



When Confidentiality in International Commercial Arbitration (Ica) is not Salutary: African Perspectives on Transparency

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Abstract

Transnational human rights litigation against extractive companies involves cases of environmental degradation in the Global South with increasing frequency. Recent cases in the Niger Delta have shed light on some of the gaps in domestic and global governance. The inclusion of ecocide in the Rome Statute as proposed by the IEP provides a welcome response to fill this legal void. However, several questions critical for the adoption of a strong framework remain unanswered. While the overall thesis of this paper endorses the classification of ecocide as an international crime, by focusing on the opportunities and challenges presented by the definition proposed by the IEP, it attempts to examine how the regime needs to be reinforced in light of the Niger Delta case.

Keywords: Litigation; Niger delta; IEP; Economic interests reinforcement

Introduction

The definition of ecocide proposed by the Independent Expert Panel represents a huge leap forward in accountability for environmental damages, but greater efforts are still required to establish a strong framework and provide legal certainty to the main stakeholders across different industries. The case of the Niger Delta can serve as an example to reconsider some of the solutions proposed by the IEP. First, several African countries (and state parties to the Rome Statute) are highly dependent on revenues from extractive industries. Their reliance on extractive industries is indissociably connected to the burden of environmental disruption. Examples such as the Niger Delta case demonstrate that it is not easy to strike a balance between economic interests and environmental protection [1]. Decades of pollution in the Niger Delta have advanced the country's economic interests but have left a legacy of considerable environmental destruction that local communities are still battling. It remains an open question where the line should be drawn between economic interests and environmental protection, to which the IEP has not offered any clear response.

Second, the formulation of the definition of ecocide by the IEP has revived the interests of policymakers at the domestic and international levels. For example, Vietnam, Russia, and Armenia have each enacted domestic laws criminalizing the destruction of the environment. While these advances can be seen as positive steps toward recognizing the importance of environmental due diligence, there is not sufficient attention given to the imperative to develop coherent and mutually reinforcing laws that criminalize ecocide. As a result, there is a risk that the laws and standards which are individually developed by countries will not delineate the same elements of the crime. Therefore, the efforts toward a universal standard of prosecution of ecocide will not be mutually reinforcing [2]. Third, environmental standards of due diligence are sector-specific and constantly evolving. If failing to uphold the highest standards of environmental protection is a reason for perpetrators of ecocide to be held accountable for their recklessness, then the nature of these standards at least needs to be clarified to increase awareness of the fact that these standards are developed. Given that environmental remediation can never result in the complete restoration of the environment, further efforts need to be made to promote voluntary compliance before focusing on enforcement [3]. Fourth, transnational human rights litigation has shown that individuals are largely unable to cover the cost of environmental damages. Several cases, including the Niger delta pollution case, have

highlighted the role of parent companies in the quest for compensation for local communities. Because of this, the IEP could have considered how to include this progress in the legal framework proposed in the regulation of Ecocide.

Discussion

In light of these issues, this paper discusses: (1) The need for clear guidance on the cost-benefit analysis introduced by the IEP;

(2) The necessity of establishing a strong legal framework for prosecuting ecocide;

(3) The importance of clarifying environmental standards of due diligence; and

(4) How environmental damages should be redressed because these issues offer opportunities for further legal redress.

I. Understanding ecocide

The cases of pollution resulting from oil activities in the Niger Delta present insights that can be used to reinforce the legal framework proposed by the IEP regarding ecocide. Indeed, studies provide evidence that: "The inhabitants of the Niger Delta have experienced oil spills on a par with the 1989 Exxon Valdez disaster in Alaska every year for the past 50 years, a yearly average of about 240,000 barrels (...). These statistics mask a human tragedy on an extraordinary scale. The pollution is ingested by local communities and seriously impacts human health and mortality rates. A recent study by the University of St Gallen in Switzerland found that infants in the Niger Delta are twice as likely to die if their mothers live near an oil spill. That amounts to a scandalous 11,000 premature deaths per year." However, the prosecution of these cases did not consider the cumulative impact of the environmental damage. Instead, companies were held accountable for isolated

