

# Environmental Crime In Africa: issues, Challenges and the role of prosecutors

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# context

- Environmental crime has become increasingly organized and transnational in nature.
- It can be seen, just as drug and firearms trafficking, as one of the most significant areas of trans-border criminal activity.
- It threatens and disrupt societies in the region and hinder sustainable development.
- It also poses complex conceptual, investigative, detective, prosecutorial and sentencing challenges
- Conserving Africa's resources, however, requires support of criminal processes.
- Prosecution is at the heart of these

# Africa's natural resources and threats

- Africa's paradox of abundant natural resources against endemic poverty. New discoveries & changed NR map
- Environmental degradation and natural resource depletion( water, air, climate change, land use, wetlands n, forest excision, wildlife destruction and poaching)
- 2013 Africa Progress Report “ *Equity in Extractives: Stewarding Africa's Natural Resource for All*”
  - Over the past decade, Africa's economies have been riding the crest of a global commodity wave.
  - Extractive industries have emerged as a powerful engine of economic growth.
  - Surging demand for natural resources in China and other emerging markets has pushed export prices to new highs – and the boom shows no sign of abating.
  - With new exploration revealing much larger reserves than were previously known, Africa stands to reap a natural resource windfall.

# Basis for environmental management

- Effective and equitable stewardship of Africa's natural resource wealth could transform the region.
- Sustainability imperatives and global developments ( From UNCHE, Rio to Rio+ 20)
- Challenge of defining SD, SDG Goals but continental acceptance of importance
- From international Conventions, continental priorities, national constitutions and Framework environmental laws-  
**preeminent place of sustainable development & Governance  
nexus.**

# Foundational issues

- Environmental law as multifaceted and requiring multiple ways of enforcing or procuring adherence to set norms
  - Unregulated industrial development leading to envtl pollution; need to sustainably manage fauna and flora from excessive exploitation; technological development may negatively impact on envt etc
- Different principles emerging to guide sustainable environmental management
  - Inter- & intra-generational equity; precautionary principle; EIA; polluter pays, risk assessment and risk management in transboundary movement of living modified organisms; access and benefit sharing of proceeds from envtl resources etc
- Enforcement mechanisms are varied and diverse
  - **Command and control (big stick) Vs incentives (carrots)**
- The role of national institutions and law enforcement agencies in making sustainable envtl management a reality
  - Being new field requires innovative interventions

# Use of criminal law for environmental management

- Initially (before emergence of IEL), the common law and certain aspects of criminal law were used for environmental protection.
- Modern focus on incentives & cooperative management
- Efforts to use criminal law to address environmental degradation & emerging challenges
  - Should it??
  - How effective??
  - Any relevance for extractive industry??

# Questions about utility of criminal law for environmental management

- Can criminal law elicit behavior that contributes to sustainable development given that it is mainly concerned with unacceptable behavior? (& not preventative)
- What is the scope and nature of the offences?
- What is the *mens rea* of the offenders?
- What should be the standard of proof given principle of precaution?
  - Beyond reasonable doubt?
  - On a balance of probabilities?
- Who bears the burden of proof?
- Types of evidence required?
  - Expert witnesses
- Appropriateness of criminal procedural rules for evtl crimes

# Rationale for criminal law

- Failure of civil/administrative law to adequately deter violations
- Societal preference to criminalize actions as an expression of moral outrage & to prohibit the activity
- Economic rationale: an effectively enforced criminal statute raises the cost of certain kinds of conduct & therefore encourages compliance with laws and regulations that would otherwise be largely ignored
  - Likelihood of apprehension and punishment critical
  - Need to make penalty more expensive than gains made out of criminalized conduct ( E.g. Kenyan Wildlife Act)



# International legal framework

- Environmental crime as any unlawful or willful act or emission leading to degradation of environment punishable by state
- Main motivation is financial gain. Mainstay of organized criminal groups. ( High profit & low risk)
- Characterized by organized networks, porous borders, irregular migration, money laundering, corruption and the exploitation of disadvantaged communities.
- Most environmental Conventions have criminal provisions couched in different ways
  - Require development of appropriate national legislation to ensure the application of the agreements and to punish infractions against their provisions
    - E.g. The Basel Convention on the Control of transboundary Movements of hazardous wastes requires parties
      - To 'consider illegal traffic in hazardous wastes and other wastes to be criminal'
      - To introduce national legislation to prevent and punish illegal traffic

# International legal framework

- Require enactment & enforcement of legislation necessary to effectuate provisions with ‘appropriate penalties for violation thereof’
- Require that violations
  - ‘shall be an offence punishable under the law of the territory in which the ship is registered’ (Intl Convention for the Prevention of Pollution of the sea by Oil)
- . Some agreements expressly recognize their deterrent function
  - ‘the penalties specified under the law of a party shall be adequate in severity to discourage violations of the present Convention’ (UNCLOS; Bamako Convention Banning import into and Movement within Africa of Hazardous Waste)
- Net effect is to prevent envtl violations or punish causers of such violations

# Common kinds of environmental crimes

- Some categories international crime into Five
  - **Illegal trade in wildlife** in contravention to CITES);
  - Illegal trade in ozone-depleting substances (ODS) in contravention to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;
  - **Dumping and illegal transport of various kinds of hazardous waste** in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes
  - **Illegal, unregulated and unreported (IUU) fishing**);
  - **Illegal logging and trade in timber**

# Current status

- Great nexus between environmental crime, corruption and tax evasion and illicit capital
- It is due to mutations in the operations of criminal syndicates & diversification to include environmental crimes, e.g. poaching
- Most environmental crimes are transboundary and involve syndicates, hence need for cross-border collaboration.
- Environmental crime generates tens of billions of dollars in profits for criminal enterprises every year
- Criminal groups are making millions by trading in **environmental contraband**, **hazardous waste**, and **endangered species of plants and animals**.
- Still others profit by **illegally dumping waste** in the ocean or in developing countries, **sometimes on behalf of companies eschewing high disposal costs at home**.

