



## Victims of environmental crime

**SUMMARY** *There is an international trend to accompany administrative and civil liability for environmental law violations with criminal sanctions. However, applying general rules on victims of crime to victims of environmental crime is problematic due to the specific characteristics of those who suffer from environmental harm.*

*There are various approaches to environmental protection and related rights, characterised as either "anthropocentric" or "ecocentric". Whereas the existence of substantial environmental rights is controversial, environmental victims have been granted certain procedural rights including those concerning access to justice.*

*Some international conventions have promoted giving access to justice to environmental organisations. However, as far as criminal proceedings in the EU Member States are concerned, their possibilities have remained limited.*

*Whereas the EU shares competences on environmental protection with the MS, its impact on national criminal laws has been limited. Two environmental directives provide for criminal sanctions for environmental violations. The use of such sanctions to guarantee the enforcement of EU environmental law has a legal basis in the treaties. Before Lisbon, it was supported by the case law of the Court of Justice of the European Union (CJEU).*

In this briefing:

- Context
- Who is a victim?
- Environmental victims' rights
- EU law and policy
- Main references

### Context

#### **Criminal liability for environmental harm**

Both within and outside the EU, environmental harm has been tackled mainly by administrative and civil law. Administrative authorities grant and withdraw relevant permits and impose fines on violators. Additionally, individuals may seek the enforcement of their rights in civil courts and be awarded compensation.

However, over the past two decades, there has been an international trend to make use of criminal law to deal with the most serious environmental violations. In this respect, criminal law is often linked to administrative law, as the latter defines the allowed "use" of the environment. The criminal liability of the perpetrator is thus dependent on the unlawful nature of their conduct, which to become a crime must violate the rules established by administrative statutes or decisions.<sup>1</sup>

Criminal law serves different purposes than other branches of law. It protects social order, has a stronger "deterrence" aim and demonstrates "social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law".<sup>2</sup>

It also sets stricter requirements for liability to be engaged, which may be problematic with respect to environmental crime. This is true in particular with respect to the intent of the perpetrator, which is often required and which might be difficult to prove.



Image Copyright Lightspring, 2012.  
Used under licence from Shutterstock.com

Moreover, the possibility for legal persons to be held criminally liable (corporate liability) – indispensable in effectively dealing with environmental violations – is not provided for in the criminal law of some states.

Dealing with victims of environmental crime is yet another challenge for criminal law. Contrary to general trends in criminology – reflected in criminal law and procedure – where there is increasing emphasis on the victims of crime, victims of environmental crime have not been subjected to extensive analysis or regulation.

The gradual criminalisation of environmental law highlights the need to take a closer look at those who suffer from environmental crime and to examine how the type and extent of rights to be awarded to them would best suit the purpose of protecting the environment via criminal law.

## Who is a victim?

### **Anthropocentric vs ecocentric**

Some authors believe that, due to its abstract nature, environmental crime is victimless or at least lacks concretely identifiable victims. And those who endeavour to identify environmental victims<sup>3</sup> disagree as to their definition.

The definition of the legal interests to be defended by environmental law and, consequently, of the range of possible victims tends to reflect one's eco-philosophical perspective.

Whereas it is sometimes held that only humans may enjoy rights (anthropocentric approach), there are those who would see them extended to animals or even inanimate objects, such as rocks or forests (ecocentric approach).

The ecocentric approach involves theories which stress the relationship between humans and nature, which leads to considering the environment *per se* or entire ecosystems as victims. The ecosystem is thus a functional unit of which humans and

animals are part, and which is harmed as a whole by illicit behaviour. Some "ecologists" go as far as to claim that animals should enjoy rights as "individuals", just as humans do.<sup>4</sup>

Even if one restricts the range of possible victims to humans only, there is still a wide range of potential victims. This is because environmental crime affects not only individual interests, but also those of entire communities or groups of people which cannot be easily defined. Some authors have even included future generations, stressing the need to consider the consequences of today's actions for those who are not yet born.

