Migai Akech and Rose Mwebaza

Enforcement of environmental crime laws

A framework training manual for law enforcement agencies

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Glossary of terms

Biological diversity or biodiversity
The variety of life in all its forms, levels and combinations

Charge
A written statement of complaint brought against an accused person in a court of law

Climate change
Any long-term change in the statistics of weather over periods that range from decades to millions of years

Crime
An intentional act or omission in violation of criminal law (statutory or case law), committed without defence or justification, and punishable by the state

Defence
A means or method of defending oneself against an accusation

Desertification
The gradual transformation of habitable land into desert

Environment
The total context within which all the components of nature exist and interact

Environmental law
The principles and rules of law dealing with the protection, management and utilisation of natural resources and the environment

Environmental crime
Any wilful or unlawful act or omission leading to the degradation of the environment (and resulting into harmful effects on human beings, the environment and natural resources), which is punishable by the state

Environmental inspection
Checking or testing activities of individuals, companies and other entities against established environmental standards

Environmental investigation
Conducting an official inquiry on alleged violations of environmental laws and standards

Expert
A person with the special skill or knowledge representing mastery of a particular subject or discipline

Pollution
Contamination of the environment with man-made waste

Sentence
A statement formally pronounced by a court of law in a criminal proceeding and specifying the punishment to be inflicted upon the convict

Treaty/convention
A written agreement between two or more states made by negotiation

Witness
A person who testifies before a court of law

Acronyms

CBD Convention on Biological Diversity
CEL Commission on Environmental Law
CFCs Chlorofluorocarbons
CITES Convention on International Trade in Endangered Species of Wild Flora and Fauna

EIA Environmental Impact Assessment

GHG Greenhouse Gas

HCFCs Hydrochlorofluorocarbons
HFCs Hydro-fluorocarbons

IECEL International Council of Environmental Law
IUCN World Conservation Union

LATF Lusaka Agreement Task Force

NAP National Action Plan

ODS Ozone-Depleting Substances

PFCs Perfluorocarbons
POP Persistent Organic Pollutant

RAP Regional Action Plan

SF6 Sulphur Hexafluoride
SRAP Sub-Regional Action Plan

UNCLOS United Nations Convention on the Law of the Sea
UNFCCC United Nations Framework Convention on Climate Change

Guidelines for trainers

This manual is intended for national trainers on environmental crime in Eastern and Southern Africa. It seeks to enable such trainers to equip police officers and other actors involved in fighting environmental crimes with knowledge and understanding of the nature of environmental crimes, environmental inspection and investigation, and prosecution of environmental crimes. Its methods are based specifically on a participant-centred learning approach to facilitate optimum participation of learners.

FORMAT OF THE MANUAL

The modules of the manual are formatted to assist the trainer to prepare teaching notes, discussion topics and materials for group activity. Each module contains notes under the following headings:

- Topic
- Objectives: These are written in behavioural, measurable and achievable terms. Each module should last about 45–90 minutes
- Introduction: This is an overview of the module
- Content essential for presentation: This part contains the main content of the module. Major concepts are examined, examples provided, and in some cases group activities are suggested
- Points for discussion
- Suggestions for group activity for participants

To meet all the training objectives set out for each module, the trainer should utilise fully the material and methods proposed under the topics provided.

Points to promote discussion

There are points arising from substantive information that should be discussed with the participants.

The participants will probably raise their own points for clarification or discussion during or after presentation. The trainer should respond fully to their questions or comments.

The trainer should also integrate group activity into the training. In developing group activities, the trainer should adapt them to the professional orientation of the participants. Group activities may include:

- Visual pictorials which are discussed in plenary
- Case studies
- Working-group exercises
- Role plays
- Brainstorming
- Debate
- Drama
- Poems
- Video

Note: Where materials are repeated, the trainer should make cross references.

Learning objectives

This manual seeks to achieve these learning objectives:

- Impart knowledge so that the participants can comprehend information relevant to environmental crimes
- Change the attitude of participants so that they can accept the urgency, necessity and desirability of effective enforcement of environmental criminal laws
- Change the behaviour of participants so that they can treat environmental crimes like other types of crimes
- Prepare participants to investigate and prosecute environmental crimes effectively

Training methods

Training will be most effective if it is participatory and actively involves the participants.

Thus while trainers should adapt their approaches to suit particular national or other circumstances, presentation should take this format:

- Presentations by the trainer, based on the material provided in this manual
- Discussions between participants and the trainer or resource person, based on points arising from the presentations
- Group activity by the participants

Trainers should use any teaching aids available.

Trainers should also encourage participants to raise questions or comment during presentations and discussions, with the trainer guiding the discussions and providing insights into the issues raised. Concerns should be addressed as they arise in the course of the training.

In conducting group activities, it is recommended that:

- Sufficient time should be allocated for each activity.

- Effort should be made to ensure that all participants are fully involved in the assigned group work.
- The answers, observations and other responses provided by participants are respected. Trainers should not ridicule or cut down participants' answers, observations and other responses.

In using these methods, the main objective is to establish a two-way flow of information. Participants will be mature adults and professionals, whose experience can be tapped during the training. The trainers will thus impart knowledge and learn from the participants. In addition, the participants will share information and experiences among themselves.

Who should be trained?

This manual targets the officials of all agencies involved in fighting environmental crimes, including police officers, officials of environmental agencies such as inspectors, customs officials, and prosecutors. Effective enforcement of environmental criminal law requires the cooperation of all these officials, who thus need to be equipped to operate from an informed perspective.

The training should be based on the identified needs of such officials.

Evaluation

During training, the trainer will use questions and answers, and practical exercises to assess the progress of the participants.

At the end of the training, the trainer should set written examinations.

MODULE 1

Foundations of environmental crimes

Objectives

At the end of this session, participants should be able to:

- Explain the state of Africa's environment
- List and explain some of the major environmental problems in Africa
- Explain what environmental law is
- List and explain some of the major environmental law treaties

Contents

Foundations of environmental crimes

INTRODUCTION

In this module, we describe the environmental problems that Africa faces today, and responses to these problems at national, regional and international level.

