CHALLENGES IN REGULATING ENVIRONMENTAL CRIMES

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ABSTRACT

Environmental crimes can be broadly defined as illegal acts that directly harm the environment. Often perceived as victimless and incidental crimes, environmental crimes frequently rank low on the law enforcement priority list, and are commonly punished with administrative sanctions which are themselves often unclear and minor. The paper is pointing to the relevance of the Directive 2009/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (ECD) which itself is not as an instrument of criminal law, as the provision on environmental liability can help prevent environmental crime by making perpetrators liable for consequences of their action and clean-up measures. The lack of legal certainty may also be a weakness in ECD which defines what constitutes an environmental crime by reference to a behaviour being unlawful under other directives. Also, it implies that the definition of environmental crime depends upon the violation of national legislation implementing the environmental acquis. In authors' opinion proper interrelationship between criminal law and non-criminal law enforcement avenues are of utmost importance to achieve the objectives of environmental protection more effectively.

KEY WORDS

environmental crimes, regulation, environmental protection, implementation

1. INTRODUCTION

The paper is focused on the phenomena of rising number of environmental offences and at their effects, which are increasingly extending beyond the borders of the States in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response. Generally environmental crimes involve wildlife crime such as illegal exploitation of the world's wild flora and fauna, while pollution crime is the trade and disposal of waste and hazardous substances in contravention of national and international laws. Moreover, in addition to those, new types of environmental crime are emerging, such as carbon trade and water management crime.

Practice has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law. Perceived as ‘victimless’ and low on the priority list, such crimes often fail to prompt the required response from governments and the enforcement community.

2. THE MAIN AREAS OF ENVIRONMENTAL CRIMES

According to the European Commission, environmental crime covers acts that breach environmental legislation and cause significant harm or risk to the environment and human health. Main areas of environmental crime are the
illegal emission or discharge of substances into air, water or soil; trade in wildlife; trade in ozone-depleting substances; as well as shipment or dumping of waste [1].

Environmental crimes are not victimless. The economic, environmental and health impacts of illegal trade can be sufficiently important to disrupt whole economies and ecosystems, undermining legal and environmentally sustainable activities and reducing future options for the use of resources.

Environmental crime is interrelated with the corruption at all levels and unless corrupt officials are tackled, efforts to combat environmental crime will be impeded - a fact that should be acknowledged within cross-cutting resolutions on environmental crime of the United Nations and within the UN Convention against Corruption [2].

3. THE RESPONSE TO THE ENVIRONMENTAL CRIME

While the definition of environmental crime is not universally agreed, it is often understood as a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade in or theft of natural resources, including serious crimes and transnational organized crime. Many emerging definitions for environmental crime have actually constrained the term by limiting it to crimes associated with breaches of environmental legislation only to result in easement of prosecution and punishment, since environmental crime is typically only seen as referring to infractions (fines) or misdemeanours (fines or shorter term imprisonment), rather than felonies.

Since shortcomings of environmental protection system are also reflected in facilitating the incurrence of damage within a weak regulatory framework, there is a need to recognize inherent rights of the environment, of other species and water itself, outside of their usefulness to humans [3].

The presence of organized criminal groups acting across borders is one of the many factors that have favoured considerable expansion of environmental crimes in recent years. Led by vast financial gains and facilitated by a low risk of detection and scarce conviction rates, criminal networks and organized criminal groups are becoming increasingly interested in such illicit transnational activities.

Environmental crime is highly lucrative, it can be as profitable as illegal drug trafficking, but the sanctions are much lower which make this activity extremely attractive for organized crime [4]. A person who commits environmental crime exploits the lack of international consensus and the divergence of approaches taken by countries. What may constitute a crime in one state is not so in another. This effectively enables criminals to go forum shopping and use for example one country to conduct poaching, another to prepare merchandise, and export via a third transit state [5].

The INTERPOL General Assembly Resolution in 2010 states that there is a vital need for a global response to combat environmental crime and INTERPOL should play a leading role in supporting the international enforcement efforts [6].

Unlike any other known crime, environmental crimes are aggravated through their additional cost and impact on the environment and cost to future generations. It also deprives governments of much-needed revenues and undermine legal businesses. Many environmental crimes, by contrast, remain unregistered in spite of the massive scale. This has been a primary cause of low awareness of both the scale and the different modi operandi of effective laundering methods in the enforcement sector. In addition, the capacity of governments to enforce criminal law greatly varies. Therefore, the community must recognize and address environmental crimes as a serious threat to peace and sustainable development and
strengthen the environmental rule of law at all levels.

