

**Victims of  
Environmental Crime –  
Mapping the Issues**

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*THE INTERNATIONAL CENTRE FOR CRIMINAL LAW  
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# **Victims of Environmental Crime – Mapping the Issues**

**Eileen Skinnider**

Director of Human Rights and Research  
International Centre for Criminal Law Reform  
and Criminal Justice Policy

March 2011

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## INTRODUCTION

In recent years, with greater understanding of the need to protect the environment and a better appreciation of what the environment can and cannot sustain, regulation, and in some cases, criminalization of harm to the environment is becoming more accepted.<sup>1</sup> Environmental crime has been identified as one of the most profitable and fastest growing areas of international criminal activity, with increasing involvement of organized criminal networks<sup>2</sup>. Serious environmental harms committed by otherwise legitimate corporations for financial motives are increasingly attracting media attention.<sup>3</sup> At the 12<sup>th</sup> United Nations Congress on Crime Prevention and Criminal Justice (2010), the international community acknowledged the challenges posed by emerging forms of crime that have significant impact on the environment and called on Member States to study this issue and share best practices.<sup>4</sup>

Despite this growing awareness, environmental crimes often fail to prompt the required response by governments, the enforcement community and the public. Often perceived as

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<sup>1</sup> Samantha Bricknell, *Environmental Crime in Australia*. Australian Institute of Criminology Reports, Research and Public Policy Series No. 109. (Canberra: Australian Institute of Criminology, 2010) at p. 2.

<sup>2</sup> According to the *International Crime Threat Assessment*, an estimated \$22-31 billion is made each year from illegal dumping of hazardous waste, smuggling of hazardous material and abuse of scarce natural resources. Estimating the scale of environmental crime is problematic. Interpol estimates that global wildlife crime is worth at least \$10 billion a year. The World Bank states that illegal logging costs developing countries \$15 billion in lost revenues and taxes. In the mid-1990s around 38,000 tonnes of CFCs were traded illegally every year – equivalent to 20% of global trade in CFCs and worth \$500 million. In 2006 up to 14,000 tonnes of CFCs were smuggled into developing countries. See online:<http://www.fas.org/irp/threat/pub45270index.html>

<sup>3</sup> The most recent example is the Deepwater Horizon oil rig explosion, killing 11 workers and triggering oil gushing uncontrollable for nearly three months into the Gulf of Mexico. See Campbell Robertson and John Collins “Cleanup and Questions Continue” New York Times, November 3, 2010.

<sup>4</sup> Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, 19 April 2010, A/CONF 213/18, para 14 [Salvador Declaration]: We acknowledge the challenge posed by emerging forms of crime that have a significant impact on the environment. We encourage Member States to strengthen their national crime prevention and criminal justice legislation, policies and practices in this area. We invite Member States to enhance international cooperation, technical assistance and the sharing of best practices in this area. We invite the Commission on Crime Prevention and Criminal Justice, in coordination with the relevant United Nations bodies, to study the nature of the challenge and ways to deal with it effectively.

“victimless”, environmental crimes do not always produce an immediate consequence, the harm may be diffused or go undetected for a lengthy period of time. Added to this is the fact that many environmental disruptions are actually legal and take place with the consent of society. Classifying what is an environmental crime involves a complex balancing of communities’ interest in jobs and income with ecosystem maintenance, biodiversity and sustainability.

Environmental crime affects all of society.<sup>5</sup> It can have detrimental consequences on the economies and security of a country. For individuals and communities, it may impact public health, livelihoods, and lower property values, as well as impacting on non-human species, nature itself and future generations. The effects of a single environmental offence may not appear significant but the cumulative environmental consequences of repeated violations over time can be considerable.

Victims of environmental harm are not widely recognized as victims of “crime” and thus are excluded from the traditional view of victimology which is largely based on conventional constructions of crime. This has meant little attempt to describe the actual prevalence and consequences of environmental crime victimization. Environmental crime victims challenge the traditional victimology approach as they are often victimized collectively and can involve non-conventional victims (non-human species, the environment and future generations). The far-reaching impacts of environmental crime raise complex and unique issues for both victims and government.

The objective of this report is to advance the knowledge of the legal and policy issues for victims of environmental crime. Historically, research on environmental crime has lacked the theoretical and methodological depth that has been undertaken for other traditional

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<sup>5</sup> For example, illegal logging contributes to deforestation, depriving forest communities of vital livelihoods, causing ecological problems like flooding, and is a major contributor to climate change (up to 1/5 of greenhouse gas emissions stem from deforestation). Michael O’Hear “Sentencing the Green-collar offender: punishment, culpability and environmental crime” (2004) 95:1 Journal of Criminal Law and Criminology.

crimes.<sup>6</sup> In particular, the field of victimology has paid little attention to this type of victimization or to understand how it differs from other types of victimization. Nor has it considered implications for these victims in seeking access to justice, redress, assistance and support.

This research maps out the issues relating to victims of environmental crime and identifies topics requiring further study. Part I provides a brief overview of the international and domestic legal framework, using Canada as the case study, before examining some of the conceptual debates regarding definitions and philosophical perspectives. Part II explores the range and types of victims, mapping out the issues for further study. Part III sets out the legal and quasi-legal bases upon which victims of environmental crime can access justice and apply for various types of remediation.

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<sup>6</sup> Carole Gibbs et al, notes that one reason might be that environmental studies has largely been left to other disciplines. Carole Gibbs et al, *Introducing Conservation Criminology: Towards Interdisciplinary Scholarship on Environmental Crimes and Risks* (2010) 50 Brit. J. Criminol. 124-144 at p.124.



# PART I: THE LEGAL FRAMEWORK

Environmental crime creates particular challenges for victims. The legal framework is complex, involving different goals and philosophies, such as sustainable development, inter-generational equity, criminal justice and regulatory regimes, and victims' rights. Before analyzing the range and type of victims and their access to justice issues, this Part of the paper provides a brief overview of the international and national legal frameworks, illustrating the complexity of the systems in which victims must operate.

## 1. The International Framework

The international community has developed a broad range of norms and standards to protect the environment and natural resources affected, impacted or endangered by human activities with a focus on sustainable development. Criminal law has a place in ensuring sustainable development; however, it is not the only tool and is part of a plethora of mechanisms.

### (i) International environmental law

#### *(a) Protecting the environment under international law*

At the international level over 200 multilateral environmental agreements (MEAs) formalize international obligations regarding the protection of biodiversity and ecosystem services<sup>7</sup>, the marine environment and the atmosphere, sustainable development, regulation of the use of chemicals and transfer and disposal of

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<sup>7</sup> The Millennium Ecosystem Assessment (2005) formalized the definition of ecosystem services (which are the benefits for humankind from a multitude of resources and processes supplied by nature) into four categories: provisioning, such as the production of food and water; regulating, such as the control of climate and disease; supporting, such as nutrient cycles and crop pollination and cultural, such as spiritual and recreational benefits. Biodiversity is not regarded as an ecosystem service itself, but rather as a pre-requisite underpinning each of them. See UNEP and the Secretariat at the Convention on Biological Diversity "Ecosystem Services" pamphlet at <http://www.cbd.int/iyb/doc/prints/factsheets/iyb-cbd-factsheet-ecoservices-en.pdf>.

waste.<sup>8</sup> This broad framework reflects the international community's recognition of the interdependence between development and the environment by integrating environmental protection in regulatory regimes.<sup>9</sup> This is reflected by a crucial concept of environmental law: sustainable development. Its most common and generally accepted definition<sup>10</sup> is found in the Brundtland report of 1987: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>11</sup> If development is not environmentally sustainable, the consequences for people and the extent of their victimization can be considerable.

*(b) The status of victims in international environmental law*

MEAs place emphasis on responsibilities of States rather than on the rights of people, including victims. As a general rule, MEAs do not consider people (individual or collective) as victims per se. There is a provision in the *Convention on Biological Diversity* that

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<sup>8</sup> Some of the more notable treaties include: *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 12 I.L.M. 1080 (1973) [CITES]; *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1541 (1987) [Montreal Protocol]; *Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 28 I.L.M. 657 (1989) [Basel Convention]; *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 13 November 1972, 11 I.L.M. 1294 (1972) [London Convention] (updated in the 1996 Protocol); *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 12 I.L.M. 1319 (1973) (modified by the Protocol of 1978) [MARPOL 73/78].

<sup>9</sup> See Philippe Sands "Introduction" in Philippe Sands, ed, *Greening International Law* (London (UK): Earthscan Publications, 1993); Philippe Sands *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003) at pp.253 to 256 and 263 to 266; Patrica Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment* (Oxford: Oxford University Press, 2009) at pp.55 and 116 to 118; Jean-Maurice Arbour & Sophie Lavallée, *Droit International de l'Environnement* (Cowansville (QC): Éditions Yvon Blais, 2006) at pp.66-67; Jaye Ellis & Stepan Wood, "International Environmental Law" in Benjamin Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Portland (OR): Hart Publishing, 2006) at pp.375, 378 and 379; and *Agenda 21*, UNCED, Report, I (1992), Chapter 8.

<sup>10</sup> Marie-Claire Cordonier Segger "Sustainable Development in International Law" in David Armstrong, *Routledge Handbook of International Law* (New York: Routledge, 2009) at p.356.

<sup>11</sup> Report of the World Commission on Environment and Development: *Our Common Future*, 4 Aug. 1987, UN GA Res., A/42/427 (1987), at Chapter 2, par.1. Canada adopts this definition in s.3 of Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33. See also: Marie Claire Cordonier Segger & Ashfaq Khalfan, eds, *Sustainable Development Law – Principles, Practices, & Prospects* (Oxford: Oxford University Press, 2004), at p.103 and Duncan French, *International law and policy of sustainable development* (Manchester: Manchester University Press, 2005) at p.55; and at Article 7.2 *New Delhi Declaration on Principles of International Law Relating to Sustainable Development* (London: International Law Association, 2002).

relates to non-state actors when referring to traditional knowledge of indigenous people. On rare occasions when individuals are protected, the State adopts their cause and brings a claim to an international tribunal.<sup>12</sup> However the cases will be defined and controlled by the States involved and not by the victims.

The *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters* (Aarhus Convention) is one of the few MEAs that involve citizens.<sup>13</sup> This European regional treaty, open for signature and ratification to Canada and other states, takes a comprehensive approach to government accountability and environmental protection by emphasizing public participation. The treaty recognises the importance of three pillars – access to information, public participation and access to justice – to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.<sup>14</sup> “The public concerned” has a broad meaning to include the public affected or likely to be affected by, or having an interest in, the environmental decision-making and they are to have access to a review procedure to challenge any environmental decision, act or omission.<sup>15</sup> Non-governmental organizations (NGOs) promoting environmental protection are deemed to have an interest.

The *Protocol on Strategic Environmental Assessment* (Kiev Protocol) to the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention) calls on States Parties to ensure early, timely and effective opportunities for public participation in the strategic environmental assessment of plans and programmes.<sup>16</sup> The Governing Council of the UN Environmental

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<sup>12</sup> For example, the *Trail Smelter* Case involved private lands that were damaged in the state of Washington by smoke coming from a smelter in British Columbia owned by a private corporation. The two governments represented the individuals in the cases. This example is based on international customary law rather than a specific MEA. *Trail Smelter* Case, 16 April 1938 and 11 March 1941 Vol III Reports of International Arbitral Awards (1905-1982) (UN: 2006). Online: [http://untreaty.un.org/cod/riaa/cases/vol\\_III/1905-1982.pdf](http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf).

<sup>13</sup> 25 June 1998, 38 I.L.M. 515 (1999) [*Aarhus Convention*] Thirty-nine countries and the European Community have since signed it.

<sup>14</sup> The preamble of the *Aarhus Convention* recognizes an environmental right: “every person has the right to live in an environment adequate to his or her health or well-being”.

<sup>15</sup> *Aarhus Convention*, *supra* note 13 at art. 9.

<sup>16</sup> 21 May 2003, Doc. ECE/MP.EIA/2003/2 [*Kiev Protocol*], at art. 8.

Programme has recently considered two sets of guidelines that assist States in developing national legislation on access to information, public participation and access to justice in environmental matters<sup>17</sup>, as well as on liability, response action and compensation for damage caused by activities dangerous to the environment<sup>18</sup>.

*(ii) International criminal law and the environment*

Internationally, *Protocol I* to the *Geneva Convention* first established the only direct international criminal offence regarding the environment, which provides for a “prohibition of the use of methods of warfare which are intended or may be expected to cause (widespread, long term and severe) damage to the natural environment”.<sup>19</sup> This has been incorporated into the *Rome Statute of the International Criminal Court (ICC)*.<sup>20</sup>

*(a) Argument for establishing an international crime against the environment*

At the time of drafting a *Code of Crimes Against the Peace and Security of Mankind* in 1996, the International Law Commission proposed a definition for an international crime against the environment, requiring a serious willful act with harm having an international element.<sup>21</sup> However, this was not adopted in the *Rome*

<sup>17</sup> Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010, online: UNEP, <<http://www.unep.org/DEC/PDF/GuidelinesAccessstoJustice2010.pdf>.

<sup>18</sup> Draft Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, considered by an Inter-governmental Meeting in Nairobi, 9-11 Nov 2009 (UNEP/Env.Law/IGM.Lia/2/2 (9 Oct 2009)), online: <http://www.unep.org/dec/PDF/events/guidelinesandcommentaryannexes.pdf>.

<sup>19</sup> *Convention Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.

<sup>20</sup> *The Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, article 8(2) (b)(iv) [Rome Statute].

<sup>21</sup> The International Law Commission proposed the following elements of such a crime: (1) The act must be serious (seriousness being deduced from either the nature of the act or the magnitude of the effects). (2) The harm must have an international element (as when it is transboundary or some human commons are affected). (3) The conduct need not be prohibited by any specific environmental norm (if it targets the foundations of human society, it must be deemed unlawful per se). (4) The act must be willful. See: Christian Tomuschat, “Document on Crimes Against the Environment: Draft Code of Crimes Against the Peace and Security of Mankind (Part II) - Including the Draft Statute on the International Criminal Court” (27 March 1996).



*Statute*. Some scholars have argued that the time has come to establish an international crime against the environment.<sup>22</sup> If such a crime is added to the *Rome Statute*, victims (individually or collectively) would be eligible to get compensation from the ICC Victims Trust Fund. The ICC could also make orders for forfeiture and restitution or orders for compensation and rehabilitation to help victims recover from the environmental damages they and their community suffered.<sup>23</sup> There is also a campaign to include “ecocide” in the *Rome Statute*, which has been defined as “the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished”.<sup>24</sup> Ecocide would include damage done to any species, not just humans.

*(b) Argument for establishing crimes against future generations*

Closely related to sustainable development, inter-generational equity and the potential international crime against the environment is the new Campaign to End Crimes against Future Generations.<sup>25</sup> The campaign seeks to add a new crime to the *Rome Statute*. It would criminalize serious violations of economic, social and cultural rights and severe environmental harm and is based on already existing international norms such as the prevention of transboundary environmental harm, the *International Covenant on Economic, Social and Cultural Rights*, and the *Rome Statute*.<sup>26</sup> A draft definition of crimes against future generations includes three environmental

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<sup>22</sup> See Frédéric Mégret “The Case for a General International Crime Against the Environment”, online: <http://ssrn.com/abstract=1583968>.

<sup>23</sup> *Rome Statute*, articles 68, 75 and 79.

<sup>24</sup> Polly Higgins, *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide* (London (UK): Shephard-Walwyn, 2010).

<sup>25</sup> See <http://ecafig.org/>.

<sup>26</sup> Sébastien Jodoin, *Crimes against Future Generations - A New Approach to Ending Impunity for Serious Violations of Economic, Social, and Cultural Rights and International Environmental Law* (World Future Council and the Centre for International Sustainable Development Law, 2010) at pp.3 to 5.

sub-sections.<sup>27</sup> The acts (deliberately depriving members of any identifiable group or collective of objects indispensable to their survival; causing widespread, long-term and severe damage to the natural environment; and unlawfully polluting air, water or soil) must be committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety or means of survival of any identifiable group or collectivity.

### (iii) UN Crime Commissions and Congresses

The UN Commission on Crime Prevention and Criminal Justice first addressed the issue of environmental crime in 1995. At that time, a resolution was adopted on environmental crime urging Member States to “consider acknowledging the most serious forms of environmental crimes in an international convention”.<sup>28</sup> Particularly relating to victims, paragraph (i) provided that “in designing environmental law enforcement strategies, the legislator should consider in the framework of the constitution and the basic principles of the legal system, the *rights of identifiable victims, victim assistance, facilitation of redress and monetary compensation, by removing legal barriers such as standing to sue, participation in proceedings and actions by citizens, including class action suits and citizen suits*” (emphasis added).

To date, such a convention has not been developed. In fact, for a number of years the issue of environmental crime was not on the agenda of the UN Crime Commission. However references to environmental crime re-emerged in the 2005 Bangkok Declaration from the 11<sup>th</sup> UN Crime Congress due to concerns about the increased involvement of organised criminal groups in illicit trafficking in

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<sup>27</sup> *Ibid*, at p. 2. Crimes against future generations means any of the following acts within any sphere of human activity, such as political, military, economic, cultural, or scientific activities, when committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity: ... (c) Deliberately depriving members of any identifiable group or collectivity of objects indispensable to their survival, including by impeding access to water and food sources, destroying water and food sources, or contaminating water and food sources by harmful organisms or pollution; ... (h) Causing widespread, long-term and severe damage to the natural environment, including by destroying an entire species or ecosystem; (i) Unlawfully polluting air, water or soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity; ...”

<sup>28</sup> ECOSOC Resolution 1994/15 (25 July 1994).

protected species of wild flora and fauna.<sup>29</sup> Five years later at the 12<sup>th</sup> UN Crime Congress a broader reference was made to acknowledge the challenges posed by emerging forms of crime that have a significant impact on the environment and calling on Member States to strengthen their national crime prevention and criminal justice legislation as well as to enhance international cooperation, technical assistance and share best practices, as well as study the nature of the challenge and ways to deal with it effectively.<sup>30</sup> The growing concern related to environmental crimes has led the UN Crime Commission to dedicate its 22<sup>nd</sup> session in 2013 to this issue.

## **2. The Domestic Legal Framework – the Case of Canada**

Protecting Canada’s environment is a complex process. Various pieces of legislation, both federally and provincially, as well as associated regulations, establish a legal framework for conserving and protecting the environment, as well as environmental management and sustainable development.

### *(i) Environmental protection statutes*

Environmental protection statutes provide various agencies to protect and manage different aspects of the environment and contemplate a range of legislative and regulatory measures. The legal framework

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<sup>29</sup> Bangkok Declaration: Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, GA res 60/177, annex paragraph 12: With regard to the increased involvement of organized criminal groups in the theft of and trafficking in cultural property and illicit trafficking in protected species of wild flora and fauna, we recognize the importance of combating these forms of crime and, bearing in mind the relevant international legal instruments, such as the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Biological Diversity, we call upon Member States to take effective measures to strengthen international cooperation.