To appreciate the magnitude of these problems, we must have a clear understanding of what we mean by the 'environment'. The environment may be defined as the totality of nature and natural resources, including the cultural heritage and infrastructure essential for socio-economic activities. The 'environment' is therefore the total context within which all the components of nature exist and interact.

1 ENVIRONMENTAL PROBLEMS IN AFRICA

As in other parts of the world, there has been an escalation in environmental degradation and resource depletion in Africa owing to the cumulative impacts of rapid growth in population, intensive agriculture, urbanisation and industrialisation. The priority list of environmental challenges includes land degradation, deforestation, declining biodiversity and marine resources, water scarcity, and deteriorating water and air quality.

A major reason for these adverse environmental trends on the continent is that most people and countries are poor. Their poverty is both a cause and a consequence of environmental degradation. However, the main cause of many environmental problems is the persistence of economic, agricultural, energy, industrial and other sectoral policies that largely neglect – and fail to avoid – harmful impacts on the environment and natural resource base.

Poverty has also resulted from the political instability of many countries over the past few decades. Where such instability has ended in civil war, the human and environmental effects have been even more devastating.

Poverty also exists in spite of the wealth of Africa's natural resources. Many Africans are unable to benefit from this wealth, partly because it is very unevenly distributed across the continent and partly for complex reasons connected with Africa's socio-economic history over the past 100 years.

The major environmental issues include:

A number of key issues dominate Africa's environmental problems and challenges:

- Increased food insecurity resulting from rapid population growth, degradation of agriculture and arable lands, and mismanagement of water resources, combined with poor economic policies to support food production. Land degradation is also a serious environmental problem. However, Africa owns vast areas of unexploited arable land, which could be utilised in future through the integrated management of land, water and human resources.
- African forests are shrinking as a result of deforestation. Unless energy alternatives to firewood can be found, as well as other sources of income for people whose lives depend on forests, deforestation will continue.
- The richness of African biodiversity requires greater protection and a sustainable use that will ensure the income of those who depend on it. There is a need to maximise biodiversity landscape protection, to give priority to biodiversity areas close to areas of high population density, and to give balanced attention to such regions as the arid and semi-arid areas.
- Africa's freshwater problems are acute and worsening. Most arise from the poor management of water resources, lack of financial resources for sustainable development and efficient utilisation of resources, absence of effective regional and basin development plans and shared management, and underestimation of the groundwater potential to supplement irrigation and drinking water supplies.
- Coastal and marine resources are being subjected to increasing pressure and are being degraded as a result of increased urbanisation and overexploitation, coupled with mismanagement. There is an urgent need for integrated coastal zone management.
- Air pollution has now emerged as an environmental issue of concern in most major cities of Africa. Regulatory measures and environmental standards need to be introduced to combat the problem. African emissions of greenhouse gases remain modest, but should not be left unregulated.
- The African urbanisation rate is the highest in the world. This is resulting in a deteriorating urban environment. Most of these problems, however, are common, predictable and are inevitable consequences of rapid urbanisation. They can be resolved through efficient and effective urban management systems. The challenge is to adopt city planning, development and management approaches that conform to the principles of sustainable urban development.

- Pollution of environmental media, namely air, water and land
- Hazardous wastes and chemicals
- Land degradation
- Loss of biodiversity
- Ozone depletion
- Climate change

Let us briefly examine each of these issues.

1.1 Pollution of environmental media

Pollution may be defined as: The introduction by human beings, directly or indirectly, of substances or energy into the air, water, land and soil, resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property, or impair or interfere with amenities and other legitimate uses of the environment.

Sources of pollution include industry; land, air, and water transport; agriculture; and domestic and recreational activities.

1.1.1 Air pollution

Air pollution may be defined as: The emission of any impurity into the air, such as smoke (including tobacco smoke), dust, cinders, solid particles, gases, mists, fumes, odours and radioactive substances.

Air pollution can have serious impacts. For example, it affects human and animal health, and ecosystems. It is estimated that indoor and outdoor air pollution is responsible for nearly 5 per cent of the global burden of disease.

Air pollution aggravates and possibly even causes asthma and other allergic respiratory diseases.

1.1.2 Water pollution

Types of water: ground water, surface/fresh water, marine/sea water

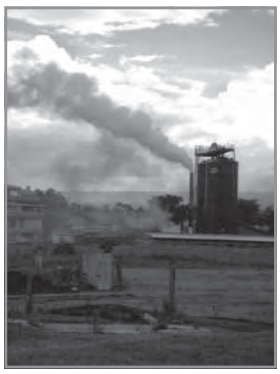
Sources of water pollution include industrial discharge of chemical wastes and by-products, discharge of under-treated or untreated sewerage, surface run-off containing pesticides, slash and burn farming practice, surface run-off containing spilled petroleum products, acid rain caused by industrial discharge of sulphur dioxide (by burning high-sulphur fossil fuels) or fertilisers.

Note: Groundwater pollution is much more difficult to abate than surface water pollution because groundwater can move great distances through unseen aquifers.

1.1.3 Land pollution

Sources of land pollution include poor regulation of solid waste disposal, poor regulation of the construction of buildings leading to, for example, wrongly sited sanitary facilities.

2 REMEDIAL MEASURES FOR POLLUTION OF ENVIRONMENTAL MEDIA



Measures to control pollution include:

- Establishment of 'ambient standards': Ambient standards set the maximum amount of a given pollutant allowed to be emitted to a given environmental medium.
- Establishment of discharge standards
- Establishment of cleaner production standards

Typically, what happens is that a country establishes an institutional framework that facilitates adherence by industry and other actors to these standards. To facilitate such oversight, these institutional frameworks require industry and other actors to obtain permits that state the quantities and types of pollutants that they can introduce into environmental media. Failure to adhere to the conditions established in these permits leads to various consequences, including civil sanctions such as withdrawal of the permits, refusal to renew permits, levy of fines, and even imposition of criminal sanctions.