# The extractive industry in Africa

- Despite a weaker global economy, Sub-Saharan Africa's growth has remained robust, averaging more than 5 per cent annually over the past 10 years.
- The IMF has identified 20 countries in Africa as “resource rich” & “export dependent”, (over 1/4 of export revenues derived from minerals), or “fiscally dependent” (their Gvts depend on minerals resources for at least 20 per cent of domestic revenue).
- Collectively, the 20 countries covered under the IMF's criteria account for 56 per cent of the region's population and 79.6 per cent of GDP.

# Extractives

- Africa's petroleum, gas and mineral resources have become a powerful magnet for foreign investment.
- Many mining companies but controlled by few of them.
- They are vertically and horizontally integrated( with consequent implications for transfer pricing and tax evasion)
- Africa's extractive industry despite its returns results largely to "resource Curse" and the "Dutch Disease."

# Key issues around oil and gas

- Oil as a fuel for corruption
  - *The governance crisis in the Gulf of Guinea is fuelled by oil corruption.*
  - Large power and control by Governments, discretionary power, lack of accountability
- Lack of transparency and disclosure (of contracts, revenues.....)
- Link to land tenure and land governance
- Weak legal and policy frameworks
- Lack of adequate capacity within continent
- The Place of Multinationals

# Issues(CTD)

- Challenges for Africa's governments include:
  - Tackling the macro-economic consequences of Africa's natural resource revenue
  - Ensuring transparency in process of awarding mining and concession contracts & utilization of revenues
  - Capacity building to negotiate favorable fiscal terms in extractives
- Converting the extractive industry to benefit countries in continent requires committed leadership



# Multinationals and the Extractive Industry

- All extractives marked by MNCs
- Common pattern, pioneer MNCs who explore, gain rights, enhance their share value and sell to more established firms
- Layers of corporations and difficult and technical financial reporting
- Profit expropriations & transfer pricing
- Huge capital outlay requirements & influence on agreements with African Countries
- Implications of Booms and Busts in investment, incentives from Gvts
- Challenges around Production Sharing Agreements
- Parliamentary Involvement in contract ratification(exception to rule)
- Dispute resolution provisions- preference for international arbitration

# Extractives & Criminal Law

- Use of criminal role to address:
  - Pollution (oils spills, gas flares, etc)
  - Corruption
  - Tax evasion
- Address issues around jurisdiction
- Understanding company structure and ownership and link to national law
- In many criminal prosecutions against corporations, the target is not only the company employees who engaged in improper activities (discharge of pollutants but also any high-level corporate officers aware of the activities are also targeted
- A problem may arise where the officer in question does not possess such knowledge
- In jurisdictions such as the US, it does not matter whether or not an officer has knowledge of the offence being committed

# CASE LAW

- In *US v. Hayes International Corporation* although the language of the statute required the defendant to act “knowingly”, the court held that the section “is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety”
- Similarly, in *US v. Hanousek*, the master was held criminally responsible and sentenced to six months in jail as a result of an employee who accidentally struck an oil pipeline with a backhoe resulting to the spill of 1,000 to 5,000 gallons of oil into River Skagway. On the material day, the master was absent and the employee was acting ultra vires the yards agreed upon

# Challenges to prosecuting environmental crimes

- Discordant legal frameworks (one country making an environmental act as an offence while neighboring country legalizes it)
- Perception as “non-crimes” “victimless” crimes hence low priority
- Inadequate border controls
- Lack of global enforcement provisions and mechanisms for env. Crimes in MEAs
- Weak technical capacity to investigate , frame and prosecute env. charges.
- Limited political will ( power, money and natural resource linkage)

# Some solutions

- Enhance coordination between various national and international governmental organizations
- Establish proper judicial frameworks at the national and regional level and enhance uniformity.
- Enhance the investigative capacity and professionalism of the government agencies responsible for addressing environmental crime.
- Enhance the awareness of citizens.
- Enhance exchange of information and collection of data amongst security and prosecution agencies and environmental management bodies
- Improve national legal frameworks & institutional capacity to ensure compliance with MEAs

# Action for Prosecutors

- If left unaddressed, environmental crime will erode state authority & contribute to a state of lawlessness
- Criminals dealing with environmental contrabands do not fear arrest and prosecution
- Need for prosecutors to:
  - Understand the complexity of environmental management and the extractive industry
  - Assess the adequacy of tools at their disposal to fight environmental crimes (laws, investigative equipment, personnel)
  - Collaborate with other sectors and agencies
  - Enhance regional and international cooperation

# Final reflections

- *The Task of prosecuting and investigating crimes is extremely challenging in most developing countries. Even, where environmental laws exist, local police forces are often uneducated about environmental concerns or influenced by corrupt officials. Prosecution can also be held up by a lack of informed judges.*
- *But even an informed judiciary, well-informed judiciary, well-trained investigators, and the political will to promote enforcement cannot necessary prevent illegal trading, which will be exploited by criminals as long as they perceive a demand.*

## So??

- *Meanwhile criminals continue to raise up the ante; many of them simply incorporate penalties into the cause of doing business.*
- *Stopping these crimes require officials to wield an ever bigger stick and increase the resources to deal with them.*
- *But boosting the capacity to fight environmental criminals is an enormous challenge, one that requires resources, determination, and political will.*
- *If environmental criminals are to be checked, then they must be fought with a level of severity at least equal to the ecological threats they pose*