Resolution 2007/16/1 of the Commission on Crime Prevention and Criminal Justice encourages Member States to cooperate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit international trafficking in forest products, including timber, wildlife and other forest biological resources, where appropriate through the use of international legal instruments such as the UN Convention against Transnational Organized Crime and the UN Convention against Corruption.

ECOSOC Resolution 2008/25 encourages Member States to continue to provide UNODC with information on measures taken pursuant to Resolution 2007/16/1, which may include holistic and comprehensive national multi-sectoral approaches, as well as international coordination and cooperation in support of such approaches, including through technical assistance activities to build the capacity of relevant national officials and institutions.

<sup>30</sup> Salvador Declaration, para 14, *supra* note 4.

provides for both *prohibitions* against activities that destroy or degrade the environment and set out a regime for *authorizations* for activities which produce an environmental harm, usually in the form of a licence or permit. Violations can be dealt with by way of prosecution, administrative sanction, or voluntary compliance measures.<sup>31</sup>

Since “environmental law” was not considered in the division of power sections of the 1867 Constitution Act, the responsibility for environmental protection is divided between the federal and the provincial governments. They exercise this authority according to their field of jurisdiction in accordance with the constitution.<sup>32</sup> This has resulted in a framework which involves both federal and provincial legislation dealing with similar matters,<sup>33</sup> creating differing responsible government agencies,<sup>34</sup> and at times, causing jurisdictional overlap which can hinder enforcement. For instance, the definition of “environment” varies from province to province.<sup>35</sup> Federally, the “environment” is defined as the components of the Earth including air and water, together with all layers of the atmosphere, all organic and inorganic matter and living organisms, as well as the interacting

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<sup>31</sup> For example, there are approximately 50 regulations in the CEPA, *supra* note 11, that establish regulatory offences. Section 274 creates something in the nature of a crime against the environment which is triggered when a violation of CEPA regulations occur. It provides: every person is guilty of an offence and liable on conviction on indictment to a fine or to imprisonment for a term of not more than 5 years, or to both, who, in committing an offence (a) intentionally or recklessly causes a disaster that results in a loss of the use of the environment, or (b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person. S. 274(2) specifically provides that s. 220 or 221 of the Criminal Code apply in the case of anyone contravening CEPA whose wanton or reckless disregard for the lives or safety of others in fact causes death or bodily harm.

<sup>32</sup> The federal government is responsible for environmental protection regarding navigation and shipping, fishing, international regulation and commerce, Indians’ lands and reserves, and it has power to make regulation under its peace, order and good governance, and criminal law general powers. Provincial governments have power to make environmental regulations regarding civil rights, property, public lands, natural resource, municipals institutions, etc: *Constitution Act, 1867* (formerly the *British North America Act, 1867*) 30 & 31 Victoria, c.3 (UK).

<sup>33</sup> For example the Fisheries Act, a federal statute, and the Ontario Water Resource Act both deal with water pollution and the protection of wildlife is often regulated by both level of government.

<sup>34</sup> For instance, CEPA is the responsibility of Environment Canada mainly but also of Health Canada. The management of natural resources is also often divided in-between agencies.

<sup>35</sup> Issues arising include federal/provincial jurisdictional issues and differing definitions of “environment”. Some provincial legislation define “environment” more widely than others. For example, see Alberta, Yukon and Saskatchewan, as noted in Jamie Benidickson, *Environmental Law* (Toronto: Irwin Law, 2009) at p. 12.

natural system that comprises any of these components.<sup>36</sup> The statutes mainly take a sectoral approach and cover different purposes and objectives.<sup>37</sup> The main federal statutes include: the Canada Environmental Protection Act (CEPA) 1999; Fisheries Act; Forestry Act; Water Act; Canadian Environmental Assessment Act; Wildlife Act; Species at Risk Act, Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act; Migratory Birds Convention Act; Canada National Parks Act; Canada Shipping Act; and the Natural Heritage Conservation Act. Along with the federal legislation, there are provincial statutes that protect different aspects of the environment.<sup>38</sup>

### (ii) Criminal and civil law provisions

Added to the environmental protection statutes, certain *Criminal Code* provisions can be used to prosecute environmentally harmful conduct, such as criminal negligence<sup>39</sup> and common nuisance<sup>40</sup>. In addition to this legislative framework are the traditional private law doctrines such as riparian rights, nuisance, negligence, and battery which may apply in environmental cases. The *Criminal Code* is poorly suited for use in environmental cases.<sup>41</sup> Citing the vaguely worded *Criminal Code* provisions and the lack of focus on environmental interests, the Law Reform Commission of Canada in 1985 recom-

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<sup>36</sup> CEPA, *supra* note 11, s. 3(1).

<sup>37</sup> For example, CEPA deals with the regulation of toxic substances, nutrients, ocean dumping, international air and water pollution, waste management, biotechnology and the environmental management of federal government activity and has as its objective “the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention”: CEPA Declaration paragraph.

<sup>38</sup> Provincial authority to enact such statutes principally comes from provinces powers in relation to “property and civil rights in the province” and “generally all matters of a merely or private nature in the province”.

<sup>39</sup> *Criminal Code* (R.S.C., 1985, c. C-46) Section 219: criminal negligence. Everyone is criminally negligent who, in doing anything or in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

<sup>40</sup> Section 180: common nuisance: Everyone commits a common nuisance who thereby endangers the lives, safety or health of the public, or causes physical injury to any person. Other *Criminal Code* provisions that might be relevant in environmental cases include: s. 430, mischief; s. 178 offensive volatile substance; ss. 79-82 explosive substances; ss. 444-47 animal cruelty.

<sup>41</sup> John Swaigen and Gail Blunt *Sentencing in Environmental Cases*, Study Paper prepared for the Law Reform Commission of Canada (Ottawa: Law Reform Commission of Canada, 1985).

mended a new category of offences against the environment.<sup>42</sup> While this was never implemented, the *Criminal Code* was strengthened in 2004 to prosecute companies for environmentally-related crimes.<sup>43</sup>

### (iii) Crime versus offence

While the term “environmental crime” has raised much debate in many jurisdictions, the Canadian courts have established that the nomenclature of environmental “crimes” or “offences” or “regulatory offences” is irrelevant, especially for the guarantee of the Canadian Charter of Rights and Freedoms.<sup>44</sup> This means that regulatory provisions that amount to actual prohibition of blameworthy conduct are found to be constitutional under the criminal law power. As Benidickson notes, “criminal sanctions designed to prohibit certain wrongful conduct are constitutional whereas sanctions used to regulate conduct are not”.<sup>45</sup>

<sup>42</sup> Law Reform Commission of Canada, *Crimes Against the Environment Working Paper No. 44* (1985): The scope of the proposed offence would extend to: (a) environmental pollution which (i) seriously and directly damages the quality of the environment or (ii) seriously and directly endangers the quality of the environment; (b) in either case listed in (a), unauthorized conduct, normally involving as a necessary condition a serious and dramatic breach of a federal or provincial statutory prohibition or standard; (c) in either case listed in (a) conduct for which there is no over-harmful or endangering pollution being minor on nature or even tolerable and justifiable; (d) especially environmental pollution which thereby seriously harms or endangers human life or health; (e) not only immediate and known harms and dangers to human life and health, but also those which are likely to result in the foreseeable future; (f) only by express exception, that environmental pollution which deprives others of the use and enjoyment of one or more elements of the natural environment, causing very serious consequences although resulting in no serious harm to human life or health, such instances would be in the nature of catastrophes, an example being the loss of livelihood of an entire community as a result of pollution.

<sup>43</sup> Known as the Westray amendments following an unsuccessfully criminal prosecution of the company and its managers for the 1992 mining accident at Westray mine where 26 miners died. The amendments provide for occupation health and safety criminal negligence. They change the liability of organizations, making executive and corporate directors responsible for the deaths of workers, and it makes senior officers responsible for health and safety in their organization. It imposes a duty on those who have the authority to direct work, making corporations and their senior officers liable for the failure of their representatives to comply with the law: see s. 271.1 and ss. 219-221 of the *Criminal Code*.

<sup>44</sup> See *R v Wholesale Travel Group Inc* [1991] 3 S.C.R. 154 for a discussion regarding criminal versus regulatory offences. *R v Sault Ste Marie* [1978] 2 S.C.R. 1299 held the difference between criminal and regulatory offences is relevant only for evidentiary reasons. *Canada (AG) v Hydro-Quebec* [1997] 3 S.C.R. 213 upheld a constitutional challenge on the basis of the criminal law head of power in the Constitution. In this case, the Supreme Court of Canada upheld the toxic substance provisions of CEPA on the basis of the federal criminal power. It should be noted that the application of various rights guaranteed in the Charter do not apply in the same way to criminal offences and regulatory offences: for further discussion see above noted *Wholesale* case.

<sup>45</sup> Benidickson, *supra* note 35 at p. 158.

Scholars have categorized environmental crime as primary and secondary types of offences.<sup>46</sup> Primary offences include those offences that prohibit the act itself which harms the environment. For example, destroying wildlife habitat<sup>47</sup>, discharging waste into the environment<sup>48</sup>, water pollution<sup>49</sup>, dumping at sea<sup>50</sup>, and trading in endangered species<sup>51</sup>. Secondary offences refer to a breach of conditions associated with a licence or permit or order or regulation. Non-compliance with the requirements of a waste disposal permit<sup>52</sup> or breaching a term or condition in a water removal permit<sup>53</sup> are examples of such an offence. Some domestic legal frameworks, including Canada's, cannot neatly classify offences into primary and secondary categories due to the complexity of conduct and harm.

### 3. Conceptual Issues

#### (i) Defining environmental crimes

In determining the range of victims of environmental crime, the first issue that arises is how to define "environmental crime". What range of behaviours does it cover? Should the focus be on crime, deviance, anti-social behaviour, rule breaking behaviour, social harm or a broader concept of harm? Unraveling this issue, further questions arise: (i) how is the "environment" defined<sup>54</sup>; (ii) what is a

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<sup>46</sup> E. Carrabine, P. Iganski, M. Lee, K. Plummer and N. South *Criminology: A sociological perspective* (London: Routledge, 2004) at p. 316.

<sup>47</sup> *Wildlife Act*, R.S.B.C. 1996, c. 488, s. 7.

<sup>48</sup> *Environmental Management Act*, S.C.B. 2003, c. 53, s. 6.

<sup>49</sup> *Fisheries Act*, R.S.C. 1985, c. F-14, s. 36.

<sup>50</sup> *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 125.

<sup>51</sup> *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, s. 6.

<sup>52</sup> *Environmental Management Act*, S.B.C. 2003, c.53, s. 120(6).

<sup>53</sup> *Water Act*, R.S.B.C. 1996, c. 483, s. 93(2)(r).

<sup>54</sup> As previously discussed there is not an agreed to definition of "environment" under international and domestic law, and varies depending on the specific legislation or instrument. Further, the concept of the "environment" is informed variously by scientific, romantic, spiritual, ethical and other predicates. Certain scholars see the human/nature, civilization/wilderness divide as artificial; humans are part of the environment – so harm to it is harm to us. See: I. Lanthier & L. Olivier, "The Construction of Environmental 'Awareness.'" in E. Darier ed., *Discourses of the Environment* (Oxford : Blackwell Publishers, 1999).

“crime”<sup>55</sup>; and (iii) which harmful acts give rise to “victims” of crime<sup>56</sup>? In determining the definitions to be used, as UNICRI notes, it should be meaningful, useful and acceptable by everyone involved.<sup>57</sup>

*(a) The debate of the perspectives (legal, socio-legal, ecocentric, biocentric)*

There is no clear definition of environmental crime in many countries and this has led to an indiscriminate use of the term, contributing to confusion as to its meaning.<sup>58</sup> Some argue that it covers only activities prohibited by current criminal law. Others suggest that, given the influence of business interests over law and regulation, it should also include activities which are illegal but not criminal<sup>59</sup>. Still others suggest that it should include activities which are “lawful but awful”<sup>60</sup>. Given how political, economic, social and cultural factors influence how societies define crime, it can be difficult to fully separate the question of what *is* illegal from what *should* be illegal. Underlying this debate are the various philosophical stances on the appropriate relationship between human beings and nature, the causes of environmental crime and the appropriate response to address them.

The legalist (or legal-procedural) perspective is the narrow one which defines an environmental crime as a violation of criminal laws

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<sup>55</sup> As many environmental disruptions, such as clear cutting of forests and on-going pollution releases are considered legal, any discussion of environmental crime requires an understanding of the political, economic, social and cultural factors that influence how societies define crime. From a positive legalist perspective a crime is something that is against the law. However others have studied the broader social processes that help give meaning to “crime”. For further discussion see: Jean-Paul Brodeur, with Geneviève Ouellet, “What Is a Crime? A Secular Answer” in *What Is a Crime? Defining Criminal Conduct in Contemporary Society*, edited by the Law Commission of Canada (UBC Press, 2004).

<sup>56</sup> Williams differentiates between environmental crime victims and environmental “casualties”, with casualties implying a notion of chance while victim embodies the idea of suffering caused by a deliberate or reckless human act. For further discussion see: Christopher Williams, “Environmental Victimization and Violence” (1996) 1:3 *Aggression and Violent Behavior*.

<sup>57</sup> Kristiina Kangaspunta and Ineke Haen Marshall, editors, *Eco-Crime and Justice, Essays on Environmental Crime* (UNICRI: 2009).

<sup>58</sup> M. Clifford and T.D. Edwards “Defining environmental crime” in Clifford M (ed) *Environmental Crime: Enforcement, Policy and Social Responsibility* (Gaithersburg: Aspen Publishers, 1998).

<sup>59</sup> “Criminal” in this sentence refers to the narrow concept of violations of criminal law and do not include administrative and regulatory sanctions.

<sup>60</sup> “Lawful but awful” is a phrase coined by Nick Passas in “Lawful but awful: ‘Legal Corporate Crimes’” (2005) 34 *Journal of Socio-Economics* 771-786.



designed to protect the health and safety of people, the environment or both.<sup>61</sup> However questions arise as to whether environmental crime encompasses occupational health and safety crimes. How broad is “environment” viewed when determining which laws are designed to protect it? Does it include built environments as well as natural environments? Do environmental crimes include wildlife crimes and animal cruelty?

A socio-legal perspective broadens environmental “crime” to include regulatory and administrative violations. This equates crime to any illegal activity or formal rule-breaking, whatever form the rule might be. Green criminologists argue that studying criminal violations is too narrow, as environmental harms are often dealt with as civil or regulatory violations.<sup>62</sup> In some countries, offences against the environment are typically regulatory or administrative offences that are included in various environmental bills rather than as provisions in criminal codes.<sup>63</sup> Such offences are part of the administrative law regime established for protecting the environment.<sup>64</sup>

Both the legal and socio-legal perspectives have been criticized for being anthropocentric. This view 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”.<sup>65</sup> Even the sociological perspective of “lawful but awful” which considers environmental harm more broadly,

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<sup>61</sup> Gibbs et al, *supra* note 6 at p 125. Also see Y. Situ and D. Emmons, *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* (Thousand Oaks, CA: Sage, 2000) where environmental crime is defined as “an unauthorized act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanction”. They argue that until the practice or behaviour actually breaks a law, it cannot be considered, and hence treated as, a crime.

<sup>62</sup> Gibbs et al, *supra* note 6 at 126.

<sup>63</sup> Megret, *supra* note 22.

<sup>64</sup> As previously noted, in the Canadian system, most environmental offences are considered part of the criminal law system. Permits, orders and licenses are administrative but the violation of them or a prohibition (regulatory offence) is dealt with as a criminal offence and prosecution is conducted by crown prosecutors (either provincial or federal). The review of administrative decisions, and in some cases, the review of administrative penalties/fines is conducted by the relevant administrative tribunal as part of the administrative law regime.

<sup>65</sup> Mark Halsey & Rob White, “Crime, Ecophilosophy and Environmental Harm” (1998) 2 *Theoretical Criminology* 345, at p. 349, argue that human beings continue to be placed at the centre even when discussing climate change and sustainable development.

going beyond formal prohibition, might be seen as anthropocentric, if lawful is in reference to broader human interests. This too could be said for 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.<sup>66</sup>

An ecocentric perspective would include those acts that have identifiable environmental damage outcomes and originated in human action but that may or may not violate existing rules and environmental regulations.<sup>67</sup> A biocentric perspective sees any human activity that disrupts a biotic system as environmental crime. This includes intentional or negligent human activity or manipulation that impacts negatively on the earth's biotic and abiotic natural resources, resulting in immediately noticeable or indiscernible natural resource trauma. These perspectives prioritize the intrinsic value of ecosystems over human interests.

*(b) The debate of how to balance the level of environmental harm with social interests*

Environmental crimes, like other crimes, are social constructions influenced by power relations in society and reflect society's view of morally reprehensible conduct.<sup>68</sup> Consequently, economic interests play an integral role in determining which or whether environmental harms will be treated as crimes or violations, and which ones will be accepted or justified as "normal".<sup>69</sup> As Korsell notes, a considerable proportion of environmental harm is "legal and takes place with the

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<sup>66</sup> *Our Common Future*, *supra* note 11. Rob White, "Environmental Harm and Crime Prevention" Trends & Issues in Crime and Criminal Justice Series No 360, June 2008, Australian Institute of Criminology online: <http://www.aic.gov.au/documents/8/F/7/%7B8F7C8770-041C-4D1B-AB4A-106A387D62F5%7Dtandi360.pdf>.

<sup>67</sup> Gibbs et al, *supra* note 6 at p. 127.

<sup>68</sup> Michael Lynch & Paul B. Stretesky, "The Meaning of Green: Contrasting Criminological Perspectives" (2003) 7:2 Theoretical Criminology 217, at p. 218.

<sup>69</sup> *Ibid*, at p. 218.

consent of society”.<sup>70</sup> The environmental damage only becomes an offence when there is a breach of rules and permits. So for example, laws usually 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 laws.

Traditionally, harmful environmental practices have not been viewed with the same moral repugnance as crimes against persons or property. As Bricknell notes, this reflects, to some extent, the reality of the age in which they are being committed, by whom and why.<sup>71</sup> 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.<sup>72</sup> Perhaps the increasing involvement of organized criminal groups in polluting activities was not envisioned when drafting regulations. From a victim’s perspective does it matter if the river is being polluted by organised criminal groups disposing of toxic waste from meth labs or by legal dumping by a corporation? 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.<sup>73</sup>

### *(c) The debate about including risk when defining crime*

A grey area in studying victims of environmental crime is whether to include behaviour that creates environmental risks that

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<sup>70</sup> Lars Emanuelsson Korsell, “Big Stick, Little Stick: Strategies for Combating Environmental Crime” (2001) 2 *Journal of Scandinavian Studies in Criminology and Crime*, 127 at p. 133. Pappas, *supra* note 61, also suggests that quite often the main reason why practices remain legal and respected is that industries are able to mobilize financial and other resources in order to avoid stricter regulation.

<sup>71</sup> Bricknell, *supra* note 1 at p. 2.

<sup>72</sup> Helena Du Rees “Can Criminal Law Protect the Environment” (2001) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 109 - 126.