2.1 Hazardous wastes and chemicals

A wide range of chemicals can cause significant harm to human and animal health, and the environment. These include substances that are explosive, flammable,

oxidising, poisonous, infectious, corrosive, toxic, ecotoxic, radioactive, liable to spontaneous combustion, and emit flammable gases upon contact with water. Such chemicals raise a number of concerns:

- **Illegal dumping:** This may be carried out by local 'backyard' operators who expect to escape identification, or facilitated across borders by transnational criminal organisations.
- **Transport and disposal of hazardous wastes:** These pose high risks of accidental spills that can be particularly harmful in densely populated and ecologically sensitive areas. Disposal needs to be subject to special precautions, such as immobilisation of the waste, to prevent it from leaching into water bodies and soils.
- **International trade in hazardous chemicals:** The country of destination might lack the capacity to regulate and oversee the disposal of imported waste or the waste stream from a local operation recycling imported waste.
- **Persistence and bio-accumulation of organic pollutants:** Certain organic pollutants, such as pesticides, do not break down naturally, especially in colder climates. Instead, they persist in the environment and gradually accumulate in the fatty tissues of animals, occurring in higher concentrations each step further up the food chain, impairing the health of those animals.
- **Cause of serious health problems and death:** Hazardous wastes may poison human beings and animals; persistent organic pollutants also cause cancer and mutation.
- **Cause of serious damage to water resources and environment:** For example, hazardous wastes from mining operations released into watercourses cause fish kills and forest dieback.

2.2 Remedial measures for hazardous wastes and chemicals

Measures for dealing with hazardous wastes and chemicals include the following:

- At **national level**, many countries have established laws governing production and importation, labelling, registration of users, handling, logging of movement, and responsible care of industrial and agricultural chemicals. Typically, these laws are supported by administrative agencies and enforcement officers.
- At **international level**, a number of treaties deal with hazardous wastes and chemicals. The main treaties are as follows:

2.2.1 Prior Informed Consent (PIC) Convention, 1998

seeks to ensure that governments have the necessary information to assess the risks of hazardous chemicals and to take informed decisions on their future import management.

Under this convention, certain persistent organic pollutants (POPs) are to be phased out of production by international agreement. These are chemicals that share the following properties:

- High toxicity
- Persistence, lasting for years or even decades before degrading into less dangerous forms

- Mobility, as they evaporate and travel long distances through the air and through water
- Higher concentration further up the food chain and accumulation in fatty tissues

2.2.2 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989

provides for measures to deal with the control of transboundary movement of hazardous wastes, environmentally sound management of hazardous wastes, and enforcement and implementation of the provisions of the convention at international and national levels.

2.2.3 Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998

which creates a legally binding obligation for implementation of the Prior Informed Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. It is a means of formally obtaining and disseminating the decisions of importing countries as to whether they wish to receive shipments of certain chemicals. It facilitates information exchange about characteristics of chemicals and thereby informs the importing country's national decision-making processes for their importation and use.

2.2.4 Stockholm Convention on Persistent Organic Pollutants, 2004

which seeks to eliminate the most dangerous persistent POPs that remain operative over long periods of time and poison specific aspects of an ecosystem. It also supports the transition to safer alternatives and cleaning-up of old stockpiles and equipment containing POPs.

3 LAND DEGRADATION

Land degradation includes soil erosion and soil compaction and is a threat to the sustainable use of land resources. The main causes of land degradation are vegetation removal through commercial logging and tree cutting to provide domestic fuel, as well as clearance of forests for commercial or subsistence cultivation.

Land degradation contributes to desertification, which has been defined as the gradual transformation of habitable land into desert.

3.1 Remedial measures for land degradation

The remedial measure for land degradation is the **United Nations Convention to Combat Desertification**, 1992, which seeks 'to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements'.

Parties to the convention agreed to take a number of actions:

- Ecological and socio-economic actions such as minimising the intensive cultivation of marginal lands that leads to soil erosion and desertification, and taking measures to reduce the rate of population growth
- Land-use planning, rehabilitation, conservation and sustainable management of land and water resources
- Development of national action plans (NAPs) to identify the factors contributing to desertification and practical measures necessary to combat desertification and mitigate the effects of drought in a given country
- Improvement and/or establishment of early warning systems and food security systems; development of sustainable irrigation programmes; establishment of legal and institutional frameworks; and, strengthening capabilities for assessment and observation of hydrological and meteorological services
- Preparation and implementation of sub-regional and regional action programmes (SRAPs and RAPs) that provide collection, analysis and exchange of information

4 LOSS OF BIODIVERSITY

Biological diversity (or biodiversity) is the variety of life in all its forms, levels and combinations. It represents the variability within and among all ecosystems, species and genetic material.

The Convention on Biological Diversity defines biodiversity as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

The convention distinguishes three levels of biological diversity:

- Diversity within species
- Diversity between species
- Diversity of ecosystems

4.1 Major concerns

The extinction of species and their habitats and the destruction of ecosystems have profound implications for economic and social developments because of the goods and services they provide. The loss of diversity of life diminishes the chances for medical discoveries, economic development and adaptive responses to challenges, such as climate change.

4.2 What is causing the loss of biodiversity?

Human activities are eroding biological resources and greatly reducing the planet's biodiversity.

Direct causes of the extinction of species include destruction of habitats, over-exploitation, over-consumption, pollution. On the other hand, indirect causes include the incidental taking of species and the introduction of foreign species into habitats.

4.3 Remedial measures for loss of biodiversity

A number of treaties aim to enhance the conservation of biodiversity, as follows.

Goods and services provided by ecosystems include:

- Food, fuel and fibre
- Shelter and building materials
- Purification of air and water
- Detoxification and decomposition of wastes
- Climate stabilisation and moderation
- Moderation of floods, droughts, temperature extremes and the forces of wind;
- Generation and renewal of soil fertility, including nutrient recycling
- Pollination of plants, including many crops
- Control of pests and diseases
- Maintenance of genetic resources as key inputs to crop varieties and livestock breeds, medicines, and other products
- Cultural and aesthetic benefits

4.3.1 The Convention on Biological Diversity (CBD), 1992

was the first treaty to take a holistic, ecosystem-based approach to the conservation and sustainable use of biological diversity.