4. THE EUROPEAN REGULATION ON ENVIRONMENTAL CRIME


The ECD provides for minimum rules Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment. It establishes measures relating to criminal law in order to protect the environment more effectively.

Recital of Article 3 of the ECD quotes that Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;

(d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(h) any conduct which causes the significant deterioration of a habitat within a protected site;

(i) the production, importation, exportation, placing on the market or use of ozone-depleting substances [7].

According to ECD Member States shall ensure that inciting, aiding and abetting the intentional conduct is punishable as a criminal offence and shall take the necessary measures to ensure that the offences be punishable by effective, proportionate and dissuasive criminal penalties [7].

Legal persons can be held liable for offences where such offences have been committed for their benefit by any person who has a leading position
within the legal person, acting either individually or as part of an organ of the legal person, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person. Member States shall also ensure that legal persons can be held liable where the lack of supervision or control, by a person, has made possible the commission of an offence referred or the benefit of the legal person by a person under its authority. Liability of legal persons does not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences [7].

Member States shall take the necessary measures to ensure that legal persons held liable are punishable by effective, proportionate and dissuasive penalties [7].

Thus, the ECD defines a number of serious offences that are detrimental to the environment and it requires EU countries to introduce effective, proportionate and dissuasive penalties. Common rules on criminal offences make it possible to use effective methods of investigation also on environmental crimes.

It must be pointed out that ECL Directive does not create a list of new illegal acts, because the existing law already provides for these prohibitions. Therefore, the Member States, by transposing this directive will only have to attach to these existing prohibitions some criminal sanctions.

The ECD only sets a minimum standard of environmental protection through criminal law to be adopted by the Member States and Member States are free to maintain or introduce more stringent protective measures. It does not lay down measures concerning the procedural part of criminal law nor does it touch upon the powers of prosecutors and judges.

4.2 Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD)

The ELD aims at ensuring that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. Insofar as the ELD provides for the financial responsibility of an operator, it lays down a framework, based on the polluter-pays principle, which can be qualified as one of "environmental liability", even though liability under the ELD has little in common with standard civil liability rules.

The designated competent authorities by Member States will ensure effective implementation and enforcement of the ELD; they will also safeguard the legitimate interests of relevant operators and other interested parties.

There are three categories of environmental damage under the ELD:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43;

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60, of the waters concerned;

(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms [8].
4.3 Convention on the Protection of Environment through Criminal Law

The Council Convention on the Protection of Environment through Criminal Law, Strasbourg, 4.XI.1998, is aimed at improving the protection of the environment at European level by using criminal law in order to deter and prevent conduct that is most harmful to it. It also seeks to harmonize national legislation in this field [9].

This new legal instrument, not in force and with only 3 ratifications, obliges Contracting States to introduce specific provisions into their criminal law or to modify existing provisions in this field. It establishes as criminal offences a number of acts committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or result in the death of or serious injury to any person.

The Convention defines the concept of criminal liability of natural and legal persons, specifies the measures to be adopted by states to enable them to confiscate property and define the powers available to the authorities, and provides for international co-operation. The sanctions available must include imprisonment and pecuniary sanctions and may include reinstatement of the environment, the latter being an optional provision in the Convention.

Another major provision concerns the possibility for environmental protection associations to participate in criminal proceedings concerning offences provided for in the Convention.

5. THE APPROACH TOWARDS CRIMINALISING ENVIRONMENTAL HARMS

The important issues are whether the implementation of EU instruments in the field of the protection of the environment results in consistent outcomes in national law and legal certainty.

As criminal law came to be viewed as an ultimate solution, it was placed under exclusive judicial control, and all violations of social norms meriting punishment were united in a single criminal code. Subsequently, a plethora of social, economic, and, inevitably, environmental legislation produced a set of complementary penal norms outside the criminal codes [10].

The lack of legal certainty may also be a weakness in ECD that defines what constitutes an environmental crime by reference to a behaviour being unlawful under other environmental directives. Explicitly, the structure chosen implies that the definition of environmental crime depends upon the violation of national legislation implementing the environmental acquis. Therefore, the approach towards criminalising environmental harm of the ECD makes it difficult to determine which behaviour constitutes environmental crime.

