilty of significant offences without undermining itself”.¹⁷ The issue of global environmental harm has had more traction with the international human rights framework. The UN Human Rights Council has passed resolutions noting that climate change has implications for the full enjoyment of human rights and that the world’s poor are particularly vulnerable. The UN Declaration on the Rights of Indigenous Peoples codifies the right in providing indigenous people the “right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”.

5. The “environment” itself as a victim

Considering the environment as a victim focuses on how the illicit behaviour harms the biodiversity and ecological integrity of the planet rather than human beings. Adopting this approach would broaden the environmental protection regime and impact on the concept of victimization. Our environment is often treated as a virtually unlimited resource that can be exploited without grave consequences. Yet the harms can be irreversible, such as extinction of species, destruction of natural landscapes, climate change, as well as harms to humans. Some jurisdictions have incorporated the rights of nature into their Constitutions and provide that every person, people, community or nationality are able to demand the recognition of rights of nature before public bodies.¹⁸ One scholar looked at different ways to measure the “value” of the environment and therefore the extent of victimization to the “environment”.¹⁹ Examples of determining the value could include: looking at the cost of replacing it or of restoring it to its original condition, or trying to determine the monetary value people place on non-market items such as threatened species, free running streams and clear skies.

Appreciating the extent of victimization of the environment will depend on the perspective one takes. The traditional anthropocentric perspective sees non-human nature as an instrument for humans, “something to be appropriated, processed, consumed and disposed of in a manner which best suits the immediate interests of human beings”.²⁰ In this view, victims are people, whether this is defined as individuals victims or communities or seen as future generations, through the principle of intergenerational equity, which requires the present generation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations and for the concept of sustainable development, which means development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Alternative perspectives include the ecocentric perspective, which views human beings as merely one component of complex ecosystems that should be preserved for their own sake. Here the victim is specific environments and non-human species. Scholars from the animal rights perspective take the

¹⁷ Megret, Frederic, “The Challenge of an International Environmental Crime”, on-line: <http://ssrn.com/abstract+1583610>.

¹⁸ Rights of Nature Articles in Ecuador’s Constitution. Article 10. Persons and people have the fundamental rights guaranteed in this Constitution and in the international human rights instruments. Nature is subject to those rights given by this Constitution. See Chapter 7th: Rights for Nature, articles 71-74. Article 71: Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structures, functions and its processes in evolution..... Article 72. Nature has the right to restoration.

¹⁹ Benidickson, J. Environmental Law (Toronto: Irwin Law: 2009).

²⁰ Mark Halsey and Rob White “Crime, Ecophilosophy and Environmental Harm” (1998) 2 Theoretical Criminology 345 at p. 349.

position that animals are themselves victims as “individuals”, not just part of nature.²¹ The biocentric perspective sees any human activity that disrupts a biotic system as environmental crime. These last two perspectives prioritize the intrinsic value of ecosystems over human interests.

Scholars advocate for the use of restorative justice approaches in the context of environmental prosecution as these are often more flexible, proactive and suitable for the broader understanding of victims.²² These relatively new “green” sentencing options might be more preventive than punishment, such as restorative or enhancement of the environment in public places, as well as other creative punishments, including environmental audits of company activities, publication of the offence, and a requirement for notification in company annual reports.

Questions for further study could include: how do current justice systems respond to victims that include non-human species and the environment itself and deal with the complexity of environment sustainability and intergenerational equity? How do the various legal regimes (criminal, regulatory, administrative or civil) conceptualizes “victims” and do certain regimes offer better protection for different groups of victims.

Conclusion

The Thematic Discussion Guide recognizes that environmental victimization is a serious social and political problem that transcends national boundaries and is a topic of interest to a broad range of different intergovernmental forums. The Crime Commission, in focusing on its specific mandate of crime prevention and criminal justice aspects, can add value by studying the actual prevalence and consequences of victimization as a result of environmental crime. It is crucial to appreciate the extent of victimization, the losses and damages caused by these forms of crime, who and what are affected, from individuals, local communities and indigenous peoples, to nature itself, non-human species, the ecosystems and biodiversity, as well as the challenges victims face in accessing justice. This can contribute to the development of a holistic response wherein the criminal justice system is an effective tool and part of a plethora of mechanisms to protecting the environment.

²¹ White, Rob, “Victims of Environmental Crime” (Presentation at the UNICRI conference: November 23, 2012).

²² Fisher, Richard and Heffernan, Felicity and Verry, John, “Restorative Justice Approaches in the Context of Environmental prosecution”.