The CBD stresses that biodiversity is a common concern of humankind, which basically means that the conservation of the earth's biodiversity is the responsibility of all human beings. It also requires states to conserve and sustainably use biodiversity for the benefit of present and future generations.

The main objectives of the convention are the conservation of biodiversity, the sustainable use of the components of biodiversity, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources – including appropriate access to genetic resources and appropriate transfer of relevant technologies and appropriate funding.

The CBD requires states parties to take certain actions:

- Adopting national policies that explicitly recognise the importance of and seek to ensure biodiversity conservation
- Declaring and protecting national parks and other categories of nature reserves
- Taking measures, including controls, over the conversion of habitat and harvesting of species whose survival is endangered
- Establishing national controls over foreign access to, use and development of national genetic material and information
- Granting foreign access to national genetic resources for research and development and mutual sharing of the benefits derived from this

Other treaties that impact on biodiversity include:

4.3.2 The Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971 (Ramsar Convention)

The main objective of the Ramsar Convention is to stem the destruction of wetlands and promote their conservation. Among other things, it seeks to protect the

'flyways' of migratory birds. Flyways are the migration routes and areas used by waterbird populations in moving between their breeding and wintering grounds.

4.3.3 The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972

The main objective of this convention is to establish an effective system for the collective protection of cultural and natural heritage of outstanding universal value. It imposes a duty on each state party to identify, protect, conserve and transmit its cultural and natural heritage to future generations.

Among other things, it requires states parties to:

- Integrate the protection of their heritage into comprehensive planning programmes and to set up services to protect such heritage.
- Submit a list of properties forming part of its cultural and natural heritage to the World Heritage Committee established under the convention.

4.3.4 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES)

The main objective of this convention is to protect endangered species from overexploitation. This protection is to be achieved through a system of imports/exports permits. The convention seeks to protect animals and plants, whether dead or alive, and any recognisable parts or derivatives of animals and plants.

In the case of endangered species, or species that may become endangered, the convention requires that the scientific and/or management authorities of either the state of import or the state of export must issue permits for exports or imports.

- The permit should state that the export or import of the animal or plant (or part or derivative of such animal or plant) will not be detrimental to the survival of the species in question.

Examples of endangered species are white rhino, marine turtle, and giant panda.

4.3.5 The Convention on the Conservation of Migratory Species of Wild Animals, 1979

The main objective of this convention is to protect those species of wild animals that migrate across national boundaries.

Among other things, the convention requires 'range states' (that is states in the migration range of the species in question) to endeavour to conclude agreements where doing so would benefit the species, especially those that periodically cross one or more national boundaries or are in unfavourable conservation status.

4.3.6 United Nations Convention on the Law of the Sea (UNCLOS), 1982

One of the main objectives of this convention is to protect the marine environment.

It gives coastal states the sovereign rights and exclusive jurisdiction over an 'exclusive economic zone', extending to 200 nautical miles from the baseline, and

with exclusive powers to prescribe and enforce laws for the conservation, exploration and exploitation of living and non-living resources.

It requires coastal states to determine the distribution and abundance of the living resources in their exclusive economic zone.

- The state is required to assess the total allowable catch or maximum sustainable yield for each species, before it determines how much should be harvested for national needs.
- Further, it requires that foreigners should be permitted to harvest any surplus stocks under mutually agreed access agreements that are beneficial to the coastal state.

5 OZONE DEPLETION AND GLOBAL CLIMATE CHANGE

5.1 What is climate change?

The United Nations Framework Convention on Climate Change defines "Climate change" as a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

Climate change is any long-term change in the statistics of weather over periods that range from decades to millions of years. It can express itself as a change in the mean weather conditions, the probability of extreme conditions, or in any other part of the statistical distribution of weather. Climate change may occur in a specific region, or across the whole earth.

There is substantial agreement that human activity contributes to the climate change phenomenon, and that global climate change could have potentially grave implications for the planet and the human community.

For example, human actions – particularly burning fossil fuels (coal, oil and natural gas) and land clearing – are increasing the concentration of greenhouse gases, which are a natural part of the atmosphere. Naturally occurring greenhouse gases include water vapour, carbon dioxide, methane, nitrous oxide, and ozone. Greenhouse gases that are not naturally occurring include hydro-fluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF6), which are generated through industrial processes. The problem is that the higher the concentration of these gases, the more heat is trapped. This is known as the enhanced greenhouse effect.

In addition, the burning of coal, oil, and natural gas, as well as deforestation and various agricultural and industrial practices, are altering the composition of the atmosphere. Land use changes, such as clearing land for logging, ranching and agriculture, also lead to carbon dioxide emissions.

The presence of ozone in the stratosphere is important because it forms a layer that absorbs ultra violet (UV) radiation from the sun, thereby preventing it from reaching the earth's surface. Exposure to UV rays is extremely harmful to humans: it increases the incidence of sunburn and DNA damage, such as melanomas and carcinomas (skin cancers), and cataracts in the eyes, and by damaging the human immune system. But the ozone layer is being depleted by increases in the

atmosphere of chemicals and substances such as chlorofluorocarbons (CFCs) and HFCs. It is estimated that the ozone layer has been reduced globally by 4%.

Impacts of climate change include:

Health (weather-related mortality, infectious diseases, air-quality respiratory illnesses), agriculture (crop yields, irrigation demands), forests, water resources (supply, quality), coastal areas (erosion of beaches, inundation of coastal lands), and loss of habitat and species.

Climate change models project that:

- The earth's mean annual surface temperature will increase by about 1.4 to 5.80 C between 1990 and 2100, with land areas warming more than oceans.
- Precipitation will increase globally, with both increases and decreases locally, and with more heavy precipitation events.
- Sea level will rise between 9 cm and 88 cm between 1990 and 2100.
- Increase of extreme weather events will increase, for example floods, droughts, heat waves.

5. 2 Remedial measures for ozone depletion and climate change

Remedial measures for ozone depletion and climate change can be found in various treaties, including the following.