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incidents of Oil spills. Cases were filed in the UK and the Netherlands for similar environmental issues against the multinational corporation Shell. Unfortunately, these cases did not necessarily resolve the damage suffered because the region is still facing a major environmental crisis due to oil activities [4]. In the definition of environmental crimes, the efforts of prosecutors should also be applied to elucidating criteria that the office of the prosecutor can use to determine if the action of the state is in-existent or insufficient to address environmental damage. The definition proposed by the IEP does not capture this dimension of the problem. In addition, experts have proved that the responsibilities for the oil spills are complex. Indeed, many of the oil spills result from acts of sabotage. However, the enactment of strong criminal laws in Nigeria did not deter the commission of these acts of sabotage which continue to occur at an alarming rate. In contrast, companies were held accountable for failing to internalize vandalism risks in their internal systems [5]. Reasonably, it could have been expected that the Nigerian Parliament take steps to clarify environmental standards. However, nothing was done to improve legal certainty. This legal void poses a great challenge to the management of environmental risks. While the oil spills in Nigeria cause loss of biodiversity and environmental destruction, the underlying extractive activities provide substantial economic revenues to the Nigerian state. In accordance with the definition of ecocide proposed by the IEP Panel, there are still doubts as to whether the destruction of the environment in cases such as the Niger Delta falls within the scope of the definition. In accordance with the draft of the IEP, ecocide can be envisaged if "unlawful activities or reckless disregard of the potential environmental damage is committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment." When the definition is framed in this way, the terms are quite acceptable. However, the IEP Panel introduces another requirement that provides that reckless acts must be clearly excessive in relation to the social and economic benefits anticipated, without providing any further clarifying detail [6]. The first question that the International Criminal Court (ICC) may have to deal with in this context could be: Which indicators can be used to establish the excessive character of the damage, given that several laws authorize activities harmful to the environment? Who would be well-positioned to declare that the damage is excessive, especially when governments may benefit from revenues?

II. The reliance on domestic legal frameworks

The International Criminal Court intervenes when domestic jurisdictions fail to prosecute perpetrators of grave crimes. This policy means that domestic laws need to incorporate the elements of crimes contained in the Rome Statute [7]. With the general definition above that highlights the centrality of the existence of domestic environmental laws criminalizing ecocide, the focus is on the enactment of strong and adequate environmental laws at the domestic level.

As highlighted above, the specific acts covered by the definition proposed by the IEP actually differ among various countries. For example, Vietnam's Penal Code criminalizes "the destruction of the natural environment committed in time of peace or war." However, this definition does not contain any element of the definition proposed by the IEP. This situation raises questions regarding the content of environmental laws at the domestic level. According to the United Nations Environment Program (UNEP), 176 countries have enacted environmental laws as of 2017.

However, the content of these laws differs from one country to the other as noted in the report on environmental rule of law published by UNEP [8]. While some countries have enacted strong environmental laws, environmental protection in most states can range

from inadequate to effectively non-existent. This situation can create "double standards" in environmental governance.

As a result, there is a necessity to reinforce environmental governance by encouraging countries to adopt similar definitions of ecocide. As part of the effort to establish a framework for the criminalization of ecocide, additional steps to define a model law that contains basic elements common to all states are necessary. The European Law Institute is working on a project to elaborate model laws for the European Union which would criminalize ecocide. Similar initiatives at the global level would undoubtedly facilitate the efforts to establish an international framework [9]. If the enactment of laws continues with a lack of coordination, the absence of common statutory elements in some legislation may seriously hinder the prosecution of environmental crimes.

III. The need for clear standards of due diligence

The development of laws will not resolve all the issues of environmental governance. Technological standards will also need to be clearly defined to increase legal certainty. At the international level, due diligence is recognized as a defence against liability [10].

Conclusion

This paper focused on the steps necessary to strengthen the legal framework proposed by the IEP. In this regard, the analysis proposed practical solutions that state parties to the Rome Statute can take while considering the adoption of the ecocide definition. Moving forward, the debates on ecocide should not only address the perceived shortcomings of the definition but also the nature of the reforms needed in domestic laws. Furthermore, the drafters of the definition of ecocide also need to reflect on the enforceability of the court's decisions. Unlike prosecuting crimes against individuals, enforcement of ecocide statutes will require substantial amounts of money to first be secured through parent companies.

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Conflict of Interest

None

References

1. Mattei U, Pardolesi R (1991) Law and economics in civil law countries: A comparative approach. *Int Rev Law Econ* 11: 265-275.
2. Hazard GC (1998) Discovery and the role of the judge in civil law jurisdictions. *Notre Dame Law Rev* 73: 1-13.
3. Joseph Dainow (1967) The civil law and the common law: some points of comparison. *AJCL UK* 15: 419-435.
4. Tetley W (2000) Mixed jurisdictions: Common Law v. Civil Law (codified and uncodified). *La Law Rev US* 60: 1-63.
5. Pejovic C (2001) Civil law and common law: Two different paths leading to the same goal. *Pored pomor pravo EU* 40: 1-27.
6. Quigley J (1989) Socialist law and the civil law tradition. *AJCL UK* 37: 781-808.
7. Merryman JH (1981) On the convergence (and divergence) of the civil law and the common law. *Stan J Int'l L* 357: 1-39.
8. Fon V, Parisi F (2006) Judicial precedents in civil law systems: A dynamic analysis. *Int Rev Law Econ EU* 26: 519-535.
9. Cheh MM (1990) Constitutional limits on using civil remedies to achieve criminal law objectives: Understanding and transcending the criminal-civil law distinction. *Hastings* 42: 1-91.
10. Graff M (2007) Law and finance: Common law and civil law countries compared—An empirical critique. *Economica UK* 75: 60-83.