<sup>73</sup> Bricknell, *supra* note 1 at p. 2.

are not currently subject to regulation or criminal enforcement but where further understanding of the risk may lead stakeholders to argue for regulation and/or criminalization.<sup>74</sup> This raises the complex question of what creates risk to the environment. Uncertainty when determining risk may occur in cases where the probability of exposure to the hazard is unknown and/or the precise consequence of exposure to the hazard are not clear, such as building nuclear power plants on a fault line. Risk assessment underpins environmental regulations and standards both at the general level of statutory provisions and policies (the “acceptable” cancer risk from dioxin levels) and at the level of the particular (the permitting of effluent concentrations at a particular facility).<sup>75</sup> The public is generally not involved in the weighing of risks of industry activity against the projected costs of mitigation and the perceived benefit to society. Some criminologists argue that many of the most serious forms of environmental risk come from “normal social practice”.<sup>76</sup> For example, currently lawful practices such as using old oil tankers arguably create great risk from an ecological perspective.

*(d) The debate regarding criminalization versus regulatory protection*

Some scholars and environmentalists do not believe that using criminal law or criminalization is the best approach to protecting the environment and assisting victims. They suggest that cooperative “consensual” types of regulation promote greater compliance. They refer to the range of other measures that protect the environment, such as the issuance of permits and licences for activities like fishing, hunting and even discharging toxic substances, the creation of land management plans, legislations covering the authorized utilization of natural resources (including mining, logging, oil exploration, etc.), energy and transportation policies, environmental assessment, self-regulation and “private governance” regimes. These scholars point to the complexities of applying criminal law to environmental cases,

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<sup>74</sup> Gibbs et al, *supra* note 6, at p. 133.

<sup>75</sup> See, A. Fairbrother and R.S. Bennett “Environmental risk assessment and the precautionary principle”, presented at Society of Environmental Toxicology and Chemistry Annual Meeting, Charlotte, NC, November 1998.

<sup>76</sup> Halsey and White, *supra* note 65 at p. 346.

including the legal technical problems<sup>77</sup> (such as causation and dispersal of harm factors), lack of experience in prosecution services in handling these kinds of cases<sup>78</sup>, and the challenges in prosecuting corporate crime<sup>79</sup> (corporate legal personality as a shield, diffusing of responsibility within the corporation and extensive resources for defence).

Others argue that in terms of perception, the dealing of environmental violations primarily through a separate regulatory bureaucracy may have the effect of downplaying their serious nature.<sup>80</sup> Given the seriousness of environmental harm, an increased utilization of the criminal law has been called for. While the costs of environmental crime have not been systematically measured and there are few reliable statistics, some scholars suggest that the total costs are acknowledged to be enormous.<sup>81</sup> Others note the lack of environmental prosecutions and the general move to “soft” regulation as reflecting a lack of political will and being more indicative of the rise of neoliberalism than of any inherent unsuitability of criminal law to environmental wrong-doing.<sup>82</sup> Further study is needed as to whether victims of “regulatory offences” are given the same regard as the victims of “crimes” and how this influences their access to justice.

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<sup>77</sup> Du Rees, *supra* note 72 at p. 115.

<sup>78</sup> *Ibid* at p. 119.

<sup>79</sup> Prosecuting corporations and their directors poses a number of challenges. Both can be held liable for environment crimes; however, the choice of who to prosecute is not an easy one. When an action can't be attributed to one director, it is better to prosecute the corporation. The corporation may also have more financial means to pay for large fines, compensations and rehabilitation measures. Nonetheless, a corporation cannot be put in jail and holding a corporation liable minimizes the criminal aspect of criminal liability, especially if the corporation will only be minimally affected by the monetary penalty. Offenders can defend themselves by proving that they were diligent and did everything possible to avoid the environmental harm. Gathering the proof to counter the due diligence defenses is complicated and costly. For further discussion see Benidickson, *supra* note 35 at pp 187 to 190.

<sup>80</sup> See Megret, *supra* note 22 and Korsell, *supra* note 70 at p 134.

<sup>81</sup> Hazel Croall “Victims of White Collar and Corporate Crime” at [http://www.uk.sagepub.com/stout/croall\\_white\\_collar%20-%20vics\\_crim\\_soc.pdf](http://www.uk.sagepub.com/stout/croall_white_collar%20-%20vics_crim_soc.pdf). Also see J.S. Albanese, *White-collar crime in America* (Englewood Cliffs, NJ: Prentice Hall, 1995), where he notes that corporate crime is estimated to cost at least 20 times as much as street crime. In Canada, the value of the environment is being measured (as opposed to costs of harm to the environment): Mark Anielski and Sara Wilson “Natural Capital: Assessing the Real Value of Canada’s Boreal Ecosystem”.

<sup>82</sup> See L. Snider, “The sociology of corporate crime: An obituary: (or: Whose knowledge claims have legs?)” (2000) 4:2 *Theoretical Criminology* 169; F. Pearce, F. & S. Tombs, “Ideology, hegemony and empiricism: Compliance theories and regulation” (1990) 30:4 *British Journal of Criminology*.

Even when administrative models adopt punitive features, there appears to be an implicit minimizing of the criminal character of such acts and by implication the treatment of victims of these acts.

## PART II: RANGE AND TYPES OF VICTIMS

### 1. Range of Environmental Victims

#### 1.1 Range of Victims

##### (i) Different types of victims

Environmental crime is said to often involve victims we “do not see”<sup>83</sup> or is described as victimless<sup>84</sup>. Some scholars argue that environmental crime is of an abstract nature and lacks concrete identifiable victims. These descriptions generally come from an anthropocentric view point. Where the literature discusses human victims, it tends to conceptualize victims in very general terms such as “consumers”, “workers”, “communities” or “the general public”.<sup>85</sup> Criminologists and victimologists who use an expansive definition of environmental crime have a broad list of victims: individuals, communities (indigenous, farming, etc); non-human species; the environment (local and global) and future generations.<sup>86</sup>

##### (ii) How the law conceives “victims”

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 views 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

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<sup>83</sup> Croall, *supra* note 81 at p. 82.

<sup>84</sup> Korsell, *supra* note 70 at p. 132.

<sup>85</sup> Croall, *supra* note 81 at p. 79.

<sup>86</sup> Also worth noting is the fact that States can be victims too. A good example is the small island States in the Pacific that will be submerged due to climate change; see <http://www.sids-net.org/aosis/>. See also *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) where the American States tried to force the EPA to regulate greenhouse gases and alleged that climate change would make them lose coast lines and thus territory.

the statute which has been violated.<sup>87</sup> Criminal law traditionally focuses on individual victims whereas environmental legislation often describes the environmental harm as an offence against public interest. The acts that result in harm to the environmental victims can range from intentional to negligent actions. Negligence can be countered by due diligence, which is a minimum standard of care showing that the offender did everything possible to prevent the act from happening. From the perspective of the victim, however, the same kind of “harmful consequences” can result whether the offence is classified as a crime, regulatory offences or negligent action. Issues for further study include: whether the traditional concept of individual victimization adequately incorporates the collective victimization often experienced by victims of environmental crime; and an analysis of how the various legal regimes (criminal, regulatory, administrative, or civil) conceptualize “victims” and what protections each has to offer them.

## 1.2 Extent of Victimization

### (i) Challenges in determining the scope of victimization

The lack of definitional scope of the issue causes difficulty in documenting the extent of the problem, both in terms of the scope and the experience of victims. Little, if any, victimization of environmental crime is included in victim surveys. This is due, in part, to difficulties including such activities as pollution or contamination of whose harmful effects victims are often unaware. Other challenges are: (i) capturing the extent of repeated multiple victimization where the harm is accumulated over time and from a number of acts<sup>88</sup> (ii) even when individuals are aware of the impacts of environmental harm, they might not consider themselves as “crime” victims or

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<sup>87</sup> Benidickson *supra* note 35, p. 12 cites the case of *R v Enso Forest Products* (1992) 8 C.E.L.R. (N.S. 253 (BCSC aff'd (1993), 12 C.E.L.R. (N.S.) (BCCA) as an example of where the damage was done to some man-made structure and such structures were excluded from the court's understanding of environment.

<sup>88</sup> Bricknell, *supra* note 1 and L. Elliot, Transnational environmental crime in the Asia-Pacific: Complexity, policy and lessons learned, in Elliot (ed) *Transnational Crime in the Asia-Pacific: A workshop report* (Canberra: RSPAS, Australian National University, 2007).



report the harm to enforcement agencies<sup>89</sup>; (iii) the “victims” might be non-human, such as wildlife and their habitats, which is difficult to capture in surveys; (iv) many forms of environmental crime are not easily observed or detected and do not make an obvious impact<sup>90</sup>; and (v) shifting societal and corporate values and new conceptualization of what is a “crime”.

Other sources, such as reports from enforcement agencies, First Nations communities and organizations, environmental pressure groups, epidemiological studies and investigative journalism are useful starting points to illustrate the potential extent of victimization. This literature review reveals few reliable statistics, but as Croall notes it has been widely acknowledged that the total costs of environmental harm can be enormous.<sup>91</sup> For example, she refers to a study which estimates as many as 800,000 premature deaths globally can be attributed to ambient air pollution and a UK study which estimates at least 24,000 premature deaths each year attributed to poisoning by various forms of air pollution.<sup>92</sup> However these statistics are selective, unsystematic and not all can be attributed to “criminal” behavior.

### (ii) Common characteristics of victimization

Victimologists have generally not included victims of environmental crime in their research. Further study is required to get a better understanding of this type of victimization and how it differs from other types of victimization. However a review of the literature does suggest certain noticeable characteristics. These include: (i) the victims are not always aware of the fact that they have been victimized;<sup>93</sup> (ii) the victimization is often delayed with the victim becoming aware of the victimization much later after

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<sup>89</sup> Croall, *supra* note 81 at p. 81. See also Hazel Croall “Economic crime and victimology a critical appraisal” (2010) *Journal International de Victimologie*, available on-line: <http://www.jidv.com/njidv/index.php/archives/150-jidv-23/425-economic-crime-and-victimology-a-critical-appraisal>.

<sup>90</sup> Korsell, *supra* note 70 at p. 133.

<sup>91</sup> Croall, *supra* note 89.

<sup>92</sup> *Ibid.*

<sup>93</sup> The offender is often a corporation which can devote huge resources to prevent people from knowing that they were victimized or hide their own responsibility for the crime. See Korsell, *supra* note 71.

the crime was committed;<sup>94</sup> (iii) victims are not sure about who victimized them or who exactly is responsible; (iv) the victimization is often serious not so much because any individual victim was seriously affected, but because numerous victims were affected by the crime; and (v) victimization can often include repeat offences.<sup>95</sup> The characteristic of the collective nature of this kind of victimization needs to be understood, particularly with its implications for victims to seek assistance, support and redress which have predominately developed for traditional crimes involving individual victims. Exploring how other crimes which involve collective nature of victims, such as “crimes against humanity” or large identity theft involving thousands of victims, could provide useful insights.<sup>96</sup>

### (iii) Issue of re-victimization

Re-victimization is an issue for many victims trying to access justice and participate in the justice system. There is often a huge asymmetry between the power (resources, influence, etc.) of the victimizer and that of the victims – even when the victims are acting collectively. Corporations might be seen as “clients” to the enforcement officers who oversee compliance of the laws and therefore choose the soft regulatory approach rather than prosecution.<sup>97</sup> A further factor that can compound victimization and deny access to justice is the actions of corrupt officials. Further research is required to understand the extent of re-victimization of victims of environmental crime by seeking to access the justice system.

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<sup>94</sup> Croall, *supra* note 89.

<sup>95</sup> *Ibid.*

<sup>96</sup> Further, while it is beyond the scope of this paper, a greater understanding is needed as to how this victimization links with other security issues. The destruction of the environment can reduce biodiversity and cause ecological problems such as flooding or drought. This can deprive communities of their livelihoods, increase food insecurity, and trigger forced migration and population displacement.

<sup>97</sup> Du Rees, *supra* note 72 at pp 117-120. She discusses the problems of the role of supervisory agencies which have a double role, both to collaborate with industries and to function as their supervisors. The agencies rely on the cooperation of the industries concerned and therefore, as she notes, it is not difficult to see that reporting offences is not the best way to maintain an environment that fosters such cooperation.

### 1.3 Geographic Range of Victims

Environmental crime can be contained within jurisdictional boundaries (be these provincial/territorial or national); effect more than one country; or be considered a global issue.

#### *(i) Transnational*

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. Also, the environmental harm itself may be transnational in nature, for example, pollution of a river that crosses international boundaries. Research increasingly focuses on transnational environmental crime particularly involving organised crime.<sup>98</sup> However, transnational crime 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.<sup>99</sup>

The globalized nature of the production processes and the international political economy are intimately linked to transnational environmental victimization.<sup>100</sup> However, little research has focused on the victimization aspect of transnational environmental crime. Of note, though, is the particular concern that transnational environmental crime takes advantage of developing countries that have less stringent environmental regulations than developed

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<sup>98</sup> See: Interpol reports found at: <http://www.interpol.int/Public/EnvironmentalCrime/Default.asp>. Interpol established an Environmental Crime Committee in 1992 and currently has two working groups: Wildlife Crime Working Group and Pollution Crime Working Group. UNICRI also has been conducting research on transnational environmental crime and recently published *Freedom of Fear* magazine on "Planning the Environment", found at [www.freedomfromfear-magazine.org](http://www.freedomfromfear-magazine.org).

<sup>99</sup> Bricknell, *supra* note 1 at p. 6.

<sup>100</sup> D.R. Simon, "Corporate Environmental Crimes and Social Inequality: New Directions for Environmental Justice Research" (2000) 43:4 *American Behavioral Scientist*; C.W. Schmidt, "Environmental crimes: Profiting at the earth's expense". (2004) 112:2 *Environmental Health Perspectives*; P. Green, T. Ward & K. McConnachie, "Logging and Legality: Environmental Crime, Civil Society, and the State" (2007) 34:2 *Social Justice*.

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 organised criminal groups and legitimate corporations. Internationally, environmental practices that degrade or exploit natural resources are predominately European or Western owned industries and markets, and it is the native population that suffers from destroyed economies.<sup>101</sup> And it is these economically marginalized groups that have little power to protect their interests.

*(ii) Global*

Some environmental crime/harms can be global in nature. For instance, environmental crimes can contribute to climate change. 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 as perpetrator. Therefore, criminal law must be clear as to what behaviour is illegal as it “cannot render the whole of society guilty of significant offences without undermining itself”.<sup>102</sup> Conversely, some reports have addressed the issue of how climate change itself can cause criminal behaviour, for instance, the fraudulent and collusive behaviour associated with the establishment of carbon offset and trade emission schemes.<sup>103</sup> Interpol has a special project group which is reviewing national legislation that may inadvertently facilitate climate change related crime.<sup>104</sup>

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<sup>101</sup> Christopher Williams ed., *Environmental Victims: New Risks, New Injustice* (London: Earthscan, 1998).

<sup>102</sup> Frédéric Mégret, “The Challenge of an International Environmental Crime”, on-line: <http://ssrn.com/abstract=1583610>.

<sup>103</sup> Bricknell, *supra* note 1 at p.5, provides a discussion and sources to show the fraudulent behaviour in carbon offsetting schemes, such as “double selling” of credits, purchase of “worthless” credits, purchase of carbon reductions that would have happened anyway and collusive behaviour between entities: A. Bergin and R. Allen, *The thin green line: Climate change and Australian policing* (Australian Strategic Policy Institute special report issue 17: Canberra, 2008). Even the UN-managed World Bank administered Clean Development Mechanism (CDM) has not been impervious to “deceitful claims”, with an estimate that two-thirds of the credits produced by the scheme did not correlate with any reduction in greenhouse gas emissions: P. McCully “Discredited strategy” *The Guardian Weekly*, 21 May 2008. A recent survey of carbon offset schemes in Australia discovered considerable variability in the nature and standard of the carbon offsets being promoted: C. Riedy and A. Atherton “Carbon offset watch: 2008 assessment report” (Sydney, 2008).

<sup>104</sup> See the work of the Interpol Pollution Crime Working Group 2009, found on-line at: <http://www.interpol.int/Public/EnvironmentalCrime/Pollution/WorkingGroup.asp>.

## 1.4 Demographic Range of Victims

At first glance it would seem that everyone is at risk from environmental crimes, irrespective of gender, age, geographical location or socio-economic position. The risks of pollution, water contamination, and hazardous waste disposal would appear to affect all citizens. However, as some studies illustrate, particularly from the United States, patterns of victimization reflect broader patterns of inequality, similar to other forms of crime.<sup>105</sup> Certain studies demonstrate a strong association between non-white and poor communities in the US and the location of hazardous waste sites.<sup>106</sup> In the United Kingdom, some of the worst cases of chemical pollution have disproportionate effect on lower class communities.<sup>107</sup> A number of studies show minorities and the poor face higher levels of air pollution than other groups, and face delays in terms of cleaning up of hazardous sites.<sup>108</sup>

Scholars that study environmental justice and racism have examined the link between the public health of indigenous peoples and their environment.<sup>109</sup> Such studies suggest that the marginalization of indigenous communities onto reserves resulting in their economic disadvantage contributed to the decision by these communities

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<sup>105</sup> David Pellow studies the intersection between environmental hazards and community demographics, which conclude that environmental inequality (environmental racism) is prevalent in communities across the US. He found communities of color and low-income neighborhoods are disproportionately burdened with a range of environmental hazards, including polluting industries, landfills, incinerators and illegal dumps. David N. Pellow, "The Politics of Illegal Dumping: An Environmental Justice Framework" (2004) 27:4 *Qualitative Sociology*. R. Pinderhughes examines social science empirical research on the relationship between race, class and the distribution of environmental hazards and the theoretical perspectives which have emerged to explain environmental inequities. He finds that there is a growing body of research shows that the most common victims of environmental hazards and pollution are minorities and the poor. He states that a disproportionate exposure to environmental hazards is part of the complex cycle of discrimination and deprivation faced by minorities in the US. Raquel Pinderhughes, "The Impact of Race on Environmental Quality: An Empirical and Theoretical Discussion" (1996) 39:2 *Sociological Perspectives*.

<sup>106</sup> Lynch and Stretsky, *supra* note 68 and Pinderhughes, *ibid*.

<sup>107</sup> Croall, *supra* note 89.

<sup>108</sup> Pinderhughes provides a number of examples of these studies, see *supra* note 105.

<sup>109</sup> Constance MacIntosh, "The Intersection of Aboriginal Public Health with Canadian Law and Policy" in Tracey M. Bailey, Timothy Caulfield & Nola Ries, eds., *Public Health Law & Policy in Canada* (Markham (On): LexisNexis, 2008) at p.405.

to allow for toxic waste dumps near their locations.<sup>110</sup> The special relationship Aboriginal communities possess with the land and the environment as a whole makes them more likely to be affected by the poor quality of the environment, pollution, the loss of biodiversity, etc.<sup>111</sup> Similarly, environmental risk appears to be transferred from rich to poor countries, for example, the dumping of toxic waste or locations for chemical production. A number of examples come to mind, including the Bhopal case, the recent Amazon pollution case where an Ecuadorian court found Chevron guilty<sup>112</sup> and the thesis suggesting that unregulated over-fishing and dumping of waste off the Somali coast by Western flagged ships led to the piracy issue as a form of retribution or the initial creation of a militia coast guard that evolved into piracy.