At the same time, the Council of Europe Convention on the Protection of the Environment through Criminal Law, 1998 has a different structure, which is the behaviour that has to be criminalised as described in a more direct manner in the Convention itself, which has never entered into force.

6. PROTECTION IF ENVIRONMENTAL SECURITY

In 2014, the INTERPOL General Assembly passed a Resolution on INTERPOL’s response to emerging threats in Environmental Security. In that Resolution, instead of defining environmental crime, INTERPOL instead focused on environmental security by recognizing the impact that environmental crime and violations can have on a nation’s political stability, environmental quality, its natural resources, biodiversity, economy and human life [11].

At the European level, there are more than 200 directives in force on environment as subject matter environment in force. Nevertheless, there
are cases of severe non-observance of European environmental law [12].

National legislatures have addressed environmental exploitation through a more or less comprehensive network of administrative laws. National laws have made regulations as to the extent of permissible pollution and acceptable risks in most environmental areas, frequently leaving to the administrative entity the task of establishing the allowable level of pollution in individual cases.

There definitely exists a close relationship between administrative laws and criminal law in the provisions of administrative law regulating allowed use of environment in statutory provisions, provision of subsidiary legislation, such as ordinance or regulations, or by administrative decisions aimed at environmental security.

The authors bring forward the opinion that an active role of the judiciary may essentially contribute to environmental protection [13].

7. THE ENVIRONMENTAL CRIME IMPLEMENTATION IN THE REPUBLIC OF CROATIA

Croatian Criminal Code in its Part XX regulates criminal acts against environment specifying the crimes of environment (Art. 193), discharging the polluting substances from the vessel (Art. 194), endangering ozone layer (Art. 195), endangering the environment with waste (Art. 196), endangering the environment with industrial plant (Art. 197), endangering the environment by radioactive substances (Art. 198), endangering with noise, vibrations or ionizing radiation (Art. 199), destroying protected natural areas (Art. 200), destroying habitat (Art. 201), trading in protected natural values (Art. 202), illicit introduction of wildlife or GMO in the environment (Art. 203), illicit hunting and fishing (Art. 204), killing or torturing of animals (Art. 205), transmitting contagious diseases and organism harmful for plants (Art. 206), manufacturing and putting on the market harmful means for treatment of animals (Art. 207), unconscionable administering of veterinary assistance (Art. 208), devastation of forest (Art. 209), altering water regime (Art. 210), illicit exploitation of mineral resources (Art. 211), illegal construction (Art. 212), beneficial repentance (Art. 213) and severe crime against environment (Art. 214) [14].

Although Croatian legislation establishes high degree of environmental protection, the awareness of threats of the severe consequences of this type of crimes is not yet sufficient neither with criminal prosecution body nor with administrative body [15].

In 2015 a total of 1 imprisonment punishments, 112 probation imprisonment sanctions, 12 fines and 5 community service sentences has been pronounced [16].

The reason for low number of detected and reported crimes is in still insufficient activity of competent institutions whose task is detecting and reporting the crimes, although timely detecting of such acts and reporting the criminal act is indispensable for the purposes of prevention. In practice, there are cases where state attorney qualifies the crime endangering the environment by improper waste management as minor infringement.

8. CONCLUSIONS

Environmental crimes represent an emerging form of transnational organized crime requiring more analysis and better responses. What makes environmental crime so lucrative is that a small number of perpetrators are actually caught and even fewer are punished. Few perpetrators are sentenced to jail, sentences that are pronounced are often light and fines are negligible compared to the profits and gains.

An offence is a crime only if the state decides to punish certain behaviour through criminal law. It implies that the definition of environmental crime
depends upon the violation of national legislation implementing the environmental acquis.

Criminalizing an environmental offence can be an effective and dissuasive way to achieve proper implementation of environmental law. However, there are large differences between the criminal sanctions provided for environmental offences and often existing criminal sanctions are not sufficiently stringent to ensure a high level of environmental protection. At the level of the European Union, the lack of legal certainty may also be a weakness in ECD, which defines what constitutes an environmental crime by reference to a behaviour being unlawful under other directives.

Environmental crime should not be seen to refer to infractions resulting in fines or misdemeanours consequential to fines or shorter-term imprisonment, because, in authors’ opinion environmental crimes should fall under already established laws on serious crimes.

In authors’ view, proper interrelationship between criminal law and non-criminal law enforcement avenues is of utmost importance to achieve the objectives of environmental protection more effectively. Nevertheless, compliance with environmental administrative law cannot always preclude criminal liability.

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