This approach was illustrated – though outside the field of criminal law – by the Philippine deforestation case [Minors Oposa v Secretary of the Department of the Environment and Natural Resources](#). The petitioners evoked a breach of the constitutional "right to a balanced and healthful ecology" to the detriment of future generations they claimed to represent on the basis of "intergenerational responsibility". Before the case was finally settled out of court, it was admitted following the court's recognition of future generations as a legitimate plaintiff.<sup>5</sup> The issue was also raised in the case [EHP v Canada](#) before the UN [Human Rights Committee](#), whereby the chairperson of an environmental group acted on behalf of the present and future generations.

### **Consequences for criminal sciences**

The above characteristics, such as collective victimisation, a tendency to include non-conventional victims, and the often gradual and silent character of victimisation make environmental crime difficult to address from the standpoint of traditional criminal sciences.

Indeed victimology (the scientific study of victimisation), which is based on traditional definitions of crime, has devoted little attention to victims of environmental crime, focusing instead on individual victims.

## Environmental victims' rights

Environmental damage may amount to a breach of certain rights or legitimate interests, both of individuals and collective entities. Different legal systems might then grant different means of judicial protection to those environmental victims, including access to criminal courts.

### Environmental rights

The idea that claims related to the environment may be formulated in terms of human rights is behind the ongoing and heated debate on "environmental rights".

Whereas the connections between human rights and the environment have been acknowledged since the late 1960s, there is no globally accepted substantive right to protect the environment (such as the right to a "clean" or "healthy" environment). However, certain procedural environmental rights concerning *inter alia* access to justice have been expressly recognised by an increasing number of international law instruments. This may be because the mechanisms they are based on are "politically" easier to accept.<sup>6</sup>

### European Convention on Human Rights

Questions have been raised as to whether environmental rights are protected by [the European Convention on Human Rights](#).

In the 2003 [Hatton and others v the UK](#) case, the European Court of Human Rights held that "there is no explicit right under the Convention to a clean and quiet environment". It is argued, however, that the Court plays an increasingly important role in enhancing environmental rights and remedies under administrative and civil law. This role is performed through the interpretation of existing substantive human rights.<sup>7</sup>

Article 8 ECHR (the right to respect for private and family life) has been the most common ground for complaints in environmental cases. Nevertheless, the Court's case law (including the 2001 and

2003 *Hatton* cases, *Powell and Rayner v the UK*, *Handyside v the UK* or *López Ostra v Spain*) has set certain limitations on the use of human rights in this respect:

- Article 8 may only be invoked when the individual is directly and seriously affected.
- Fair balance has to be struck between the competing interests of the individual and of the community as a whole. Environmental considerations have to be weighed against other interests.
- National authorities have direct democratic legitimacy and are, in principle, better placed than an international court to evaluate local needs and conditions. They enjoy a wide margin of appreciation in this respect.

### Aarhus Convention

The adoption of the 1998 [UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#), known as the [Aarhus Convention](#), was a major development as far as promoting procedural environmental rights is concerned.

The Convention makes express reference to human rights in its preamble and Article 1. Whereas it only goes as far as to recognise the existence of a "right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (which is a substantial environmental right), it has established a number of detailed procedural rights in administrative law procedures. They fall under the three "pillars" indicated in the Convention's title.

The definition of access to justice in the Aarhus convention is based on the right to a fair trial in human rights law (e.g. Article 6 ECHR). It means access to review procedures to challenge the legality of decisions made without respecting the rights of access to information and to public participation in decision-making.

Article 9(2) of the Aarhus convention grants such access not only to individuals, but also to environmental organisations. The latter are deemed to have legal interest without being directly affected by environmental decision-making. The Aarhus convention does not apply however to criminal procedure.

### Standing of environmental organisations in criminal proceedings

#### *International law*

The question arises as to whether initiating legal proceedings related to environmental harm should be reserved for the state or also given to environmental organisations. A general rule is that *locus standi* (standing) is granted only to subjects having a private interest in the case. Public interest should conversely be defended by state institutions. It is argued however that environmental law cuts across such distinctions given that "environmental interests" combine collective and individual elements.<sup>8</sup> Even though the problem remains controversial, an "extended" *locus standi* has been promoted by some international conventions.

The [Convention on the Protection of Environment through Criminal Law](#) (see box) is of relevance in this connection.