5.2.1 United Nations Framework Convention on Climate Change (UNFCCC), 1992

is the main international treaty on climate change, together with its Protocol of 1997 (the **Kyoto Protocol to the Climate Change Convention**).

The primary objective of the UNFCCC is to manage the concentration of greenhouse gases in the atmosphere, and to prevent all forms of anthropogenic (or human) interferences with climate.

5.2.2 The Kyoto Protocol to the Climate Change Convention, 1977

sets mandatory targets on greenhouse gas emissions for developed countries.

- It requires developed countries to ensure that their aggregate anthropogenic carbon dioxide equivalent of the greenhouse gases do not exceed their

The convention requires all states parties to

- Promote sustainable management, and promote and cooperate in the conservation and enhancement of sinks and reservoirs of all greenhouse gases
- Gather and share information on greenhouse gas emissions, national policies, and best practices
- Prepare for adaptation to the impacts of climate change, by, among other things, developing and elaborating appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods
- Prepare national inventories of emission sources and sinks
- Launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts

assigned amounts (which are calculated in accordance with the provisions of the protocol).
- It offers a flexible mechanism in how countries can meet their targets. Countries may increase their carbon sinks, carbon trading, or through the clean development mechanism.

(The trainer should explain these three concepts in a simple manner, using illustrations.)

5.2.3 The Vienna Convention for the Protection of the Ozone Layer, 1985,

is another significant treaty with its **Montreal Protocol, 1987.**

This convention established a framework for the gathering of scientific information on the stratospheric ozone layer and for general cooperation such as the adoption of specific measures to reduce the introduction of ozone-depleting substances (ODS) into the atmosphere.

5.2.4 The Montreal Protocol

which came into force in 1989, established specific standards for the global phasing out of ODS production and consumption for listed substances – including CFCs, hydrochlorofluorocarbons (HCFCs), methyl bromide, and halons.

Suggested questions for group discussion

- Describe some of the major environmental problems that Africa faces today?
- Mention some of the major environmental treaties that try to resolve these problems.
- How are environmental problems handled in your country?

Suggested group activity

- Ask each participant to make a list of words, terms or concepts which that he or she has not fully understood and which that need further explanation.
- Divide the participants into small groups (between two and four groups, depending on the size of the class). Ask each group to identify and describe three or four new things they have learnt from the session. Each group should appoint someone to take notes and report back to the class. The trainer should provide opportunities for class discussions after each group presentation, or after all the groups have made their presentations.

6 INTRODUCTION TO ENVIRONMENTAL LAW

Environmental law comprises rules and doctrines arising from common law; constitutional provisions; statutes; general principles (otherwise called soft law); and treaties that deal with the protection, management and utilisation of natural resources and the environment.

Environmental law is concerned principally with ensuring the sustainable utilisation of natural resources according to a number of fundamental principles developed over the years through national and international processes. These are the principles of sustainability, intergenerational equity, prevention, the precautionary principle, the polluter pays principle, public participation in environmental matters, integration of environmental exigencies into development planning and management, the principle of prior consultation and ultimate cooperation.

6.1 Principle of sustainability

The principle of sustainability requires that natural resources should be utilised in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

It strives for equity or fairness in the allocation of the benefits of development and decries short-term resource exploitation which does not consider the long-term costs of such exploitation. In short, it advocates for prudent utilisation of natural resources.

This principle is often referred to as 'sustainable development', which may be defined as meeting the development needs of the present generation without jeopardising the interests of future generations.

6.2 Principle of intergenerational equity

The principle of sustainability should be examined together with that of intergenerational equity, which focuses on future generations as rightful beneficiaries of environmental protection. Essentially, the principle of intergenerational equity advocates fairness, so that present generations do not leave future generations worse off because of the choices they make today regarding development. Its implementation requires the utilisation of natural resources in a sustainable manner while avoiding irreversible environmental damage.

6.3 Principle of prevention

The principle of prevention states that 'protection of the environment is best achieved by *preventing* environmental harm in the first place, rather than relying on remedies or compensation for such harm after it has occurred'. The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures. At international level, this principle has been particularly prominent in the context of pollution.

6.4 Precautionary principle

The precautionary principle recognises the limitations of science, as it is not always able to accurately predict the environmental impacts of resource utilisation. Thus environmental problems occurring today – such as ozone depletion and climate change – were not foreseen in good time by scientists.

- It thus calls for precautions in making environmental decisions where there is scientific uncertainty.

Accordingly, it is closely related to the principle of prevention and 'can be viewed as the application of the principle of prevention where the scientific understanding of a specific environmental threat is not complete'.

The precautionary principle thus requires that all reasonable measures must be taken to prevent the possible deleterious environmental consequences of development activities.

Further, it demands that scientific uncertainty should not be used as a reason for not taking cost-effective measures to prevent environmental harm.

In addition, the need for environmental impact assessment (EIA) should be seen in the context of the precautionary principle. The purpose of such an assessment is to weigh up the impact of proposed development activities and ensure that any likely adverse impacts on the environment can be dealt with.

6.5 The polluter pays principle

The polluter pays principle requires that polluters of natural resources should bear the full environmental and social costs of their activities. It thus seeks to ensure that the full environmental and social costs of resource utilisation are reflected in the ultimate market price for the products of such utilisation. Since environmentally harmful products tend to cost more, this principle promotes efficient and sustainable resource allocation because consumers are likely to prefer cheaper, less-polluting replacements for such products.

6.6 Principle of public participation

The principle of public participation seeks to ensure environmental democracy and requires that the public, especially local communities, should participate in environmental and developmental decisions that affect their lives.

It requires that the public should have appropriate access to information concerning the environment that is held by public authorities, and should be given an opportunity to participate in decision-making processes.

In addition, the public should be given effective access to judicial and administrative proceedings. Accordingly, the public should have access to the courts to seek review of environmental decision making.

6.7 Integration of environmental exigencies into development planning and management

This principle is to the effect that environmental considerations should be taken into account and, to every extent possible, integrated into development planning and management.