There may also be a gendered impact of environmental harm. The UN Environmental Programme states that the connections between gender relations, environmental change and vulnerability have only begun to be studied. Some preliminary studies illustrate the vulnerability of women to environmental harm, for example pregnant and nursing women, as well as women who plan to bear children in

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<sup>110</sup> D. Brook, "Environmental Genocide: Native Americans and Toxic Waste" (1998) 57:1 American Journal of Economics & Sociology

<sup>111</sup> One of the key issues for aboriginal health in Canada is the quality of drinking water. In 2006, 12% of reserves were under boil water orders and 50% of the orders lasted more than a year. There is currently no federal legal standard for water quality on reserve; only policy guidelines. The O'Connor report stated that the federal government should adopt legally enforceable water standard for reserves that are as high as the normal Canadian standard, if not higher since the Aboriginal close relation to the environment. A lot of Aboriginal peoples still practice traditional food gathering. This "country food" (fishing, hunting, foraging, etc) is subject to environmental contaminant. The health of Aboriginal peoples is thus affected by the contaminant found in this traditional source of food. Although water quality may affect the health of any Canadians; country food affects more specifically Aboriginals because of their culture. "Approximately 91% of all Arctic Aboriginal household consume traditionally harvested foods, and 22% report that country food is their only source of meat and fish." Sadly, the nutritive values of country foods are diminished by the fact that they are often contaminated by organic pollutants (PCB's and DDT) and heavy metals (mercury and lead). "These types of contaminants (1) remain intact for extended periods of time, (2) are toxic, (3) are bioaccumulative, and (4) are prone to long-range transport." Recent data seems to demonstrate that Aboriginal peoples are exposed to these contaminants in a concentrated form. Researches show that 80% of pregnant women in Nunavik and 68% in the Baffins have a level of mercury in their blood that exceeds safety guidelines. Nearly half of them have an intake level of PCB that is above Health Canada level of concern.

<sup>112</sup> "Chevron found guilty in Amazon pollution case" 16 February 2011 as reported on the Multilateral Environmental Agreements Regional Enforcement Network. After a 17 year legal battle, Chevron was found guilty by Ecuadorian courts for massive environmental contamination of the Amazon and was ordered to pay a fine of \$9 billion in damages.

the future, are particularly vulnerable to environmental pollution, and women experience excess mortality related to heat waves as compared to men.<sup>113</sup> While these studies offer persuasive indicators of environmental inequality, much more work is needed to understand victimization from broader patterns of global, socio economic, race, gender and age inequalities.

## **2. Victim Typologies**

Crime victims are generally seen as victims who have been physically, financially or emotionally injured and/or have had their property taken or damaged by someone committing a crime or an illegal act. Depending on one's eco-philosophical perspective, victims can be extended to animals or the environment more generally. Victims can be categorized in a variety of different ways to assist in developing policy responses and identifying issues for further research. This section categorizes environmental crime victims according to: 1) the nature of wrongful acts; 2) the nature of the harm to victims; 3) the extent of damages suffered; 4) the scale of crime; and 5) perpetrator identifiability / relationship with victim.

### **2.1 By Nature of Wrongful Acts**

Environmental crime can take many different forms. The impact on victims, as well as the appropriate approaches to prevention and remediation, will vary depending on the type of illegal activity. It can be useful for policy purposes to categorize victims according to the nature or type of illegal activity, such as pollution, illegal trade in dangerous substances, wildlife crime, and illegal natural resources exploitation. However, neatly classifying victims this way can be difficult given that some situations might involve more than one type of illegal activity, such as illegal dumping of toxic substances and pollution.

Classifying crime or harm per activity might reduce the debate or discussion around the extent of victimization. For example, if we focus on the trade of endangered animals, we might ignore the harm

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<sup>113</sup> These studies and more are discussed in Susan Buckingham and Rakibe Kulcur "Gendered Geographies of Environmental Justice" (2009) 41: 4 *Antipode* 659-683.

that is caused when these animals are removed from their habitat impacting on the viability and diversity of other species. Another situation is if we focus on offences which involve breaching of a licence or permit, we might not take into account the impact such a breach has on nature or communities.

International treaties are generally established according to the “type” of harm: ocean pollution<sup>114</sup>; wildlife<sup>115</sup>; and hazardous waste and its disposal<sup>116</sup>. Some scholars have categorized illegal activities in three broad categories: brown, green and white environmental crimes.<sup>117</sup> “Brown” environmental crimes tend to be defined in terms of urban life and pollution. “Green” issues refer mainly to wilderness areas and conservation matters, such as logging practices. “White” issues refer to science laboratories and the impact of new technologies, such as e-waste and genetically modified organisms. Interpol examines environmental crime in three categories: wildlife; pollution and “other”. Another classification examines environmental harm according to the site location: built environment versus natural environment.<sup>118</sup>

In Canada, like in many other countries, there is no uniform definition of environmental crime. Environmental laws tend to be compartmentalized in separate statutes, and different agencies are responsible for enforcement. Certain types of acts are commonly recognised as environmental crime:

- Pollution or other contamination of air, land and water (including illegal dumping and discharge)<sup>119</sup>

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<sup>114</sup> *MARPOL*, *supra* note 8, UN Convention on the Law of the Sea (UNCLOS) London Protocol on dumping at sea, International Convention for the Control and Management of Ships’ Ballast Water and Sediments, International Convention on the Control of Harmful Anti-Fouling Systems on Ships and a range of regional treaties.

<sup>115</sup> *CITES*, *supra* note 8, has some criminal implementation provisions.

<sup>116</sup> *Basel Convention*, *supra* note 8.

<sup>117</sup> White, *supra* note 66 at p. 2.

<sup>118</sup> *Ibid.*

<sup>119</sup> This category includes pollution infractions, such as pollution discharges over the legal limit, illegal disposal of hazardous waste. In British Columbia, pollution is defined as “the presence in the environment of substance or contaminants that substantially alter or impair the usefulness of the environment”: *The Environmental Management Act*, S.B.C. 2003, c. 53. This is in contrast to other provincial legislations, such as Quebec while defines water pollution as contaminant greater than the permissible level determined by regulation. Federal legislation also covers pollution: see *CEPA 1999*; *Fisheries Act 1985*, c. F-14.



- Illegal trade and movement of dangerous substances
- Wildlife crimes<sup>120</sup>
- Illegal natural resources exploitation<sup>121</sup>

Much of the research has tended to focus on specific types of environmental harm and responses to that harm. A review of the literature did not reveal a comprehensive study comparing the nature and extent of victimization from the various wrongful acts. Certain observations can be made, but further study is needed:

- Pollution or other contamination: (i) lack of self identification of victims due in part to the fact that it is difficult to distinguish between legal and illegal pollution, some victims are unlikely to be aware of such harmful activities unless and until they result in some form of harm, or victims might not be able to identify the perpetrator; (ii) the nature of harm might be long term with implications for future generations, non-humans and their habitats; and (iii) disproportional impact on indigenous communities.
- Illegal trade and movement of dangerous substances: (i) disproportional impact on developing countries; and (ii) increasing involvement of organised criminal groups.
- Wildlife crimes: (i) severe impact to victims of the non-human species and the “environment” which might affect the number of “reported” or “detected” cases.
- Illegal natural resources exploitation: (i) relationship between patterns of victimization and broader questions of social structure and power; (ii) focus has been on states and communities as victims rather than individual victimization; and (iii) issues of secondary victimization and links to armed conflict and food security.

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<sup>120</sup> Wildlife crimes include the illegal harvesting and trade in (protected) flora and fauna and harms to biodiversity. The federal Wild Animal and Plant Protection and Regulation of International and Inter-provincial Trade Act (WAPPRIITA) sets out several offences, including making possession of illegally imported plants and animals an offence. The Species At Risk Act (SARA) which entered into force in 2003 promotes the protection and recovery of endangered species and protects their critical habitat.

<sup>121</sup> Illegal natural resources exploitation includes illegal, unregulated and unreported fishing; illegal logging and timber trade; illegal extraction of natural resources like mining. It could also include Illegal land management (such as illegal filling of wetlands, endangered species habitat removal).

Issues arise as to whether these classifications include the illegal trade in genetically modified organisms. Does it go so far as including lesser offences such as littering? Another issue is whether to include the illegal trade and acquisition in cultural heritage, which is not immediately recognised as environmental crime per se but some countries describe it as such. There is also what has been termed “associated” environmental crimes such as fraud arising from carbon trade emission schemes.<sup>122</sup>

## 2.2 By Nature of the Harm to Victims

Any one instance of environmental crime may cause many different types of harms or damage which can affect humans, non-humans, communities, local and global environments (biosphere/ecosystem services) as well as future generations. Victims can suffer from direct or indirect, point-source or diffuse, individual or cumulative, short-term or long-term harm. Because of this, it can be difficult to categorize victims neatly by the type of victim and type of damage suffered. Nevertheless, this typology is useful for purposes of designing victim remediation programs as it distinguishes among different types of damage suffered by victims, each of which requires different remediation measures. It should be noted that our understanding of “harm” to victims is constantly shifting as scientific knowledge advances.

The challenges should be kept in mind. Environmental harm, because of its diffuse nature, is difficult to relate to criminal law theories of harm and victimization.<sup>123</sup> While environmental damage can cause immediate and catastrophic harm, such as in Bhopal and the Gulf of Mexico, it can also involve small, relatively negligible, incidents which can have considerable consequences when looking at the cumulative effect. And the fact that it often takes time for the

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<sup>122</sup> These kinds of schemes were developed to produce a change in behavior, to reduce pollution emissions and reward companies who reduce. Variance on trading schemes (tradable emission schemes are essentially a market-generated venture whereby emissions permits can be bought and sold and credits generated when emissions cuts for certain pollutants are achieved).

<sup>123</sup> Megret, *supra* note 102, notes that crime against the environment may be crimes that are committed in exceedingly slow motion where the criminal law, traditionally, relies on clearly and ideally relatively immediately ascertainable damage (bodily harm, death, damage to property).

extent and impact of the damage to be understood also make this difficult.<sup>124</sup> Therefore the harm from each “crime” may be difficult to identify, and this makes it difficult in turn to identify the victims. Another challenge is how to assess harmfulness when environmental regulatory offences include behaviour which might not result in actual harm, but rather create potential or risk of harm.

### (i) Individuals

Individual victims may incur financial loss, consequences to health, emotional distress and loss of quality of their environment. Financial loss, direct and indirect, can be in the form of property value, loss of income, loss of livelihoods, as well as loss of economic security, higher insurance rates, and the financial loss related to the amount of time spent attempting to remedy the direct loss. Environmental crime can also impact on the health of individuals and result in death. The explosion in Bhopal, which released poisonous gas, resulted in over 20,000 deaths and at least 200,000 injuries and illnesses.<sup>125</sup> However, in many cases there can be significant delay between the criminal act, which results in exposure, and the manifestation of the harm to health. Research has focused on the relationships between increasing rates of illness and disease, such as cancer, heart disease, disease of the respiratory system, neurological damage, birth defects and genetic mutations, miscarriages, lowered sperm count, and sterility with exposure to environmental hazards.<sup>126</sup> The harm to the environment can relate to the presence of environmental agents that injure, such as lead, or it can relate to the absence of environmental macro and micro nutrients that are vital to human survival, leading to conditions such as malnutrition.<sup>127</sup>

Other losses from environmental harm include emotional/psychological distress, particularly as there can be lengthy delays and challenges in seeking remedies for environmental harm. Re-

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<sup>124</sup> Megret, *ibid*, notes that this characteristic is magnified when the damage is not only geographically but temporally diffuse, ie when the fact that it harm at all may only be ascertainable with substantial passage of time.

<sup>125</sup> F. Pearce, & S. Tombs, “Ideology, hegemony and empiricism: Compliance theories and regulation” (1990) 30:4 *British Journal of Criminology*; Croall, *supra* note 81.

<sup>126</sup> Pinderhughes, *supra* note 105.

<sup>127</sup> Williams, *supra* note 101.

victimization by the process can occur as many environmental cases take an inordinately long time in the justice system to be dealt with. For example, the Ecuadorian oil contamination case took 17 years to result in remediation for the victims and likely will be appealed by Chevron.<sup>128</sup> Individual loss can also include the loss of enjoyment of the environment. Harm is not limited to measurable harm such as the actual harm to human health, but can also include a broader notion of reduction in the quality of life.<sup>129</sup> The environment can have all sorts of value, including recreational, aesthetic, cultural, heritage, scientific or education. For example, in a New Zealand case the impact on passive recreational uses of a stream that had been polluted was taken into account by the courts.<sup>130</sup>

### (ii) Communities

Victims of environmental crime are usually victimized collectively. The harms experienced by individuals, including financial loss, increased health risks and loss of quality of their environment, can also be experienced collectively by the community as a whole. Economic impacts can affect communities which rely on industries for business and employment, such as those dependent on waters that are polluted, fish breeding areas that are harmed, crops that are polluted or environments visited by tourists that are harmed.<sup>131</sup> There may also be loss that results from the diminution of the economic benefits that were provided by the ecosystem. For example, the destruction of wetland that provided natural water purification means that the community now has to install water treatment plant.

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<sup>128</sup> The Ecuadorian case, *supra* note 112.

<sup>129</sup> Brian Preston cites a number of courts have held that the concept of life extends beyond absence of physical elimination to the activity of living in an environment of a certain quality. The denial of a wholesome and ecologically sound environment is a deprivation of life: The Hon. Preston, Brian J. "Principled Sentencing for Environmental Offences" paper presented to the 4<sup>th</sup> International IUCN Academy of Environmental Law Colloquium: Compliance and Enforcement: Towards More Effective Implementation of Environmental Law, White Plains, New York, 16-20 October 2006, on-line: [www.lawlink.nsw.gov.au/lawlink/.../Sentencing%20.../Sentencing%20-%20New%20York520\(updated\).doc](http://www.lawlink.nsw.gov.au/lawlink/.../Sentencing%20.../Sentencing%20-%20New%20York520(updated).doc). See also West Pakistan Salt Miners Labour Union v The Director, Industries and Mineral Development, Punjab, Lahore 1994 SCMR 2061 *Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994); *Waweru v Republic of Kenya, High Court of Kenya*, Misc. Civil Application No 118 of 2004, 2 March 2006.

<sup>130</sup> *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492, as cited in Preston, *ibid.*

<sup>131</sup> Preston, *supra* note 129.

Environmental crime can also increase the health risks in communities. A case in point is the Chevron Ecuadorian case where the court found that more than 9,000 people were at significant risk of contracting cancer in the coming decades.

Specific collective harm is the loss of culture and traditions. The harm might affect communities, such as indigenous, farming or coastal communities in particular ways, depending on their relationship with that environment. Many communities have certain cultures, beliefs and traditions that are eroded as a result of environmental degradation. For example, the loss of traditional hunting or gathering opportunities may lead to loss of cultural tradition or identity. The public trust perspective sees the natural resources such as air, waterways and forests, held in trust by the state for the benefits and the use of the general public. Environmental crime can impact adversely on these natural benefits and in those situations, the victims are the members of the public who are the beneficiaries of the public trust.<sup>132</sup> In a Northwest Territories case, 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.”<sup>133</sup> Consideration of the harm to species and their ecosystems are seen as “indispensable prerequisite for sustainable development”<sup>134</sup> and can affect “the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic values of biological diversity and its components”<sup>135</sup>.

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<sup>132</sup> Public trust doctrine means that despite its ownership of natural resources, the government holds certain resources, such as navigable waters, on trust or in a fiduciary capacity for the public. It is a doctrine that has played a central role in water and environmental management in the United States but has not been fully appreciated in Canada. See Ralph Pentland “Public Trust Doctrine - Potential in Canadian Water and Environmental Management”, POLIS Discussion Paper, 09-03 June 2009, on-line [http://poliswaterproject.org/sites/default/files/public\\_trust\\_doc-trine.pdf](http://poliswaterproject.org/sites/default/files/public_trust_doc-trine.pdf) and Kate Smallwood “Coming out of Hibernation: The Canadian Public Trust Doctrine, A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Masters in Law, University of British Columbia, Canada, 1993.

<sup>133</sup> *Krey v R* (1982) (NWT Terr. Crt) the environmental crime involved attempting to export four falcon eggs in contravention of the Export and Import Permits Act as discussed in Benidickson, *supra* note 35.

<sup>134</sup> *Our Common Future*, *supra* note 11.

<sup>135</sup> The Convention on Biological Diversity, 1992 found at: <http://www.cbd.int/doc/legal/cbd-en.pdf>.

### (iii) The environment / nature

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. The International Convention on Biological Diversity defines an ecosystem as “a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”. The ecosystem approach, as opposed to the sectoral approach (air, land, water), looks at the integration and interaction among the living and non-living elements of an ecosystem and views it as one functional unit.<sup>136</sup> Adopting this approach would broaden the environmental protection regime and impact on the concept of victimization.<sup>137</sup> 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 landscape, climate change, as well as harms to humans. Scholars from the animal rights perspective take the position that animals are themselves victims as “individuals”, not just part of nature.

### (iv) Future generations

Environmental crime has been described as being of an abstract nature, more about future generations and what the environment will look like for them.<sup>138</sup> The environmental law regime includes references to future generations. For example, the BC Forest and Range Practices Act (2002) codifies sustainable use as: including managing forests to meet the present needs without compromising the needs of future generations. The formulation of crimes against

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<sup>136</sup> Benidickson, *supra* note 35, p. 22.

<sup>137</sup> The House of Commons Standing Committee on Environment and Sustainable Development noted: “the key insight of the ecosystem approach is that it is the integration and interaction among the living and non-living elements of an ecosystem that enable it to function as a unit. If one part is harmed, the entire ecosystem itself may be affected. Sustained life is a property of ecosystem integrity. Individual species cannot exist on their own”. Benidickson argues that the adoption of the ecosystem focus represents a broadening of the objectives of environmental protection regimes. [see *R v Inco Ltd* (2001) 54 O.R. (3d) 495 (CA) for a recent judicial statement endorsing the validity of an ecosystem focus in environmental legislation. He also refers to the Northwest Territories Environmental Rights Act which is intended to further the “integrity, biological diversity and productivity of the ecosystems. Ontario also has an Environmental Bill of Rights (1993).