According to its Article 11 "each Party may, at any time (...) grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention".

The voluntary character of this provision has been [explained](#) by the controversies around giving NGOs access to criminal

proceedings, a right recognised at the time by only a few countries. The decision as to which NGOs would have such a right and its exact content were left to national laws.

#### *EU Member States*

The scope of access to justice by environmental organisations varies considerably throughout the EU. While it is argued that the Aarhus convention has led to a broader range of possibilities in some countries, the "impairment of rights" is still often a necessary condition of *locus standi*.

In most countries criminal procedures are traditionally closed to outside influence, including participation of civil society organisations at any stage. Public authorities decide at their own discretion if a criminal procedure should be initiated and if so victims, but not NGOs, have certain procedural rights.

**Spain** is an important exception in this respect as the Spanish Constitution grants every person the right to a so-called "*actio popularis*" with respect to criminal offences. This opens the door for environmental organisations to become party to criminal proceedings and assist the public prosecutor in investigating the alleged offence. *Actio popularis* is however rarely used, which may be partly due to prohibitive fee deposits requested by courts.<sup>9</sup>

In **France** environmental associations are entitled to bring civil liability claims (the so-called "civil party petitions") in criminal cases. This is because, under certain conditions, they are recognised by law as "guardians" of the collective interest in environmental protection. This means that harm to the environment *per se* is deemed by the legislator to represent a civil loss for an environmental association.

The 1998 Council of Europe [Convention on the Protection of Environment through Criminal Law](#) is one of the major international initiatives in this field. However, it has not entered into force yet as only 14 of over 40 countries have signed, and only one (Denmark) has ratified the Convention.

The Convention obliges contracting parties to provide for criminal sanctions for serious environmental offences defined by the Convention. The provisions on reinstatement of the environment and corporate liability have, however, a voluntary character.



French courts have broadly interpreted relevant legislative provisions, as illustrated by the judgment in the **Erika oil-spill case**. The court awarded €192 million to various civil parties including environmental organisations. Other rulings have allowed civil liability claims by environmental associations even outside criminal procedure.<sup>10</sup>

## EU law and policy

### EU competence in criminal matters

Since the 1987 Single European Act, environmental protection has had a legal basis in the treaties. The EU shares competences in this respect with the MS. Criminal matters remain however mostly outside the EU remit.

Following Lisbon, Article 83(2) TFEU states that directives may establish minimum rules concerning the definition of criminal offences and sanctions if the approximation of national criminal laws and regulations is essential to ensure the effective implementation of a given EU policy.

This EU power was however subject to controversy before Lisbon. Competence disputes between the Commission and the Council led the CJEU to annul two Council framework decisions concerning environmental crime ([Environmental Crimes case](#) and [Ship Source Pollution case](#)).<sup>11</sup>

### Secondary environmental law

#### *Criminal liability issues*

Criminal liability for environmental violations has been regulated by two directives:<sup>12</sup>

- [The 2008 Directive on the protection of the environment through criminal law](#)
- [The 2005 Directive on ship-source pollution and on the introduction of penalties for infringements](#).

The directives require that MS adopt "effective, proportionate and dissuasive criminal penalties" for certain environmental offences. They do not define however the

type or minimum level of penalties to be imposed, as this would be outside EU competence, as held by the CJEU in its decision in the "Ship Source Pollution" case.

#### *Locus standi of environmental organisations*

The [2004 Environmental Liability Directive](#), the first EU directive to apply the "polluter pays" principle, concerns administrative liability. This act grants natural and legal persons the right to request the competent authority to take action with respect to environmental damage and to challenge the legality of relevant decisions in courts. This right is awarded either to those affected or likely to be affected by environmental damage or having a sufficient interest in the environmental decision or, alternatively, alleging the impairment of a right. In this regard, the interest of non-governmental organisations promoting environmental protection is considered sufficient and they are deemed to have rights capable of being impaired.

The Aarhus Convention was implemented in EU law by [Regulation 1367/2006](#) (the Aarhus Regulation). According to some authors one of the consequences is that environmental associations are deemed to fulfil the standing requirements set by primary law to bring cases to the CJEU.<sup>13</sup>

#### *Protection of the victims of crime*

The Council [Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings](#) restricts the definition of "victim" to natural persons. The only NGOs whose access to criminal procedure is promoted by the Framework Decision are victim support organisations.