It requires environmental legislation that facilitates the integration of environmental exigencies into development planning and management.

States are required to take this principle into account in preparing their development plans.

6.8 Principle of prior consultation and ultimate cooperation in environmental management

This principle states that matters of environmental protection should be handled in a spirit of cooperation by all countries and on an equal footing. Among other things, such cooperation is to be achieved through bilateral and multilateral agreements.

Prior consultation is essential for cooperation. Thus, for example, this principle requires preceding and timely notification when a proposed activity is likely to cause transboundary environmental harm.

In addition, this principle requires that consultations and cooperation should be conducted in good faith, and based on equity and reciprocity.

6.9 Other important principles

- The environment as a common concern of mankind
- The sovereign right of states to exploit their own resources pursuant to their own environmental and developmental policies
- The responsibility of states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction
- The principle of common but differentiated responsibilities

7 ENVIRONMENTAL LAW IN AFRICA

Many African countries have adopted framework environmental laws that seek to domesticate these principles. Typically, these laws provide for the following:

- Establishment of a national environmental agency (or vesting of powers in the Ministry of Environment)
- Environmental impact assessment
- Basic stipulations regulating different environmental sectors (such as air, water, soil, hazardous waste, wildlife, genetic resources)

In addition, many African countries have sought to protect environmental rights in their constitutions. For example, these constitutions provide for the right to a healthy environment or the right to life (which is often interpreted as the right to a healthy environment in which to live that life).

- At least 32 African countries (approximately two thirds) have some constitutional provisions ensuring the right to a healthy environment.
- Most African countries have constitutional provisions on the right to life.
- In addition, virtually all constitutions of African states provide procedural rights that can be indispensable in implementing and enforcing these substantive rights – including freedom of association, access to information, public participation in decision making, and access to justice (including recognition of *locus standi* and explicit recognition of public interest litigation).

The development and implementation of environmental law in Africa has been influenced by the differing legal traditions of African countries. For example, approximately one half of African countries have civil law traditions derived from European civil codes, and one third have common law traditions derived from British rule. Further, civil law systems vary from country to country, just as common law systems do.

Some of the differences between common law and civil law traditions:

- Civil law traditions disfavour judge-made law because, unlike legislators, judges do not represent popular will, and are neither elected by nor accountable to the populace. Therefore, civil law countries generally seek to enumerate all the rights and responsibilities in legal codes and constitutions.
- In contrast, common law traditions emphasise basic principles that judges are supposed to apply to the facts of a particular case. These principles may be derived from legislation, but are often uncodified and manifest themselves through a body of 'case law' interpreting and applying the principles.

Despite the differences, however, striking agreement exists among these legal traditions on the right to life and on procedural rights; and environmental provisions are widespread in both common law and civil law traditions.

In addition, civil and common law traditions have begun to merge in some respects. For example, most scholars of civil law, as well as judges and legislators, recognise that it is impossible to write a code that will provide for all eventualities. Consequently, civil law advocates and judges increasingly look to previous judicial decisions for 'persuasive authority' when considering novel legal issues. Similarly, common law countries have been codifying an impressive volume of laws and regulations.

Suggested questions for group discussion

- What do you understand by environmental law?
- Discuss the principles of environmental law.
- Are the principles of environmental law incorporated in your national laws? If so, to what extent have these principles been incorporated in national laws?

Suggested group activities

- Ask each participant to make a list of words, terms or concepts that he or she has not fully understood and that need further explanation.
- Divide the participants into small groups (between 2 and 4 groups, depending on the size of the class). Ask each group to identify and describe three or four new things they have learnt from the session. Each group should appoint someone to take notes and report back to the class. The trainer should provide opportunities for class discussions after each group presentation, or after all the groups have made their presentations.

MODULE 2

Environmental crimes and criminal prosecution

Objectives

At the end of the session, the participants should be able to:

- Explain the elements of a crime
- Identify environmental crimes
- Appreciate the importance of fighting environmental crimes
- Distinguish environmental criminal law from ordinary criminal law
- Describe transboundary environmental crimes

Contents

Environmental crimes and criminal prosecution

INTRODUCTION

In this module, we first learn about crimes and criminal law in general. We then learn about environmental crimes, and try to distinguish them from other types of crimes. Next, we learn about the use of criminal law to protect the environment. From the examples of typical environmental crimes that are committed in the region, it is hoped that the participants will appreciate the importance of fighting environmental crimes. Finally, because many environmental crimes are transboundary in nature, we learn how to fight such crimes.

1 CRIMINAL LAW

1.1 What is a crime?

A crime may be defined as an intentional act or omission in violation of criminal law (statutory or case law), committed without defence or justification, and punishable by the state.

1.2 Distinguishing core features of criminal law

- Sanctions: Criminal law is unique because it invokes the society's harshest sanctions, including the loss of liberty that results from incarceration, death and the moral stigma associated with a criminal conviction. The long-term effect of this stigma on an individual can be the most severe.
- Moral culpability: As a general rule, the severe sanctions of the criminal law are imposed only where the defendant is morally culpable or blameworthy.
  - What makes conduct more or less morally culpable depends, in the first instance, on the actor's state of mind: the more culpable the state of mind, the harsher the corresponding punishment ought to be.
  - Culpability in this context depends on the defendant's purpose, the extent of the defendant's knowledge of the circumstances surrounding his or her conduct, the conduct itself, its results, and the reasons for the defendant's behaviour.

- Standard and burden of proof: Criminal law imposes a higher burden of proof on the prosecution. In a criminal case, the government must establish the defendant's guilt **beyond a reasonable doubt** and not, as in civil enforcement actions, by mere preponderance of the evidence or balance of probability.

1.3 Elements of a crime

We can therefore say that a crime has three elements:

- *Actus reus*: that is, an action or omission.
- *Mens rea*: that is, a morally blameworthy s*tate of* mind.
- Some concrete harm with a public dimension that is realised or threatened as a direct result of the action (or inaction). The public dimension is important because criminal conduct is a crime against society; it is not just a private wrong.