<sup>138</sup> Korsell, *supra* note 70 at p. 132.

future generations is based on the principle of inter-generational equity: “The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. ‘Benefit’ in this context is to be understood in its broadest meaning as including, inter alia, economic, environmental, social and intrinsic benefit.”<sup>139</sup> Future generations are thus an important category of potential victims of environmental crimes. Climate change is an excellent example of a major environmental problem caused by current and past activities that will mostly affect the next and subsequent generations. How then would victims who do not yet exist get redress for harm that may not manifest itself concretely for many years? Sustainable development offers a solution but only if it is properly implemented. Crimes against future generations, described above, could be part of the solution. At least one case recognized future generations as plaintiff and authorized an action against the government of Philippines, which was started by a lawyer claiming to represent future generations.<sup>140</sup>

### 2.3 By Extent of Damages Suffered

Another possible typology of traditional crime is based on the extent of damage suffered: minimal or significant damage; short term

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<sup>139</sup> Article 2.2, *New Delhi Declaration on Principles of International Law Relating to Sustainable Development* (London: International Law Association, 2002). See also Principle 3 of the Rio Declaration is the expression of generational equity: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”

<sup>140</sup> *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]. Mr. Oposa brought an action to challenge the decision of the Department of the Environment and Natural Resources of giving tree harvesting license to 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 of the Philippines Constitution. To represent the future generation he used his own children as plaintiffs and argued that they represented future generations. The Supreme Court of the Philippines agreed that the action was valid and permitted the action to proceed. The case was dealt with outside of court after the decision. Citation from Judge Davide: “Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.”

or long term; manifest or latent; or immediate or lasting. This approach takes into account the nature of the crime and the type of damage suffered, as discussed above, but differs insofar as it focuses on the *extent* to which the victim suffers at a specific point in time, which might assist in prioritizing individual victim remediation services.

However, this typology might not be very useful in environmental crime. Measuring harm is limited to current knowledge of ecological science. A decisive damage may be difficult to identify as the damage might be immediate or have a future impact, or may not be quantifiable in financial terms. The substantial damage might only be ascertainable after a long period of time. For victims, this contributes to the difficulty and time consuming nature of rectifying the damage and obtaining remediation. Another challenge is that the damage might be measured differently from different perspectives. Individual victims might lose very little but the accumulated effect to the community and the environment can be considerable. Is the environment itself measured for its value to determine the impact of the loss?<sup>141</sup> Is it reasonable to expect that the higher the value of the environment (for example for its ecological, scientific or recreational purposes), the more substantial will be the harm caused to that environment? What if the environment is already harmed or disturbed before the offender's act results in further environmental harm? One way of looking at this is that a disturbed or modified environment might be less resilient to further disturbance caused by the offence.<sup>142</sup>

## 2.4 By Scope of Harm

Environmental crime can be large-scale or small scale, and be local, transnational or global.<sup>143</sup> It can involve a single criminal incident or regulatory violation whose detrimental effect is on a localized and discrete area or it can involve transnational organised crime

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<sup>141</sup> Benidickson, *supra* note 35, at p. 214-216 discusses the different methodologies on how one might conceive "value" of the environment. For example, does one focus on the costs of replacing it or of restoring it to its original condition, or trying to determine the monetary value people place on non-marketable items such as threatened species, free-running streams and clear skies. Refers to the study, "Counting Canada's Natural Capital".

<sup>142</sup> *Ibid*, at p. 213.

<sup>143</sup> Bricknell, *supra* note 1 at pp. 6-8.



effecting millions of individuals and causing irreparable harm to the environment. Large scale environmental crime, especially involving organized crime groups, has become the focus of intergovernmental agencies and receives more attention than small scale crime or regulatory violations.<sup>144</sup> Similarly to the previous typology, there are a number of challenges in applying this one to environmental crime victimization, including the temporal considerations given that the harm can change over time.

## 2.5 By Perpetrator

Identifiability of the perpetrator is an important factor for victim remediation insofar as it facilitates criminal investigations and allows victims to pursue civil recourse. The more difficult it is to identify perpetrators, the more difficult it is to pursue and punish them. Possible perpetrators include individuals, collectives, corporations, governments, and organized criminal groups.<sup>145</sup> There might be an interconnection between multinational corporations, corrupt state officials and organised crime.<sup>146</sup> 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. Many environmental harms have latent manifestations, could be the result of actions by numerous actors rather than a sole perpetrator, and might require complex and costly scientific or technical evidence that might be in the hands of the perpetrator. If we take the example of climate change, the perpetrators and causes are so numerous (arguably everyone is part of the problem), the harm has been done over such a long period of time, and its effects will affect the whole of earth that it is extremely hard to identify people who are liable for this serious global environmental problem. Some harm may take so much time to manifest that it will only affect future generations.

Further study needs to be done on the forms of motivation for different perpetrators (whether motivated by laziness, greed,

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<sup>144</sup> See the work of UNODC, <http://www.unodc.org/unodc/en/frontpage/what-does-environmental-crime-have-in-common-with-organised-crime.html> and Interpol, *supra* note 99.

<sup>145</sup> Bricknell, *supra* note 1.

<sup>146</sup> See for example the illegal trade in timber in Indonesia, as discussed in Elliot, *supra* note 89.

or corruption) as this helps inform mitigation measures. Reversely, how does the lack of motivation (an accident or weak regulations) affect mitigation measures and victims compensation? Should victims get redress regardless of how the harm happened? If they should, who should pay for such a redress - the perpetrators or the government (aka society as a whole)? We also need to study further the role played by corporations in defining “green” crime and how their actions impact the legal remedies available for victims. One side is presented by Lynch and Stretsky who point out that corporations spend a good deal of effort denying they have caused serious human-environmental injury.<sup>147</sup> The other side to study is the impact of corporate social responsibility and public relations on corporations to provide remedies, such as the UN Global Compact and Global Reporting Initiative that embed practices of corporate social responsibility.<sup>148</sup>

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<sup>147</sup> Lynch and Stretsky, *supra* note 68, note how corporations’ lawyers argue that executives, though possibly aware of production-associated risks, did not intentionally target specific individuals or groups to harm and that legally, the lack of such intention separates these behaviours from ordinary crime. They also argue that in many instances the injured parties have placed themselves at risk. As evidence they point to their own studies, or studies funded by associations they support financially, to provide the scientific evidence needed to undermine legal standards of proof of environmentally linked victimization in any specific instance.

<sup>148</sup> UN Global Compact, on-line [http://www.unglobalcompact.org/newsandevents/news\\_archives/2006\\_10\\_06.html](http://www.unglobalcompact.org/newsandevents/news_archives/2006_10_06.html).

## **PART III: LEGAL BASES FOR RIGHTS AND REMEDIES**

The broad concept of environmental victimization - which is often characterized by collective victimization of humans, non-humans, the ecosystem and future generations – raises a number of challenges when developing victim-centred criminal justice policies, support and assistance programmes. It is not surprising that victims of environmental crime have generally been excluded from the conventional views of victimology and criminology. The rights of victims and access to justice issues are formulated with conventional victims of crime in mind, focusing on individual victims. This then raises a number of questions. 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 inter-generational equity? What are the “access to justice” mechanisms in place that can handle collective claims or representative claims on behalf of victimized groups? Are the existing rights and remedies responsive to the particular needs and challenges experienced by victims of environmental crime? What role do the victims themselves play in determining availability of remedies? If they do not self-identify as crime victims, they might be limiting their remedies to civil law.

This part of the report explores the number of legal and quasi-legal bases upon which victims of environmental crime can rely for various types of remediation. These include a review of the international norms and standards relevant to victims as well as potential international and regional mechanisms available to victims. Given the collective nature of the victimization, which is similar to victims of crimes against humanity, the available rights and remedies in the Rome Statute are also reviewed. At the domestic level, this part of the paper maps out the availability of remediation under criminal, regulatory, administrative and civil law.

### **1. Normative Basis for Victim Remediation: International Standards and Norms**

The international framework relevant to victims of environmental crime includes norms and standards developed to ensure assistance, treatment and remediation to victims of crime and to ensure the respect of human rights.

(i) UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>149</sup> calls upon States to ensure victim assistance, treatment and remediation to all victims of crime. States should establish and strengthen judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. This includes being informed of their rights. Restitution should be available, which includes the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.<sup>150</sup> When compensation is not fully available from the offender or other sources, the State should endeavor to provide financial compensation.<sup>151</sup> The Declaration defines “victims” broadly to include situations in which the perpetrator cannot be identified, apprehended, prosecuted or convicted.<sup>152</sup> It applies only to those who have suffered harm “through acts or omissions that are in violation of criminal laws operative within Member States”. Thus, the question is whether the regulatory offences are recognised as environmental “crime” within the State’s domestic laws and whether these rights are available to victims of regulatory offences.

Work is currently underway on a draft *UN Convention on Justice and Support for Victims of Crime and Abuse of Power*.<sup>153</sup> Similar to the Declaration, the draft Convention envisages victims as natural persons who, *individually or collectively* have suffered harm in relation to victimizations from violations of criminal law or abuse of power. Draft article 10(1)(b) specifically references environmental crime and calls on States Parties to legislate to include restitution to restore the

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<sup>149</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34, November 29, 1985 [UN Victims’ Declaration].

<sup>150</sup> UN Victims’ Declaration, article 8-11.

<sup>151</sup> UN Victims’ Declaration, article 12-13.

<sup>152</sup> UN Victims’ Declaration, article 1.

<sup>153</sup> International Victimology Institute, Tilburg University (“INTERVICT”), see <http://www.tilburguniversity.nl/intervict/undeclaration/>. The current draft Convention is entitled “United Nations Convention on Justice and Support for Victims of Crime and Abuse of Power”.

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.

(ii) International human rights framework

The international human rights framework is being touted as a way to enforce some environmental norms. There is increasing recognition that the environment is tied to the protection of human life and basic human values. The *Stockholm Declaration* of 1972, generally seen as the starting point of a rights-based approach to environmental protection, provides for the fundamental right “to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and [everyone] bears a solemn responsibility to protect and improve the environment for present and future generations”.<sup>154</sup> Since Stockholm, the discourse has shifted from linking specific human rights to specific environmental disruptions to articulating the right to a clean and healthy environment as being a human right itself.<sup>155</sup>

The UN Human Rights Council (and its predecessor the Human Rights Commission) has regularly passed resolutions since 1992 that recognise the right of every person and all peoples to a healthy environment.<sup>156</sup> Most recently, the UN Human Rights Council

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<sup>154</sup> Declaration of the UN Conference on the Human Environment (The Stockholm Declaration) 1972 on-line at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503>. At the concluding of the Stockholm Conference, a declaration was made that “man is both creature and moulder of his environment, which gives him physical substance and affords him the opportunity for intellectual, morel, social and spiritual growth. Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights; even the right to life itself”.

<sup>155</sup> The right to a healthy environment is codified in the regional human rights instruments in Africa and America. The *African Charter of Human and Peoples’ Rights*, 27 June 1981, 21 I.L.M. 58 (1982), art. 24, for instance, declares that all peoples shall have the right to a general satisfactory environment favourable to their development. The 1988 *American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Additional Protocol*, 14 November 1988, 28 I.L.M. 156 (1988), art. 11, provides for a right to a healthy environment. There have been discussions about drafting a Protocol to the European Convention on Human Rights to include an explicit right to environment. The European Court on Human Rights in its case law implicitly right to environment

<sup>156</sup> The UN Human Rights Commission (as it then was) noted in resolution 2005/57 “A democratic and equitable international order requires, inter alia, the realisation of the right of every person and all peoples to a healthy environment”. The Commission also had a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights. In 1998, this Special Rapporteur’s mandate evolved into human rights and the environment.

passed a resolution on climate change noting that climate change has implications for the full enjoyment of human rights and that the world's poor are particularly vulnerable.<sup>157</sup> The recent 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."<sup>158</sup> States are to establish and implement assistance programmes for indigenous peoples for such conservation and protection, and take effective measures to ensure that no storage or disposal of hazardous materials takes place on their lands without their free, prior and informed consent.

In the international human rights discourse, a number of conceptual issues are raised. For example, does the right to a healthy environment refer to individual or collective rights? How does the due diligence obligation on States to prevent, investigate and punish such violations play out in practice? Is this right anthropocentric, focusing on the right of human beings only?<sup>159</sup> What is the discourse from an ecocentric perspective, such as animal rights, species' rights or rights for nature? Do these rights extend to future generations? What are the duties that accompany such rights?

### (iii) Application to international and regional human rights mechanisms

There are a number of cases where the international and regional human rights mechanisms have been used to seek justice for

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<sup>157</sup> The Human Rights Council resolution on climate change, Res 7/23, 28 March 2008.

<sup>158</sup> UN Declaration on the Rights of Indigenous Peoples 13 September 2007, GA Res. 61/295, art 29.

<sup>159</sup> Some authors have argued that it cannot be anything else than anthropocentric since human rights are linked to human dignity and human themselves as people. This also brings the whole eco-ethic discourse on how to view environmental law and rights. Elaine Hughes states: Environmental rights can be viewed as a basic biological survival right. The component of this right would be: "First, to supply the essentials of life, it is necessary to maintain essential biological processes. Thus, for example, humans need to have photosynthesis continue to supply atmospheric oxygen, and to maintain hydrological cycles to supply fresh water. Second, the only known way to maintain essential biological processes is to maintain functioning ecosystems. There is no artificial or technological substitute. To maintain functioning ecosystems (i.e., natural processes) scientific consensus tells us to do things such as: preserve biological diversity; maintain soil fertility and the productive capacity of the land; protect oceans; receive sunlight only at wavelengths to which the planet's biology is accustomed; maintain climatic stability; and protect ourselves and our environment from toxic contamination." Elaine L. Hughes and David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999) 30 Ottawa L. Rev. 229.

environmental victims. Victims of environmental harm have sought clarification of their rights from the Human Rights Committee. A group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations. The Committee found that the case raised a serious issue with regard to the obligation of States Parties to protect human life, but declared the case inadmissible due to failure to exhaust local remedies.<sup>160</sup> The Human Rights Committee indicated that the right to life encompasses some duty to protect human life from environmental hazards that threaten health and longevity. Victims in Canada also have applied to regional human rights mechanisms seeking remedies for environmental damage. For example, a petition has been addressed to the Inter-American Commission on Human Rights from representatives of the Inuit Circumpolar Conference who are seeking relief from the United States for the adverse consequences of climate change on their health and livelihoods.<sup>161</sup>

Victims in Europe have applied to the European Court of Human Rights to pursue remedies for violations to their right to a clean and healthy environment. The Court has noted that the right of respect for private and family life can apply to environmental cases, regardless of whether the pollution is directly caused by the State or caused by the failure of the State to regulate private-sector activities properly.<sup>162</sup> The Court has also held that the right to a fair hearing might be violated in cases where home owners experience excessive lengthy administrative proceedings to determine responsibility for defendant businesses with respect to the noise and pollution that over the years caused serious and long term health problems.<sup>163</sup>

There are a number of other regional mechanisms that can be used by environmental victims. The Commission for Environmental

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<sup>160</sup> In *EHP v. Canada*, (Communication No. 67/1980). See also Richard D. Glick, "Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights" (1995) 19 Harv. Envtl. L. Rev. 69).

<sup>161</sup> Benidickson, *supra* note 35 at p. 397.

<sup>162</sup> *Lopez Ostra v Spain* 16798/90 [1994] ECHR 46 (9 December 1994).

<sup>163</sup> *Leon and Agnieszak Kania v Poland*, Application no. 12605/03 (September 2009). *Zander v Sweden* [1993] IIHRL 103 (25 November 1993) was another right to fair hearing case. In that case the Court has also applied article 6, right to a fair trial, as a basis for finding that the applicants had been denied a remedy for threatened environmental harm, which concerned their ability to use the water in their well for drinking purposes.

Cooperation with Canada, United States and Mexico in Montreal includes a citizen submission process. For example, the latest submission is from Bennett Environmental Inc who asserts that Canada, more specifically the province of Quebec, is failing to effectively enforce the Environment Quality Act by issuing a permit for the use of chemical oxidation to treat PCB-contaminated soils without evidence that the process works.<sup>164</sup> There is also a citizen submission process of the NAFTA Environmental Side Agreement.<sup>165</sup>

(iv) Rome Statute provisions for victims

The Rome Statute which establishes the International Criminal Court (ICC) provides a useful example of how victims who have been collectively victimized might access reparations for the harms they suffered. The Statute provides for two different approaches to reparations: (i) court ordered restitution for those victims whose cases have been tried before the court, and (ii) reparations from a Trust Fund, which provides redress to large numbers of individuals, whose cases do not make it to court. The ICC may award reparation on an individual or a collective basis, or both.<sup>166</sup> The ICC State Parties have also established the Trust Fund for Victims (TFV) responsible for supporting victims of crimes under the jurisdiction of the ICC by implementing Court ordered reparation awards against a convicted person and using voluntary contributions to provide victims and their families with physical and psychological rehabilitation and material support.<sup>167</sup> A trust fund has flexibility and can ensure equitable awards among different groups of victims, and therefore in cases of victims of environmental crime, might be better able to provide some form of reparations than rigid court procedures.

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<sup>164</sup> PCB Treatment in Grandes-Piles, Quebec Submission ID: SEM-11-001 Party concerned: Canada Date filed: 11/01/2011 Status: Open. See: [http://www.cec.org/Page.asp?PageID=2001&ContentID=5608&SiteNodeID=654&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=5608&SiteNodeID=654&BL_ExpandID=).

<sup>165</sup> See Tseming Yang, "The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of the Metales y Derivados Matter" (October 2004) Vermont Law School.

<sup>166</sup> Articles 68 and 75 of the *Rome Statute*, *supra* note 20.

<sup>167</sup> Article 79 *Rome Statute*, *supra* note 20.



## 2. Legal Basis for Remediation and Access to Justice: Criminal Law

This section focuses on access to justice and available remedies for victims of environmental harm as a result of a violation of criminal law. In several jurisdictions, including Canada, prosecutions of both criminal and regulatory offences are conducted by prosecution services, although the law enforcement agencies might vary from police to environmental or conservation officers. Therefore, there is overlap with this section and the next one on regulatory enforcement. It should be noted that environmental crime is overwhelmingly prosecuted as regulatory offences rather than criminal code offences. Further study is required as to why this is so and what might be the impact on victims' access to justice and available remedies.

### (i) Victims in the criminal justice system

Crimes are viewed as acts against the State. The State is responsible for prosecuting crimes and is assumed to represent the best interests of society, including those of the victims. Traditionally, criminal cases such as assault or theft cases involve a discrete universe of victims and clearly identifiable perpetrators.<sup>168</sup> The victim of crime is usually defined in legislation as a person who is directly and proximately harmed as a result of the commission of a crime.<sup>169</sup> One of the main challenges in accessing the criminal justice system for victims who suffer from environmental harm is the individualist nature of criminal law – it is formulated with individual victims and individual perpetrators in mind.

As already discussed, victims in environmental crime cases often suffer collective victimization, such as the surrounding communities affected by pollution or might involve large numbers of potential victims, such as from an explosion at an oil refinery. Where the harm is not very obvious or direct, or the full impact is not felt until long

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<sup>168</sup> Korsell, *supra* note 70, at p. 133.