A [proposal for a directive on the victims of crime](#), currently being debated by the European Parliament, seeks to amend and extend the provisions of the above framework decision.

## Main references

[Victims of Environmental Crime – Mapping the Issues](#) / Skinnider, E. International Centre for Criminal Law Reform and Criminal Justice Policy, 2011.

[International/European Environmental Criminal Court: A comment on the proposal of the International Academy of Environmental Sciences](#) / Policy Department C, European Parliament, January 2011.

[Tackling Environmental Crime in the European Union: the Case of the Missing Victim?](#) / Cardwell, P.J., French, D. and Hall, M. The International Network for Environmental Compliance and Enforcement (INECE), 2011.

## Disclaimer and Copyright

This briefing is a summary of published information and does not necessarily represent the views of the author or the European Parliament. The document is exclusively addressed to the Members and staff of the European Parliament for their parliamentary work. Links to information sources within this document may be inaccessible from locations outside the European Parliament network. © European Union, 2012. All rights reserved.



<http://www.library.ep.ec>

## Endnotes

- <sup>1</sup> [Explanatory Report to the Convention on the protection of the environment through criminal law](#): Introduction. The authors of the report note however that "compliance with environmental administrative law cannot always preclude criminal liability" and that "(t)here is a consensus among member States that the concrete endangerment of life and of physical integrity of natural persons should, at least in certain areas, constitute [an autonomous] criminal offence".
- <sup>2</sup> Recital 3 of the [Directive 2008/99/EC](#) of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.
- <sup>3</sup> The terms "victims of environmental crime" and "environmental victims" have not been used interchangeably in this text. The latter term has a wider meaning and denotes those who suffer from any form of environmental violation, even if it is not a crime.
- <sup>4</sup> For a critical assessment of such views see [The Oxford handbook of international environmental law](#) / Bodansky, D. Brunnée, J. and Hey, E. 2007, p. 672 and Legal Rights for Nature: the Wrong Answer to the Right(s) Question / Elder, P.S. 22 Osgoode Hall L.J. 285, 1984.
- <sup>5</sup> [Victims of Environmental Crime – Mapping the Issues](#) / Skinnider, E. International Centre for Criminal Law Reform and Criminal Justice Policy, 2011, p. 39.
- <sup>6</sup> [A substantive environmental right: an examination of the legal obligations of decision-makers towards the environment](#) / Turner, S. J. 2009, pp. 5, 12 and 14.
- <sup>7</sup> [International/European Environmental Criminal Court: A comment on the proposal of the International Academy of Environmental Sciences](#) / Policy Department C, European Parliament, January 2011. p. 8. See also [The Human Right to a Clean Environment-Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases](#) / Fitzmaurice, M. and Marshall; J. Nordic journal of international law, 2007, v. 76, n. 2 and The European Court of Human Rights, environmental damage and the applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms / Fitzmaurice, M. Environmental Law Review 13(2), 2011.
- <sup>8</sup> [Access to justice in Environmental Matters in the EU](#) / Ebbesson, J. ed. 2002, p. 4–6.
- <sup>9</sup> [Access to Justice in Environmental Matters](#) / Justice and Environment, 2010. See also [Access to justice in Spain under the Aarhus Convention](#) / Fe Sanchis-Moreno, 2007.
- <sup>10</sup> [The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of Erika](#) / Papadopoulou, D. The journal of environmental law, v. 21, n. 1. 2009.
- <sup>11</sup> [Protection of the environment through criminal law: a question of competence unabated?](#) / Ryland, D. European energy and environmental law review, v. 18, n. 2, 2009.
- <sup>12</sup> Despite these two directives the application of environmental law in the EU is not consistent. These inconsistencies sparked a debate on creating a special chamber of the CJEU or even a new EU court to deal with environmental cases.
- <sup>13</sup> [NGO Standing in the European Court of Justice - Does the Aarhus Regulation Open the Door?](#) / Review of European Community & international environmental law, v. 16, n. 3, 2007.