Criminal liability is enshrined in the Latin maxim '*actus non facit reum nisi mens sit rea*', which means that the doing of an act does not make a man guilty unless he has a guilty mind.

Culpability (or intent) refers to the blameworthiness of a defendant's conduct. It is measured according to shared community intuitions and values about what is blameworthy and why.

- Society's beliefs are therefore crucial to determining whether an act is criminal and to what extent that act should be punished.
- The required blameworthy mental state for most environmental crimes is 'knowingly'.
  - The actor must 'knowingly' engage in conduct forbidden by the law.
  - Similar culpability requirements are often used in statutes – intentionally, purposely, wilfully, and negligently.
- Lawyers refer to this element of a crime as *'mens rea'*, which denotes a guilty mind.

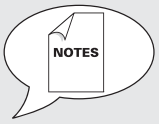
Note
In practice, criminal procedural laws guide the process of enforcing criminal laws. Whereas criminal law statutes set out crimes, criminal procedural laws set out the processes through which law enforcement agencies are to prevent or detect the commission of such offences. Thus criminal procedure laws regulate aspects such as when law enforcement officers should arrest and how; when law enforcement officers should use force and how; and when police officers should conduct searches and how.

2 ENVIRONMENTAL CRIMES

2.1 What are environmental crimes?

An environmental crime may therefore be defined as any wilful or unlawful act or omission leading to the degradation of the environment (and resulting in harmful

Common environmental crimes



- Illegal disposal of waste
- Discharging effluent from an establishment without a permit
- Misapplication of pesticides
- Illegal importation of ozone-depleting substances
- Falsification of data
- Laboratory fraud
- Setting up and operating a project without an environmental impact assessment (EIA)
- Failure to comply with the requirements of a restoration or improvement order
- Discharging harmful or polluting substances or waste substances into water systems, contrary to the law
- Disposing, storing and treating or transporting of hazardous waste without a permit
- Exporting genetic resources or their derivatives without a permit

effects on human beings, the environment and natural resources), which is punishable by the state.

Environmental crimes include all violations of environmental laws that attract criminal sanctions.

In our region, many of these offences are listed in sectoral legislation that relates to forestry, water, wildlife, fisheries, industry, etc.

- Common environmental crimes in the water sector are illegal discharge of effluent, construction on wetlands, illegal development in riparian areas, etc.
- Common environmental crimes in the fisheries sector involve illegal trade in ornamental fish, use of illegal fishing methods, blocking of creeks, etc.
- Common environmental crimes in industry consist of illegal disposal of hazardous wastes, including medical and electronic waste.

Environmental crimes can be classified into two broad categories:

- **Substantive environmental crimes:** These crimes are substantive because they directly implicate the pivotal concerns of preventing environmental degradation and hazards to public health.
  - Examples: discharging a pollutant into water or air, and storing or transporting hazardous waste in violation of a statute, regulation or permit
- **Procedural environmental crimes**: These crimes are administrative in the sense that they consist of failure to comply with administrative requirements imposed by law
  - Examples: permit violations (that is, violating the terms and conditions of permits), failure to supply required information, failure to notify the government of a reportable event or to monitor discharges, submitting a false report, tampering with or disabling a monitoring device

In a typical environmental crime situation, a person accused of engaging in illegal trade of ivory may have forged export permits. Usually, such violations will also be investigated and prosecuted when they arise in the context of environmental crimes. In our example, the offender may be charged with two offences: engaging in illegal trade of ivory; and making a false document and uttering the false document.

At this point, the trainer should discuss the sources of environmental criminal law in the country in question. Environmental criminal law is derived from international and national sources.

Related crimes

Cases involving violations of environmental laws may also involve violations of ordinary criminal law statutes. Examples of such crimes include:

- Aiding and abetting
- False claims
- Conspiracy
- Theft of conversion of public property or money
- False statements
- Mail fraud
- Obstruction of administrative proceedings
- Perjury
- Forgery

In addition, environmental crime is closely linked with crimes such as drug trafficking, weapons trade, smuggling, fraud and money laundering.

At international level, the most common environmental crimes are:

- Illegal trade in flora and fauna, and their products
- Illegal trade in ozone-depleting substances
- Dumping and illegal transport of hazardous waste
- Illegal, unregulated and unreported fishing

2.2 Who can be liable?

Environmental crimes are motivated by commercial or subsistence reasons.

Most criminal sanctions under the environmental statutes apply to any person who violates a law or regulation, including individuals, corporations, corporate officers and employees.

- Note: In law, corporations are deemed to be legal persons capable of suing and being sued, like individual human beings

Corporate liability for environmental crimes is based on the imputation of the conduct of employees to the corporation, usually through the **doctrine of respondeat superior**.

- Therefore, a corporation will be held liable for criminal acts committed by an employee acting within the scope of his or her employment for the benefit of the corporation.
- Criminal liability for the acts of employees may be attributed to a corporation even where the corporation has an express policy against the activity.
- Corporate officers may be liable for their knowing approval of or direction to employees who commit environmental crimes.
- Employees may be criminally liable if they knew or should have known that their actions or inactions violated the law.

The trainer should only use one or two of these case studies as appropriate. The trainer should use these case studies to emphasise the seriousness of environmental crimes and the need to protect the environment using criminal law.

3 CASE STUDIES

3.1 Illegal trade in sandalwood in Kenya

This is currently the most popular form of illegal trade in flora in Kenya. A five-year presidential ban on harvesting sandalwood *(Santalum album)* was imposed in February 2007. Sandalwood contains essential oils with a fragrant scent, and is used in the manufacture of cosmetics. The essential oils are more concentrated in the roots than in the stem, and as a result the whole tree is uprooted. The species has male and female plants, with the female being favoured for their fragrance.

There is a 'rush' for sandalwood because it fetches very good prices in the international market: 1 kilo of essential oils sells for about US$1,500. These prices are not reflected locally, where the farmers sell sandalwood to middlemen for between Ksh80 and Ksh200 (US$1–2.50) per kg. Sandalwood is found in protected areas such as Chyulu Hills and Tsavo West, and in the western and eastern parts of the country such as Baringo, Pokot, Samburu, and Naivasha.