<sup>169</sup> In the British Columbia *Victims of Crime Act*, RSBC 1996, C478, a “victim” is defined as “an individual who suffers, in relation to an offence, (a) physical or mental injury or economic loss as a result of an act or omission that forms the basis of the offence, or (b) significant emotional trauma and is an individual against whom the offence was perpetrated or, with respect to an individual against whom the offence was perpetrated, is a spouse, sibling, child or parent of the individual”.

after prosecution, are these “victims” accorded victim status in the criminal justice system? The challenges for victims include 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. Is criminal law suited to the more collective victimization experience of environmental crime victims? Further study is needed to explore new approaches by criminal courts in dealing with collective victimization, such as the ICC and the Victim Trust Fund, and whether other jurisdictions allow for designated representatives of a community that has been harmed to have standing as victims in criminal cases.

### (ii) Victims’ rights in the criminal justice system

The last twenty-five years have witnessed increasing recognition of the rights and needs of the victims of crime in many countries. Based on the premise that victims have a legitimate interest in the criminal justice system, several States have adopted domestic legislation to provide for a number of victims’ rights including the right to be treated with courtesy and respect, the right to present the victims’ perception of the impact of the offence; and the right to information. For example, Canada has taken measures to assist victims of crime, including amendments to the *Criminal Code*, the enactment of victims’ rights legislation in various provinces and the establishment of victim assistance and support services.<sup>170</sup> The Canadian provincial legislations do not create standing for the victims to enforce the rights set out in the Acts. Other jurisdictions have created enforceable rights for victims of crime. A case in point is the United States *Victim of Crime Act* which gives victims direct standing to claim their procedural and substantive rights in criminal cases independently of prosecutors and also imposes on the judiciary an affirmative obligation to “ensure” that those rights are afforded.

One of the issues for further study is to explore the potential impact of victims’ rights on criminal environmental investigation,

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<sup>170</sup> In 1988, the federal, provincial and territorial governments adopted the *Statement of Basic Principles of Justice for Victims of Crime*, which was updated in 2003. This Statement provides a comprehensive set of principles regarding how victims should be treated, particularly during the criminal justice process. Several Canadian provincial and territorial governments enacted legislation governing victims’ rights, including British Columbia which passed the Victims of Crime Act in 1996.

prosecution and punishment. The US *Victim of Crime Act* provides for an interesting study as to how far the potential impact can be, particularly with reference to two environmental crime cases involving large numbers of victims<sup>171</sup>. The first case involves a large number of victims from an explosion at a BP oil site<sup>172</sup> and the second case involved illegal emissions from a CITGO Petroleum site<sup>173</sup> that affected the surrounding communities, both discussed below. Another interesting issue to study is the fact that in some jurisdictions there are specialist courts established to hear environmental matters.<sup>174</sup> A question arises as to how victims are treated in these courts compared with general criminal courts.

*(a) Identifiable versus non-identifiable victims*

In cases where the impact is felt and the harm is complete, identification of all the victims can pose a logistical problem. How do the prosecutors ensure that the victims have been notified of their rights? An American magistrate suggested a “proactive approach” that “would require courts to provide an avenue for victims to identify themselves directly, and once so identified.... to do more than simply rely on the prosecutor to provide notice of such court proceedings by taking steps to provide such notice itself”.<sup>175</sup>

The CITGO conviction raised the issue of who are the eligible victims of the environmental crime who will have the right to participate in the sentencing hearing.<sup>176</sup> Prior to the sentencing, prosecutors held community meetings to determine who may have been victims of

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<sup>171</sup> The United States *Victim of Crime Act* defines a “crime victim” as a person directly and proximately harmed as a result of the commission of a federal offence, as discussed in Judson Starr, Brian Flack and Allison Foley “A New Intersection: Environmental Crimes and Victims’ Rights” (2009) Vol 23 No. 3 *Natural Resources & Environment*, available on-line: <http://www.law.uh.edu/faculty/thester/courses/Environmental-enforcement/Environmental%20Crimes%20and%20Victims'%20Rights.pdf>.

<sup>172</sup> *United States v BP Prods. N. Am.* 2008 WL 501321 (S.D. Tex. Feb 21, 2008); In Dean, 527 F.3d 391 (5<sup>th</sup> Cir. 2008) [BP case].

<sup>173</sup> *US v CITGO*, Crim No CR-06-563 (S.D. Tex. June 27, 2007) [CITGO case].

<sup>174</sup> Bricknell, *supra* note 1 mentions two Australian states which have established specialized environmental courts: South Australia established the Environment, Resource and Development Court in 1993 and New South Wales established the Land and Environment Court in 1980.

<sup>175</sup> Starr et al, *supra* note 171.

<sup>176</sup> CITGO case as discussed in Starr et al, *supra* note 173.

CITGO's illegal conduct. The questions raised include whether every resident who could smell the odours would be considered a "victim" or would some additional injury be required. Do victims only refer to individuals or could environmental justice groups have victim status? In the CITGO case, the district court allowed the prosecutors to present testimony of selected victims whose experiences and health effects were representative of others in the community.<sup>177</sup>

*(b) Victim's right to present views and concerns at appropriate stages of the proceedings*

According to the *UN Victim Declaration*, the view, concerns and representations of victims are an important consideration in criminal justice processes and should be considered in accordance with prevailing law, policies and procedures.<sup>178</sup> In order to ensure their participation, victims should be provided with information about their roles and opportunities to participate. The potential impact of this right, particularly in jurisdictions where victims' rights are enforceable and where there might be hundreds or thousands of victims, can be significant.

In the United States, the *Victims of Crime Act* provides the victims a "reasonable right to confer with the attorney for the government" but also contains a provision requiring the court to "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings" in the event that the "number of crime victims makes it impracticable to accord all of the crime victims the rights" enumerated in the Act.<sup>179</sup> In the BP case, a plea negotiated agreement was reached but without the victims being part of the discussion.<sup>180</sup> Plea bargaining agreements are not uncommon in complex corporate crime cases and can take many meetings and sensitive discussions. In the BP case, the court agreed with the prosecutors that consultation with the large number of victims was impracticable and might also jeopardize the

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<sup>177</sup> *Ibid.*

<sup>178</sup> *UN Victim's Declaration*, *supra* note 150, article 6(6) and reflected in the *Canadian Statement of Basic Principles of Justice for Victims of Crime*.

<sup>179</sup> *Victims of Crime Act*, as discussed in Starr et al, *supra* note 171.

<sup>180</sup> BP case as discussed in Starr et al, *supra* note 172.

plea discussions.<sup>181</sup> The court ordered the government to provide “reasonable notice to all identifiable victims” which was done through a press conference and an informational website and telephone hotline as well as multiple mailed notices. The government also made available a victim-witness coordinator within the US Attorney’s Office and a procedure was established by which victims could submit victim impact statements to the court. Some victims applied to court to set aside the plea settlement. They were allowed to make their case but in the end the district court rejected that their rights were violated, in part because the victims had been given an opportunity to address the court with respect to their views about the validity of the agreement. This was upheld by the court of appeal.<sup>182</sup>

In Canada, when considering that there might be hundreds or thousands of victims, how does the prosecutor keep victims informed of the case and provide the victims with an opportunity to present their concerns or views? Should they hold periodic “town hall” meetings with the crime victims to inform them of the case? 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”.<sup>183</sup> What is reasonable in such cases to ensure victims’ rights but also avoid basic logistical problems? Added to this discussion is also the principle of prosecutorial discretion and ultimately the decision to charge, plea bargain and strategize is that of the prosecutors.

### *(c) Victims’ right to be heard during sentencing*

In determining the sentence for perpetrators of environmental crime, the court considers the impact to the victims. In environmental crime cases, the victims can include individuals whose health, safety, and/or property have been impacted by the commission of the

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<sup>181</sup> The prosecutors had filed an ex parte motion prior to entering into the plea bargain informing the court of the ongoing negotiations between the government and BP and requesting an order outlining the procedures to be followed, see *ibid.*

<sup>182</sup> For detailed discussion of the procedures in the BP case, see Starr et al, *supra* note 171.

<sup>183</sup> Starr et al, *ibid.*

offence.<sup>184</sup> More commonly, the victims are the community at large, the non-human members of the community, and the “environment”. These impacts may legitimately be taken into account during sentencing. Often the severity of the sentence/penalty reflects the extent of harm to victims and the number of victims. One way of ensuring the court appreciates the impact on *individual* victims is through victim impact statements, which allow the victims to state to the court the physical, financial and emotional effects of the crime.<sup>185</sup> In some countries, judges are required by law to ask the prosecutor, before imposing a sentence, whether the victim has been informed of the opportunity to prepare a victim impact statement.<sup>186</sup>

In *R. v. Koebel*, a *Criminal Code* prosecution of some Walkerton water treatment operators (poor water quality that resulted in an E-Coli epidemic that damaged the health of several citizens and killed others), the judge used the victims’ impact statements to make a decision on the sentence.<sup>187</sup> A New Zealand court specifically held that the property owners affected by the commission of the offence of illegal clearing of native vegetation on private property were victims of a crime and victim impact statements ought to have been before the sentencing court.<sup>188</sup> Potential implications in providing all victims the right to speak during sentencing might mean that the sentencing phase of environmental crime cases could be extended significantly, at added cost, when there are multiple victims wanting to exercise this right.

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<sup>184</sup> Preston, *supra* note 129.

<sup>185</sup> A victim impact statement is a written account of the personal harm suffered by a victim of crime. The statement may be received and taken into account as evidence of the harm caused by the offence and, in that way, as evidence relevant to the determination of a punishment by sentence. Victims can voluntarily choose to prepare a victim impact statement, but once they do, consideration of it by a judge is mandatory.

<sup>186</sup> Section 722 of the *Criminal Code of Canada*: 722. (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

(2) A statement referred to in subsection (1) must be prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and filed with the court.

<sup>187</sup> *R. v. Koebel*, [2004] O.J. No. 5199, ONSC.

<sup>188</sup> *Auckland City Council v North Power Ltd* [2004] NZRMA 354, cited in Preston, *supra* note 130.

### (iii) Restitution in sentencing orders

The judge can make a variety of sentencing orders against the offender, and in so doing can have the victim in mind. In situations where individual victims are identified, the judge can order restitution. Restitution, which refers to payments the offender is ordered to make to the victim, differs from compensation, which refers to payments from the State. The Canadian *Criminal Code* permits courts to order restitution for property lost or destroyed as a result of the commission of an offence.<sup>189</sup> The Crown can apply for restitution on behalf of the victim. Crime victims in British Columbia do not have a right to make direct applications for restitution to the court, unlike victims in Alberta, Saskatchewan and Nova Scotia.<sup>190</sup> However, victims can set out the financial impact of the crime on them in victim impact statements. All provinces have some form of compensation programme for crime victims. In British Columbia, the *Crime Victim Assistance Act* (formerly the Criminal Injury Compensation Act) allows crime victims who have suffered injury to apply for compensation.<sup>191</sup> However, likely victims of environmental crime might find it challenging to apply as the compensation is limited to prescribed offences.<sup>192</sup>

Individual restitution in collective victimization situations is more difficult, particularly where the victims are not identifiable individual victims. However, where the victim is seen to be the community, general public or the environment, the court may make a number of orders. For instance, (i) an order for restoration of any harm to the environment caused by the commission of the offence; (ii) payment of the costs and expenses incurred by a public authority in restoring any harm to the environment; (iii) costs for carrying out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit; or/and (iv) payment of a specified amount to an environmental trust or a specified environmental organization for the purpose of a specified project for the restoration

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<sup>189</sup> *Criminal Code* of Canada, ss. 738-741.2.

<sup>190</sup> Benidickson, *supra* note 35.

<sup>191</sup> *BC Crime Victim Assistance Act* [SBC 2001] Chapter 38.

<sup>192</sup> For example, in BC, according to s. 3(1)(a)(i) of the *Crime Victim Assistance Act* and s.3 of the Regulation "a prescribed offence" for the purpose of the act is a *Criminal Code* offense found in schedule 1 of the regulation. It seems that the act does not cover environmental regulatory offenses.

or enhancement of the environment.<sup>193</sup> What happens if there has been irreparable harm caused by the offender's conduct, such as death of biota and damage to the ecosystem structure and function? How does the court determine restitution and in turn who is to receive the restitution? The court could fix a penalty that reflects and is proportionate to the harm. The court could order reparation by way of ordering the offender to carry out a project for the restoration or enhancement of another environment or to pay an amount to an environmental trust or specified organisation for the purpose of a project for the restoration or enhancement of the environment.

The *Criminal Code* amendments in 2004 introduced a provision which allows for adverse publicity as a part of sentencing. This requires the corporation to inform the public of the offence, the sentence imposed and the remedial measures being undertaken by the corporation through running ads in the media admitting to the criminal acts.<sup>194</sup>

#### (iv) Restorative justice

Another way of recognizing the rights and needs of the victims of crime is the concept of restorative justice, whereby justice to the victim becomes a central goal of the criminal justice system and of sentencing. In a restorative justice process, the offender participates in a restorative conference with the victims. This involves the offender making an apology, taking responsibility and being held accountable for their actions, acknowledging the victims' concerns and agreeing to try and meet those concerns by making reparations.<sup>195</sup> This concept could apply in environmental cases and has been used in a number of such cases in New Zealand. For example, in a case involving discharge of contaminants from a printing plant which caused an offensive odour and had substantial effects on victims in terms of sore throats and sinus irritations, the restorative justice process involved the company directors making a private and public apology, payment of the costs of a dispersion modelling report, tree planting, donation to the local

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<sup>193</sup> See the discussion of alternative sentences in Preston, *supra* note 129.

<sup>194</sup> Section 732.1 (3.1) of the *Criminal Code*.

<sup>195</sup> Preston, *supra* note 129.



school and payment of the costs of the restorative justice facilitator.<sup>196</sup> Given the predominance of corporations as environmental offenders, it raises such questions as whether a corporation can feel shame, express genuine remorse and be the subject of forgiveness.

#### (v) Victim services / assistance programmes

Many jurisdictions provide for the collection of a victim surcharge which funds victim assistance programmes. For example, in British Columbia, the *Victims of Crime Act* sets up a victim fine surcharge which funds services or projects that may benefit victims of crime. This fund is not used to provide direct compensation to individual victims but rather funds broader assistant and support services.<sup>197</sup> Further study could include examining whether or not and how the current victim assistance and support services are being used by victims of environmental crime.

### **3. Legal Basis for Remediation and Access to Justice: Regulatory Enforcement**

#### (i) Victims in the regulatory regime

Built into the regulatory law regime making up the environmental conservation and protection statutes, the “seriousness” of the harm perceived by society is expressed in the types of offences, maximum penalties attached and enforcement approaches<sup>198</sup>. This reflects the understanding of the intensity and extent of the environmental impact, the impact to victims, actual or potential loss, and the intentional or negligent nature of the act. The objective of regulatory statutes is to protect the public or broad segment of the public from the potentially adverse effects of otherwise lawful activity as opposed to criminal

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<sup>196</sup> *Auckland Regional Council v Times Media Group Ltd and Anthony Cook* [DC Auckland, CRN 2084004885 and 889, 16/06/03, Judge McElrea] as discussed in a paper of Judge McElrea “The role of restorative justice in RMA prosecutions” delivered at the Salmon Lecture 2004 to the Resource Management Law Association (27 July 2004).

<sup>197</sup> Sections 8.1 and 9 of the *Victims of Crime Act*.

<sup>198</sup> The legislation developed by governments is influenced by a variety of factors, including interests of non-state players, such as corporations, NGOs, and conversation groups. This varies from country to country and will be reflected in the environmental standards set by laws.

statutes which involve deterring and punishing illegal acts.<sup>199</sup> Often regulatory legislation defines victims broadly, as “general public” and not really accommodating individual victims.

Regulatory approaches can be broadly divided into the “harder” approaches, variously called “enforcement”, “command and control”<sup>200</sup> or “legalistic” models and the “softer” approaches of “compliance”, “self-regulation”, “voluntary agreements” or “education and information” schemes. The former advocates for stricter enforcement of the rules and encourages punishment for non-compliant behaviour and the latter counseling persuasion and cooperation and more severe measures as a last resort. Bricknell discusses two main models of regulation for deterring environmental offences: the tit-for-tat enforcement strategy<sup>201</sup> and the enforcement pyramid<sup>202</sup>. Both include a mixture of punishment and persuasion but differ as to the mix. Further study is required, not only with respect to which approach or blend of approaches is more effective in preventing and deterring environmental offences, but also in understanding how different regulatory approaches impact victims and take into account their perspective and their rights.

### (ii) Who detects environmental offences - victim reporting?

A literature review from other jurisdictions suggests that environmental offences are seldom reported by victims but

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<sup>199</sup> *R v Wholesale Travel Group* [1991] 3 SCR 154.

<sup>200</sup> Command and control incorporates rules on what is allowed and not allowed, and the threat of sanction (be it in the form of administrative, civil or criminal penalties) to deter and punish non-compliant behaviour.

<sup>201</sup> See Bricknell, *supra* note 1 at p. 13, for a discussion of Scholz’s development of the tit-for-tat enforcement strategy in 1984. The TFT relies on the establishment of a cooperative relationship between the regulator and the regulated, with the regulator desisting from imposing a deterrent strategy unless or until the regulated partner chooses to test or break this relationship. The partnership is resurrected if the punishment elicits a return to compliant behaviour.

<sup>202</sup> See Bricknell, *supra* note 1 at p. 13, for a discussion of Braithwaite developing the enforcement pyramid model in 1985. The enforcement pyramid promotes the view that compliance is only really achievable if the regulatory authority is supported by, and the regulated body is respectful of, the layers of intervention built into the enforcement pyramid. In its simplest form, the enforcement pyramid is constructed of five stories in which persuasion is applied first to elicit compliance, with the threat of escalating sanctions if non-compliance continues. A warning letter is followed by a civil penalty, then a criminal liability and finally incapacitation in the form of a suspension of licence. The object of this regulatory model is to give the regulated party the opportunity to voluntarily comply.

rather uncovered by means of control or surveillance activities of environmental officers.<sup>203</sup> Environmental officers might choose not to report to the prosecution authorities but rather deal with the offence through other administrative measures.<sup>204</sup> It has been suggested that the dual mandates of environmental agencies – to collaborate with companies and to function as their supervisors – have resulted in erratic decision making regarding prosecution.<sup>205</sup> Further study is required to explore whether this problem fosters, as suggested by Du Rees, the denial of the victims and their harm by environmental agencies.<sup>206</sup>

In some countries, enforcement agencies have established hotlines or on-line compliance services whereby suspicious behaviour can be reported.<sup>207</sup> In the United States, the Environmental Protection Agency has an online reporting system for violations.<sup>208</sup> There are also public awareness campaigns that encourage reporting. The Canadian Environmental Protection Act (CEPA) 1999 provides for protection to whistleblowers who are employees and citizens who report violations of the CEPA.<sup>209</sup> Whistleblower protection is very important in this area as without whistleblowers, many victims may never even become aware that they have been victimized by actions that damage the environment. Another way of increasing public awareness is the establishment of “pollution inventories” such as the Toxics Release Inventory in the United States and the National Pollutant Release Inventory in Canada, which require corporations to report the release of “listed substances” to databases that are accessible by the

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<sup>203</sup> Korsell, *supra* note 70 at p. 134.

<sup>204</sup> Du Rees, *supra* note 72. Part of this discussion involves when the avenue of administrative measures is chosen, it is the director or another executive level public servant who makes the final decision and imposes the measure, much like the a prosecutor decides whether or not to proceed with prosecution. In the end it depends on the circumstance and whether an administrative or criminal process is chosen remains in the hand of some “executive public servant”. Not that tickets with regards to some offenses may be directly impose but those are considered as regulatory offenses measure and not administrative measure, just like a speeding ticket.

<sup>205</sup> Du Rees, *supra* note 72.

<sup>206</sup> *Ibid.*

<sup>207</sup> Bricknell, *supra* note 1 at p. 16, mentions that in Australia, enforcement agencies have established hotlines or on-line compliance services whereby suspicious behaviour can be reported.

<sup>208</sup> See <http://www.epa.gov/tips/>.

<sup>209</sup> CEPA, *supra* note 11, Part 2.

public.<sup>210</sup> Another issue to study might be how often these reporting mechanisms are used and how effective they are in encouraging reporting of environmental offences by the victims.

(iii) Victims' initiation of prosecutions of regulatory offences

There is some debate as to whether prosecution is the best deterrent in environmental protection regimes or emphasis should be more on negotiated compliance.<sup>211</sup> The enforcement officer has discretion as to whether to investigate an offence and refer the matter to the prosecution service or whether to issue a warning, caution or advisory letter. This negotiated compliance is between the enforcement agency and the offender, which is usually a corporation. How are the victims' rights to present their views and concerns taken into account in such circumstances? What if the victims disagree with the decision of the enforcement agency?

*(a) Citizen petition*

The Canadian Environmental Protection Act (CEPA) 1999 provides for a citizen petition to initiate an investigation. It further establishes that under its regulations, prosecution is mandatory under certain conditions: if there is death or bodily harm to a person; serious harm or risk to the environment, human life, or health; the alleged violator knowingly provided false or misleading information, obstructed the enforcement officer or CEPA analyst, interfered with a substance seized; concealed information or did not take all reasonable measures to comply with orders or directives of enforcement officers or the Environment Minister.<sup>212</sup> CEPA provides individuals with the right to sue if they feel CEPA is not being fully enforced. This provision has been used fairly rarely, considering the cost it involves to gather all the evidence (without the power of police or other enforcement officers) and the cost of the prosecution itself (judicial cost, hiring a lawyer, etc), plus all the time needed to accomplish this task.

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<sup>210</sup> Toxics Release Inventory, on-line at: <http://www.epa.gov/tri/> and National Pollutant Release Inventory, on-line at <http://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1>.

<sup>211</sup> See the discussion in Section Part I Section 3 on "the debate regarding criminalization versus regulatory perspective".

<sup>212</sup> CEPA, *supra* note 11, Part 2.

A number of countries, including the United States and Australia allow for citizen suits.<sup>213</sup> In the US, a number of environmental laws permit such lawsuit which can be initiated by a private citizen to enforce a statute. The lawsuit can be brought against a government body, corporation or another citizen for engaging in conduct prohibited by a law (illegal pollution) or against a government body for failing to perform a non-discretionary duty (such as enacting regulations as required). Citizens must show that they have “standing” to bring such suits. The plaintiff must have suffered an injury of a legally protected interest which is concrete and particularized and actual or imminent, a causal connection between the injury and the defendant’s conduct, and there must be a likelihood of redress.<sup>214</sup>

*(b) Private prosecutions*

Individuals and NGOs may initiate private prosecutions by laying an information concerning the alleged offence and preparing for trial. In Canada, the Attorney General retains authority to stay proceedings at any time before judgement and many provincial prosecution policies provide that private prosecutions may be taken over by Crown Counsel.<sup>215</sup> Advocates criticize the fact that in some provinces private prosecutions are taken over by crown counsel and can be stayed. Others argue that public prosecutors are less likely to discontinue a private prosecution today than they used to be and are supposed to do so only when there is so little evidence that there is no case to answer or the prosecution is likely to damage the interest of justice.<sup>216</sup> Commencement of private prosecutions can shame the government into laying its own charges, as well as raise public awareness. A recent example is where an Alberta resident, assisted by Ecojustice, initiated a private prosecution against Syncrude

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<sup>213</sup> David Mossop “Citizen Suits – Tools for Improving Compliance with Environmental Laws” on-line: [http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/~/\\_media/publications/proceedings/26/mossop.ashx](http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/~/_media/publications/proceedings/26/mossop.ashx).

<sup>214</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>215</sup> Section 579(1) *Criminal Code*. In British Columbia, there is a Crown counsel policy which provides that all private prosecutions will be taken over by the Attorney General. This means that the Crown policy on whether to proceed with a charge will be used, and at times the charge may be stayed if the threshold of substantial likelihood of conviction and public interest is not meant.

<sup>216</sup> Dianne Saxe “Governments feel the sting of private prosecutions” (April 23, 2010) *Lawyers Weekly*, on-line: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1148>.

Canada Ltd alleging responsibility for killing 500 ducks at the tar sands operation.<sup>217</sup> This prosecution was taken over by Crown Counsel. Syncrude was eventually found guilty.<sup>218</sup>

In jurisdictions where private prosecutions are allowed, the person bringing the private prosecution may share in the proceeds from the fines. This might encourage more people to use private prosecutions. *R v Kingston* was a successful case where private prosecution was used in the environmental context. In this case, a biologist found evidence that the city of Kingston was depositing a deleterious substance in water frequented by fish contrary to s.36 of the Fisheries Act. The biologist started the prosecution of the city and was then joined by the provincial prosecutor who wanted to prosecute the city for the violation of the Water Resource Act. The city of Kingston was found guilty and part of the fines linked with the Fisheries Act was shared with the biologist. However, cost remains a major obstacle for private prosecution since gathering evidence, hiring experts, hiring a lawyer, etc., fall on the shoulder of the individual or the NGO. In some cases, to mitigate the impact of cost for public interest litigants, the courts have order advance cost award be paid before the trial to facilitate access to justice.<sup>219</sup>

CEPA 1999 allows for private prosecution of sorts in the form of an “environmental protection action”.<sup>220</sup> In cases where the government has failed to conduct an investigation and report or the response to the investigation was unreasonable, an individual who had applied for an investigation can bring an environmental protection action to court against a person who committed an offence under CEPA and caused significant harm to the environment. Relief is limited to interlocutory orders requiring the defendant to refrain from illegal acts, or requiring them to negotiate a plan to correct or mitigate the harm rather than damages. A further area to study might be comparing the effectiveness of private prosecutions with

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<sup>217</sup> See “Oil Sands Truths” at <http://oilsandstruth.org/syncrude-facing-private-prosecution-over-dead-ducks>.

<sup>218</sup> *R v Syncrude Canada Ltd*, 2010 ABPC 229. See also <http://envirolaw.com/syncrude-guilty-ducks-case/> and <http://ecojustice.ca/syncrude-ducks>.

<sup>219</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71.

<sup>220</sup> CEPA, *supra* note 11, Section 22.

the “private citizen suits” found in other states, such as the United States. Private citizen suits will be discussed in the next section.

*(c) North American Agreement on Environmental Cooperation*

Another avenue which individuals and groups can pursue to ensure effective enforcement of environmental legislation is through the North American Agreement on Environmental Cooperation (NAAEC). Submissions can be made to the secretariat of the Commission for Environmental Cooperation asserting that a “party to the agreement is failing to effectively enforce its environmental law”. If the submissions satisfy criteria specified in NAAEC, the secretariat may request a response from the party named in the submission. Consideration of the response may lead to the preparation of a factual record for presentation to the council, the commission’s governing body comprised of the environmental ministers of Canada, Mexico and US, and on the basis of two-thirds vote by council the factual record may be made publically available.<sup>221</sup> There have been several successful Canadian applications compelling the preparation of a factual record.<sup>222</sup> While this procedure is seen to have no teeth, it can be an effective vehicle for raising awareness of an issue.

*(iv) Victims’ participation in the prosecution of regulatory offences*

While the UN Declaration on Victims’ Rights limits the enumerated rights to victims of acts which violate criminal law, in Canada, some provincial victims’ rights legislation covers victims who suffer harm from a contravention of an enactment of the province or Canada.<sup>223</sup> Therefore, victims of regulatory offences are covered by the provincial legislation and should have certain rights

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<sup>221</sup> Chris Tollefson describes the process: “The NAAEC does not require parties to protect the environment from harm. Parties are allowed to freely choose their own preferred level of environmental protection. The NAAEC does, however, require that parties effectively enforce environmental laws they enact, which are presumably designed to achieve their chosen level of environmental protection. In short, the citizen submission process is not about preventing environmental harm per se, but rather about holding governments responsible for enforcing environmental laws”. Chris Tollefson, “Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation” (2002) 51 U.N.B.L.J.

<sup>222</sup> BC Hydro; BC Logging; BC Mining, details found at [www.cec.org/citizen](http://www.cec.org/citizen) and cited in Benidickson, *supra* note 35, at p 179.

<sup>223</sup> BC Victims Act defines “victims” as persons who suffer harm from a “contravention of an enactment of British Columbia or Canada”.

during the prosecution of regulatory offences. With the majority of environmental regulatory offences being strict liability cases<sup>224</sup>, the prosecutor might not need to show that actual harm has resulted from the prohibited act.<sup>225</sup> How does this factor influence the role of victims in these cases? Is there an opportunity for the victims to inform the court of the impact of the harm?

(v) Sentencing options – impact on victims

A number of jurisdictions have introduced alternative sentencing options in their environmental laws to reflect the collective nature of victimization and the broad range of victims of environmental harm. Bricknell notes that alternative orders are seen as useful as they can be tailored to suit the offence and are often seen to impose more of a burden on the offender than traditional fines, which have been seen as just a cost of doing business.<sup>226</sup> Some environmental legislation sets out specific sentencing principles, such as reinforcing the polluter pays principle, as well as to provide guidance to the courts when determining the appropriate sentence in these cases.<sup>227</sup> Sentencing principles also can provide guidance regarding consideration of aggravating factors, such as whether the act caused damage or risk of damage to any unique, rare, particularly important or vulnerable component of the environment.<sup>228</sup> In other

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<sup>224</sup> As Benidickson, *supra* note 35, notes regulatory offences, while covering mens rea, strict liability and absolute liability, the majority are strict liability cases.

<sup>225</sup> Benidickson, *supra* note 35, discusses interpretive uncertainty with the relationship between discharging, causing and permitting. SCC in *Sault Ste Marie* held that the discharging aspect of the offence relates to direct acts of pollution, while the causing dimension is associated with activity by the defendant that it is capable of controlling and that results in pollution. Permitting involves a passive lack of interference by the defendant, that is, a failure to prevent an incident which it should have foreseen.

<sup>226</sup> Bricknell, *supra* note 1.

<sup>227</sup> *CEPA*, ss. 287 and 287.1 establishes the sentencing principles for environmental offences. The purpose of sentencing is to deter offenders and other people from committing an offense; denounce unlawful conduct that damages the environment and human health; and to reinforce the polluter pays principle.

<sup>228</sup> When sentencing, judges should consider aggravating factors such as: “(a) the offence caused damage or risk of damage to the environment or environmental quality; (b) the offence caused damage or risk of damage to any unique, rare, particularly important or vulnerable component of the environment; (c) the offence caused harm or risk of harm to human health; (d) the damage or harm caused by the offence is extensive, persistent or irreparable; (e) the offender committed the offence intentionally or recklessly; (f) the offender failed to take reasonable steps to prevent the commission of the offence despite having the financial means to do so; (g) by committing the offence or failing to take action to prevent its commission, the offender



jurisdictions, guidance for sentencing in environmental case can be found in the jurisprudence.<sup>229</sup>

In some jurisdictions, where the victim is the community, the general public or the environment, the court may make:

- An order directing the offender to publish the offence which might include a public apology. In Canada, a decision by a territorial court held that ordering a public apology was not a legal and proper remedy.<sup>230</sup>
- An order for the restoration of any harm to the environment caused by the commission of the offence.<sup>231</sup>
- An order for payment of the costs and expenses incurred by a public authority in restoring any harm to the environment.<sup>232</sup>
- An order for costs for carrying out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit. This can include paying for chemical disposal research.

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increased revenue or decreased costs or intended to increase revenue or decrease costs; (h) the offender committed the offence despite having been warned by an enforcement officer of the circumstances that subsequently became the subject of the offence; (i) the offender has a history of non-compliance with federal or provincial legislation that relates to environmental or wildlife conservation or protection; and (j) after the commission of the offence, the offender (i) attempted to conceal its commission, (ii) failed to take prompt action to prevent, mitigate or remediate its effects, or (iii) failed to take prompt action to reduce the risk of committing similar offences in the future." A lack of aggravating factors should not be considered as a mitigating factor.

<sup>229</sup> For example, in the United States, the general principles for sentencing environment offenses are found in *R. v. United Keno Hill Mines Ltd.*, [1980] Y.J. No. 10, YUTC. They include the nature of the environment affected; the degree of the environmental damage; the deliberateness of the offense; the attitude and remorse of the offender; the evidence of damage mitigation effort; the size of the corporation (if the offender is a corporation); the realization of profit; previous criminal record; and the fact that the offender is an individual or a corporation.

<sup>230</sup> Not part of s.291. In *R. v. Northwest Territories Power Corp.*, [1990] N.W.T.J. No. 38, the court ruled that ordering public apologies was not a legal and proper remedy.

<sup>231</sup> The court may order the offender to take such steps to prevent, control, abate or mitigate any harm to the environment, make good any resulting environmental damage or prevent the continuance or reoccurrence of the offence.

<sup>232</sup> A public authority might incur costs and expenses in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the commission of the offence or making good any resulting damage. Equally, a person (including a public authority) might, by reason of the commission of the offence, suffer loss of or damage to property or might incur costs and expenses in preventing or mitigating, or in an attempt to prevent or mitigate, any such loss or damage. In these circumstances, the court may order the offender to pay to the public authority or person concerned, the costs and expenses so incurred, or compensation for the loss or damages so suffered.

- An order for 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.
- An order to carry out a specified environmental audit of activities carried on by the offender.
- An order to pay investigative costs.
- An order to attend training or establish a training course or fund scholarships for environmental studies.

In Canada, an Environmental Damages Fund was established following the “polluter pays principle”. It helps ensure that those who damage the environment take responsibility for their actions and helps connect enforcement actions to investments in repairing the harm caused to local environment and wildlife. For example, an Ontario court sentenced a company who violated CEPA’s Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations to a \$30,000 fine, of which \$18,000 was directed to the Environmental Damages Fund and \$10,000 directed to the Technical Research and Development Fund.<sup>233</sup> In another case, the court ordered that the money which was directed to the Environmental Damages Fund be for use in Nova Scotia as that was where the harm occurred.<sup>234</sup> In another case, the BC courts ordered a company to pay a sum which was then made available to a community environmental organisation to support its work on conservation and protection of fish and fauna habitat.<sup>235</sup> This Fund is available to NGOs, universities, aboriginal groups and provincial, territorial and municipal governments.<sup>236</sup> Individuals are ineligible to apply for funding but are encouraged to partner with those who can. The Fund provides financial assistance to projects such as restoration, environmental quality improvement, research and development, and education and awareness. Funding priority is given to projects that will help to restore the natural environment and conserve wildlife in the geographic region most affected by the original incident.

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<sup>233</sup> MEA-Ren news “Attempted Illegal Export of Hazardous Material Brings \$30,000 penalty” (31 January 2011).

<sup>234</sup> MEA-Ren news “N.W. Cole Associates Appraisers Limited to Pay \$10,000 penalty for violating Federal Environmental Law” (31 January 2011).

<sup>235</sup> *R v Forrest Marine Ltd* (29 April 2005)(BC Prov Court) as cited in Bendickson, *supra* note 35.

<sup>236</sup> <http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=C7C99D1F-1#eligibility>.

#### **4. Legal Basis for Remediation and Access to Justice: Administrative Law**

Many of the environmental statutes protect the environment by setting out an assessment and approval (permit and licensing) scheme maintained by the regulatory authority. Such schemes might be seen more as preventive tools. An offence against such provisions violates the objectives of these statutes including ecologically sustainable development. Often these violations are seen as administrative, technical or minor breaches that do not result in identifiable victims. Some argue these environmental regulatory schemes are primarily meant to prevent environmental harm from occurring and not just punish the offender when it does happen.<sup>237</sup> Therefore, the concept of victims of crime can be problematic in this context.

##### *(i) Administrative orders – role of victims*

The relevant authorities can issue a variety of administrative orders to promote compliance with the environmental legislation, including control orders, stop orders, preventive orders, remedial orders, and environmental protection orders without going through the court system. In British Columbia, some of the environmental legislation provides for administrative orders.<sup>238</sup> What is the role of victims in administrative sanction regime? Can victims instigate such orders?

The person or company against whom the order has been made can challenge the order in a tribunal<sup>239</sup> or as a judicial review in a superior court. Usually in this review process, the only parties present are the government and the person challenging the order. Third parties, including victims, do not have standing since it is considered that they do not have an interest in the case or that the government

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<sup>237</sup> April L. Girard, Suzanne Day, & Lauren Snider, "Tracking Environmental Crime Through CEPA: Canada's Environment Cops or Industry's Best Friend?" (2010) 35:2 Canadian Journal of Sociology

<sup>238</sup> For example, see the Environmental Management Act (s 115) and the Forest Practices Code.

<sup>239</sup> In British Columbia, the review would be done at the Environmental Appeal Board.

represents the public interest.<sup>240</sup> However, some statutory schemes allow for public involvement in judicial review<sup>241</sup> or permit appeals or reviews of a permit/order by someone who is aggrieved by the decision of the director<sup>242</sup>. For example, in one case an aboriginal community challenged the decision to grant a permit to a mining company on the basis of the duty to consult and the fact that the permit failed to protect human health and the environment.<sup>243</sup>

### (ii) Judicial reviews

Individuals and interest groups may be able to seek judicial review of the decision maker's exercise of its statutory powers in relation to licensing approvals, administrative orders and environmental assessments. The individual or group must apply for "standing" and the court must determine whether to recognize the applicant's eligibility to present its concerns before the court. Basically, the applicant must show that he or she is either directly affected or genuinely interested as a citizen in a serious and justifiable issue that would not otherwise be brought to trial in a reasonable and effective manner.<sup>244</sup> Recently in Canada and in other jurisdictions, NGOs have made applications for judicial review to compel governments to take action in response to climate change and their commitments to national green house gas emissions.<sup>245</sup> Ecojustice has represented several NGOs in cases where they oblige the federal government to respect and apply the Species at Risk Act.<sup>246</sup> The NGOs have standing as they represent the public interest, given that the species at risk cannot bring such an action.

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<sup>240</sup> *Sierra Club of Western Canada v. British Columbia*, [1984] B.C.J. No. 2944; *Sea Shepherd Conservation Society v. British Columbia*, [1984] B.C.J. No. 2726; *Kostuch v. Alberta* (Environmental Appeal Board), [1996] A.J. No. 311; *Friends of The Athabasca Environmental Assn. v. Alberta* (Public Health Advisory and Appeal Board), [1996] A.J. No. 47.

<sup>241</sup> Ontario Environmental Bill of Rights, Sections 38 & 41.

<sup>242</sup> Environmental Management Act, Section 100.

<sup>243</sup> See Decision No. 2006-EMA-006(a) of the BC Environmental Appeal Board.

<sup>244</sup> See the Finlay principles as cited in Benidickson, *supra* note 35.

<sup>245</sup> In Canada, Friends of Earth commenced application for judicial review asserting that the Minister of Environment has failed to comply with section 166 of CEPA 1999.

<sup>246</sup> *Alberta Wilderness Assn. v. Canada (Minister of Environment)*, [2009] F.C.J. No. 876; *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)*, [2009] F.C.J. No. 1052; *David Suzuki Foundation v. Canada (Minister of Fisheries and Oceans)*, [2010] F.C.J. No. 1471.

### (iii) Mandamus order

Victims or interest groups might apply for a writ of mandamus, a prerogative writ in common law which a court can issue to compel the government to perform mandatory or purely ministerial duties correctly, such as undertaking environmental enforcement actions as prescribed by law. An unsuccessful attempt to obtain such an order was made by the Canadians for the Abolition of the Seal Hunt to require the federal minister of fisheries to enforce existing regulations as a means of minimizing cruelty in the seal hunt.<sup>247</sup>

### (iv) Administrative monetary penalties

Administrative monetary penalties (AMPs) are administrative penalties much like fines but go through an administrative process rather than a criminal process.<sup>248</sup> They are distinguishable from ticketable offences as those remain in the domain of the criminal courts (for example, ticket for illegal hunting). AMPs are used because they are cheaper, faster and more convenient than criminal proceedings. However, AMPs do not result in a criminal record. Some AMP provisions will provide for an administrative hearing to determine the amount of the penalty or a procedure for appeal or review will be set. The role or position of victims is uncertain with regard to these administrative hearings.

### (v) Alternative dispute resolution, consultation and voluntary approaches – role of victims

Given the challenges of proving environmental harm in criminal and regulatory prosecutions, particularly with the complexities of scientific evidence and standards of proof, alternative approaches such as alternative dispute resolution (ADR) and consultations are seen by some as facilitating public participation and providing a forum for individuals and interest groups to voice their concerns. In deciding the type of administrative approach, particularly where the approach is preventive, voluntary, and a negotiated agreement

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<sup>247</sup> *Canadians for the Abolition of the Seal Hunt v Canada (Ministries of Fisheries and Environment)*.

<sup>248</sup> S.115 of the Environmental Management Act is an example of a provision enabling AMP.

between the offender and the enforcement officer, what role can victims have in these situations? What are the safeguards in place for the participation of environmental advocates?

*(vi) Public participation [in decisions on specific activities, plans, programmes and policies]*

Environmental bills of rights and specific statutory requirements for public notice and comment have increased the scope for public participation. For example, CEPA 1999 provides for limited public participation in connection with a wide range of government decision making, including the development of regulations, and the issuance of approvals and orders under the Act. A Canadian can petition the auditor general about an environmental matter associated with the sustainable development responsibilities of various federal government departments. Some provinces limit participation to those who are directly affected, such as Alberta. Most of the public participation happens through an environmental assessment scheme.<sup>249</sup> Those schemes provide that projects meeting certain criteria are evaluated in terms of environmental and health damages and other issues by different means before approving the project that permits and often encourage public participation. What are the opportunities for wider public participation in regulatory regimes, such as those regarding the development of environmental regulations and in decisions concerning permits and licensing approvals?

*(vii) Procedural rights to enforce the statutory right to a healthy environment*

Some Canadian provinces have established a statutory right to a healthy environment.<sup>250</sup> Procedural rights are important to

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<sup>249</sup> See the Canadian Environmental Assessment Act, and the BC Environmental Assessment Act.

<sup>250</sup> In Quebec the right to a healthy environment is found in the Environment Quality Act [Section 19.1 Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act and, as regards odours resulting from agricultural activities, to the extent prescribed by any standard originating from the exercise of the powers provided for in subparagraph 4 of the second paragraph of section 113 of the Act respecting land use planning and development (chapter A-19.1)] and the quasi-constitutional Charter Human Rights and Freedom [Section 46.1 Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and ac-

safeguard the right as well as providing access to justice when the right is violated. In Quebec, available remedies include applying for an injunction to stop the action or omission causing the alleged violation<sup>251</sup>, punitive damages (if violation of the right is intentional)<sup>252</sup>, and obtaining a declaratory judgment that the right was violated<sup>253</sup>. In Ontario, the population has a right to comment on proposed policies, acts, regulations and instruments that may affect the environment; to seek leave to appeal certain ministry decisions; to ask the minister to modify or create environmental legislation and policies; to ask the minister to investigate contraventions of environmental legislation; and sue for personal and public environment damages.<sup>254</sup> The Ontario environmental commissioner is charged with reviewing the application of the act and providing assistance to the public and to the minister when requested.<sup>255</sup> The Yukon Environment Act lists a number of remedies including injunctions, damages, costs, declarations, restoration order, monitoring order, order to evaluate the environmental impact of a development, revoking permits and any other order or remedy that the court sees fit.<sup>256</sup> The Northwest Territories courts can grant as a remedy an injunction, an order to remedy environmental harm, damages or any order considered

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cording to the standards provided by law]. In Ontario, while the right to a healthy environment is not recognized by a provision of an act, it is mentioned in the preamble of the Environmental Bill of Rights and its purpose [The people of Ontario have a right to a healthful environment].

<sup>251</sup> The remedy to a violation of the right provided by the EQA is an injunction to stop the action or omission causing the alleged violation (s.19.2) and the remedy is available to all any natural person domiciled in Québec, a municipality or the Attorney General (s.19.3). However, this remedy cannot be applied if the violation is the result of an activity authorized by the EQA (s.19.7). The courts have interpreted ss.19.1 to 19.7 liberally, and the injunction can be asked as a remedy in the case of the judicial review of a decision of the Minister of the Environment to grant an authorization certificate (*Calvé c. Gestion Serge Lafrenière Inc.* [1999] J.Q. no. 1334). On the other hand the right found in s.46.1 is more declaratory since it cannot invalidate another act (s.52 only applies to ss.1 to 38).

<sup>252</sup> If a violation of the right is intentional, a plaintiff could obtain punitive damages (s.49).

<sup>253</sup> Section 46.1 is a recognition of the right to a healthy environment. This alone has some value. The section could also be used as an interpretative tool considering the quasi-constitutional nature of the Charter of Human Rights and Freedoms and to obtain a declaratory judgment on the violation of the right.

<sup>254</sup> Ontario Environmental Bill of Rights.

<sup>255</sup> Benidickson, *supra* note 35, p.66.

<sup>256</sup> An action can be brought against a private entity that caused environmental damages or the government for failing in its role of trustee of the environment (s.8). Having a permit or authorization granted under an act of the Yukon or of Canada is a defense for a private person but not for the government (s.9).

appropriate.<sup>257</sup>

A draft Environmental Bill of Rights has been developed by Canadian environmental organizations, but to date has not yet been enacted.<sup>258</sup> This Bill is proposing to establish a statutory right, as opposed to a constitutional right, to a healthy environment.<sup>259</sup> The Bill would also guarantee key procedural rights, such as access to environmental information, the ability to participate in environmental decision-making and the ability to request investigations and policy reviews. It would also provide the ability to sue the federal government when it fails to enforce its environmental laws. Noteworthy is the liberal standing to any *resident* or *entity* of Canada to review a governmental decision touching on environmental protection, regardless of whether they are directly affected by the matter.<sup>260</sup>

Reliance on the rights articulated in the Canadian Charter has taken place in environmental cases. While the Charter does not have a provision recognizing the right to a healthy environment, some have tried to use other provisions of the Charter, mainly ss.7 (right to life, security of the person and liberty) and 15 (right to equality), to achieve environmental goals. The success of a s.7 case depends on satisfactory proof of a causal connection between an injury caused by environmental harm and the impugned decision of the government.<sup>261</sup> In *Operation Dismantle Inc. v. Canada*, a group sought to stop missile testing in the Arctic alleging that it increased the chance of nuclear war and that it could have dire impact on public health and the environment.<sup>262</sup> The case was dismissed since it was based on speculation and potential disaster; however it opened the door to such a Charter challenge. A population could, with sufficient evidence, challenge the decision of a government affecting the

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<sup>257</sup> The Northwest Territories Environmental Rights Act indicates that: "Every person resident in the Territories has the right to protect the environment and the public trust from the release of contaminants by commencing an action in the Supreme Court against any person releasing any contaminant into the environment."

<sup>258</sup> Draft Environmental Bill of Rights (Bill C-469).

<sup>259</sup> A number of States recognise the right to a healthy environment in their constitution.

<sup>260</sup> Section 22 of the draft Bill Environmental Bill of Rights (Bill C-469).

<sup>261</sup> Benidickson, *supra* note 35 p.57.

<sup>262</sup> *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441.



environment and public health.<sup>263</sup> The situation of s.15 is lackluster in recognising the right to a healthy environment.<sup>264</sup>

## 5. Legal Basis for Remediation: Civil Law

### (i) Civil remedies

#### (a) *The law of tort*

Tort law and other general civil laws include numerous causes of action, many of which are potentially applicable to perpetrators of environmental crime. Such actionable wrongs under common law include nuisance (interference with enjoyment of property); intentional or negligent interference with property (trespass), negligence, and riparian rights. Quebec civil law also offers similar civil actions, mainly extra-contractual liability (liability with fault)<sup>265</sup> and neighborhood disturbance (liability without fault)<sup>266</sup>. Certain scholars have argued that the time has come in our industrialized society to use the tort of battery (toxic battery) in cases where individuals are exposed to poorly understood or potentially dangerous chemicals.<sup>267</sup> Any victim of environmental crime can sue the perpetrator of the crime under such causes of action, seeking compensation for both

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<sup>263</sup> Andrew Gage, Public Health Hazards and Section 7 of the Charter, (2003) 13 J. Envtl. L. & Prac. 1, at p.3 to 5. See further: (*Locke v. Calgary (City)*, [1993] A.J. No. 926 and *Millership v. Kamloops (City)*, [2003] B.C.J. No. 109) as cited in Benidickson, *supra* note 35 p.58 two water treatment cases involving health risks caused by poor water quality indicated that a genuine health hazard resulting from a decision of government could constitute a violation of s.7. It is thus possible to use s.7 to obtain redress from environmental harm when it is caused by the government and as an effect on human health/security of the person.

<sup>264</sup> In *Aluminum Co. of Canada v. Ontario*, [1986] O.J. No. 697, a corporation tried to challenge an environmental regulation because it created an economic discrimination. The court ruled that economic discrimination was not a prohibited form of discrimination. See also, *Energy Probe v. Canada (Attorney General)* [1994] O.J. No. 553 where a group challenged the provision of the Nuclear Liability Act limiting liability to \$75 million for nuclear incident. The plaintiffs argued that the provision was discriminatory because the compensation of people who lived closer to nuclear power plant if an incident occurred was limited compared to victims of other incidents. They also argued that there was a physical discrimination because people living closer to a nuclear facility suffered greater physical risk. The court rejected both arguments because there was no link between the Nuclear Liability Act and risk of nuclear incident and the compensation discrimination was not a ground covered by s.15.

<sup>265</sup> Art.1457 CcQ.

<sup>266</sup> Art.976 CcQ and *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

<sup>267</sup> Lynda Collins and Heather McLeod-Kilmurray "Toxic Battery: A Tort for our Time" (2008) 16 Tort Law Review 131 at page 131.

economic damages and non-economic damages, such as pain and suffering.

Limitations for such remedies include where the perpetrator is not in the same jurisdiction as the victim; where the perpetrator is not readily identifiable; evidentiary burden of proof; and costs of litigation. It should be noted that regarding transboundary environmental harm, the principle of equal access to national remedies, defined by the Organization for Economic Cooperation and Development (OECD) and endorsed by the International Law Commission provides that someone who suffers from Transboundary environmental harm can have access to the remedy of the state where the pollution comes from.<sup>268</sup> The easiest way to get redress through private law is to show property damages (ie. loss of property value and/or loss of enjoyment of property). The remedy for civil actions linked with the environment is often damages and sometimes an injunction to stop the damaging activity.

*(b) Statutory civil liability provisions – citizen’s right to sue*

The recent trend is for statutory civil liability provisions in environmental legislation. For example the Alberta Environmental Protection and Enhancement Act creates a civil cause of action for the benefit of any person who suffered loss or damage as a result of conduct constituting an offence for which the defendant was convicted under the Act.<sup>269</sup> Victims and environmental interest groups are increasingly using the “right to sue” provision provided for in environmental laws, such as CEPA 1999.<sup>270</sup> A case in point, the Ecojustice lawsuit in May 2007 involves a global warming lawsuit, the first of this kind. Ecojustice accused the federal government of failing to comply with its commitments under the Kyoto Protocol and failure to meet its international environmental commitments. In the summer of 2007, this lawsuit was stayed when the government introduced the Kyoto Protocol Implementation Act. Another example is another lawsuit filled by Ecojustice. This time the lawsuit named the Minister of Environment as failing to investigate the environmental impact

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<sup>268</sup> See Birnie, Boyle & Redgwell, *International Law and the Environment*, (Oxford (UK): Oxford University Press, 2009) at pages 304 to 315.

<sup>269</sup> Alberta Environmental Protection and Enhancement Act, R.S.A. 2000 c E-12, s. 219.

<sup>270</sup> Girard et al, *supra* note 237.

of proposed industrial developments, particularly the proposed Irving oil refinery in St John's, New Brunswick. The lawsuit asked for a full environmental impact assessment examining the health and ecosystem impacts of the oil refinery instead of the more perfunctory, narrower assessment proposed by Environment Canada.

*(c) Challenges with quantifying damages*

Victims will face similar challenges as already mentioned in the previous sections, including proving the nature of environmental damage, albeit from a different evidentiary threshold. Quantifying the scale and scope of the harm, whether from ongoing pollution, accidents or spills, general degradation or over exploitation and mismanagement of resources will raise challenges for the victims. What is the value of nature and from which perspective? Will the courts value the recreational, scientific, aesthetic or historical value? An interesting example of how to value nature is the report entitled "Counting Canada's Natural Capital: Assessing the Real Value of Canada's Boreal Ecosystem", a study intended by its authors "to begin to identify, inventory and measure the full economic value of the many ecological goods and services provided by Canada's boreal region".<sup>271</sup>

*(ii) Class actions*

Class actions are another example of a legal avenue for remedy that can be used by victims of environmental crime/harm where there are numerous parties or potential plaintiffs.<sup>272</sup> However these legal rules were not designed with environmental actions specifically in mind and have been noted to be notoriously difficult to get certified in environmental cases.<sup>273</sup> Further study is required as to explore

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<sup>271</sup> Counting Canada's Natural Capital, *supra* note 81. See also *British Columbia v Canadian Forest Products Ltd.*, 2004 S.C.C. 38 and Olszynski, Martin "The Assessment of Environmental Damages Following the Supreme Court's Decision in *Canfor*" (2005) *Journal of Environmental Law and Practice*, 15-3, 257 which reviews current literature regarding the theory of damages suitable for assessment of environmental loss.

<sup>272</sup> To evaluate if a class action is the preferable mode of action courts must look at three things: judicial economy, access to justice, and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68.

<sup>273</sup> Andrew Gage, "Precedent-setting First Nations class action takes on fish farms" 7 December 2010, on-line West Coast Environmental Law: <http://wcel.org/resources/environmental-law-alert/precedent-setting-first-nations-class-action-takes-fish-farms>.

the use of class action suits in environmental cases and analyze the impact on the environment.

Recently a court in British Columbia certified a class action brought by the Kwikwaka'wakw/Ah-Kwa-Mish First Nation against the government of British Columbia; this first environment related class action to be certified in BC under the BC's Class Proceedings Act.<sup>274</sup> The central question in this matter is whether fish farming has resulted in damage to wild salmon stocks. The class action alleges "that the Province's licensing of fish farms and exercise of regulatory authority over their operation has resulted in sea lice infestations in wild salmon stocks, and that this constitutes an infringement of the fishing rights of proposed members of the class.

### (iii) Problems with SLAPPs

Strategic lawsuits against public participation (SLAPPs) are when a corporation multiplies legal proceedings and drags judicial proceedings to drain the NGO or individual or other groups' funds and thus stops the main judicial proceeding against them. It is a very serious issue as this denies justice to people solely on the fact that they have less means. There has been some research on several legislative initiatives that try to limit the use of SLAPPs.<sup>275</sup> Ecojustice and the Canadian Environmental Law Association have advocated for effective anti-SLAPP laws which would guarantee a right to public participation in matters of public interest; allow courts to review and dismiss SLAPPs expeditiously; and provide strong disincentives against launching SLAPPs in the form of cost awards and punitive damages.

### (iv) Victim assistance and support services

In a number of jurisdictions, environmental law organizations provide some assistance to victims of environmental crime/harm. In British Columbia, West Coast Environmental Law Association provides summary advice to members of the public facing environmental problems and environmental legal aid through an environmental dispute resolution fund.<sup>276</sup>

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<sup>274</sup> *Ibid.*

<sup>275</sup> Ecojustice "Breaking the Silence: The Urgent Need for Anti-SLAPP Legislation in Ontario, online <http://www.ecojustice.ca/publications/breaking-the-silence/attachment>.

<sup>276</sup> See the website of West Coast Environmental Law Association at <http://wcel.org/>.

## RECOMMENDATIONS FOR FURTHER RESEARCH

In mapping out the issues faced by for victims of environmental crime, a number of questions regarding the needs and challenges for victims have been raised. Further study of these issues is called for and could include:

(i) Measuring the extent of victimization. Determining whether and how these types of crime can be included in studies of victimology and victim surveys. How to enhance our knowledge of the many ways in which environmental crime affects victims, victim vulnerabilities, etc.

(ii) Mapping trends and patterns. Patterns of victimization can be related to broader patterns of global, socio economic, gender and age inequalities. This has significance for attempts to develop a critical victimology of environmental crime.

(iii) Examining the concept of harm, how it is defined and applied across different statutes, including a comparative study of regulatory schemes and strategies (within Canada and Internationally).

(iv) Analyzing the similarities and differences of the position of the various kinds of victims under criminal/regulatory administrative/civil regimes (including access to justice mechanisms, sentencing trends, remediation, etc). Particularly the issue of “future generations” as victims and how to ensure such interests are represented in the process and the modalities of compensation.

(v) Conducting comparative studies of enforcement methods and their impact on victims. This could explore methods and best practices of promoting compliance with regulations; analyze the methods of promoting compliance with environmental protection regulations; and examine issues around civil and criminal liability of corporation.

(vi) Studying the impact of criminalizing certain environmentally dangerous practices.

(vii) Studying and evaluating the relative effectiveness of various regulatory, education and awareness raising methods for the protection of the environment.