Kenyan sandalwood is exported mainly to India and China and is ordinarily sent abroad as wood. The key dealers are politicians and traders of Asian origin. However, since the ban and subsequent awareness of its export, sandalwood is now exported mainly through Tanzania. A chain facilitates its passage from the villages – where middlemen purchase it from locals – to its transportation by road to Namanga and the larger Kajiado district, from where it is smuggled into Tanzania. On 6 October 2008, for example, 40 tonnes harvested in Maralal (Samburu District) were netted at Namanga. An estimated similar amount had already crossed into Tanzania. The Kenya Wildlife Service has already netted about 20 tonnes this year (2009) and made 40 arrests.

With transportation becoming increasingly difficult, the traders are now semi-processing sandalwood into chips and sawdust. It is then transported, and even exported, in these forms. The export is now done in the form of small packets (cigarette packet size), with some going out as 'free samples' and thus being exempt from duty.

3.2 Illegal logging

Organised crime in the forestry and timber industries is one of the most pressing environmental issues facing the world today. It is threatening precious forests such as the Amazon, the Congo and the Mau in Kenya.

- This crime is driven by the low risks and high profits of a largely unregulated international market for cheap timber and wood products.
- The timber trade involves many crimes, including illegal harvesting of forests, illegal acquisition of logging rights, failure to pay relevant taxes, illegal transportation, transhipment, use of forged documents, mis-declarations at customs, and bribery and corruption of officials.
- Other crimes such as intimidation, human rights abuses and even murder also occur as a result of illegal logging.
- While the illegal logging takes place far from the public gaze in remote forest regions, it is driven by demand for cheap timber in consumer markets in affluent nations.

3.2.1 Consequences of illegal logging

Illegal logging threatens biodiversity, contributes to environmental catastrophes such as deforestation, flooding and forest fires, and is directly linked to climate change, since around one fifth of global greenhouse gas emissions is linked to forest loss.

It also deprives forest communities of livelihoods. The World Bank estimates that illegal logging costs developing countries up to $15 billion a year in lost revenue and taxes.

3.2.2 Weakness of laws

There is no coherent global regulatory framework to prevent or punish the international sale of timber deemed illegal in the country of origin. Cross-border criminal syndicates are therefore able to operate with impunity, and can sell such timber on the international market without hindrance.

3.3 Wildlife crime

Wildlife crime is perceived by many international criminals as a low risk–high profit activity, since the chances of being detected, apprehended and convicted are generally low. The proceeds of wildlife crime are also used to finance other forms of crime.

Examples of such crimes include illegal trade in ivory (we discuss one successful law enforcement example below) and illegal trade in the skins of animals such as tigers and leopards.

This crime is difficult to deal with owing to factors such as porous borders, and the existence of lawless areas. Often, this crime is facilitated by transnational criminal networks.

3.4 Smuggling of ozone-depleting chemicals

Global concern over the threat posed by ozone-depleting substances (ODS) led to the formulation of the Montreal Protocol on Substances that Deplete the Ozone Layer. The protocol establishes legally binding controls on the national production and consumption of ozone-depleting substances, and seeks to eventually phase them out to enable the ozone layer to recover.

But the drafters of the protocol failed to foresee the possibility of illegal trade in ODS as control mechanisms came into effect. By the mid 1990s, CFCs were being smuggled across national borders.

- The first target for the smugglers was the lucrative US market, where a high import tax on CFCs, designed to reduce consumption, meant high profits for smugglers.
- These crimes are committed by passing off newly produced CFCs as recycled CFCs, and mis-declaration of CFCs on shipping documents.
- Much of the newly produced CFCs were sourced from Russia, which had continued to produce CFCs in violation of its obligations under the Montreal Protocol.

3.5 Illegal trade in ivory: the Singapore seizure

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) seeks to protect certain endangered species, such as elephants. CITES prohibits international trade in elephant ivory from all countries, except Botswana, Namibia, South Africa and Zimbabwe. In these countries, CITES permits limited trade for 'non-commercial purposes'. As a result, there is confusion about what is, and is not, legal. Mixed messages from these decisions of the parties to CITES complicate the work of national law enforcement agencies.

In June 2002, 532 elephant tusks and over 40,000 traditional Japanese name seals were seized from a ship arriving in Singapore from South Africa en route to Japan. The ivory was sourced largely from elephants in Zambia (which is not one of the four exempted countries), then transported to Malawi for packing and inspection by potential buyers, before being taken to Mozambique by road. From there, it was shipped to South Africa, and then loaded for transport to Japan via Singapore.

The modus operandi employed to avoid detection included using personal and company pseudonyms, laying false trails, mis-declaring goods, bribing customs officials, tendering fake documentation, and multiple transhipments.

The Singapore seizure was the result of coordinated efforts of numerous enforcement agencies, including the Zambia Wildlife Authority, the Anti-Corruption Bureau of Malawi, the Lusaka Agreement Task Force, and the Agri-Food and Veterinary Authority of Singapore.

The investigations revealed a well-established syndicate of South East Asian and African nations, operating across at least five borders and spanning two continents. According to recovered documents, the syndicate had been active for at least eight years before the seizure, and had dispatched 19 similar sized shipments since 1994.

However, efforts to prosecute the criminals involved have been frustrated by various factors, including protracted investigations, inefficient use of intelligence and loss of key evidence, and the failure to locate many key suspects and witnesses.

4 ENVIRONMENTAL CRIMINAL LAW

This is the use of criminal law to protect the environment and control environmentally hazardous activities.

Environmental criminal law is one of two main options for enforcing environmental law. The other is administrative or civil enforcement.

4.1 Administrative/civil enforcement

This involves the issuance of legally enforceable orders by enforcement officials.

- These orders define the violation; provide evidence of the violation; and require the recipient to take corrective action within a specified time.
- If the recipient violates the order, programme managers can usually take further action, such as suspending or revoking licences or permits, and imposing fines (financial penalties which lack the moral overtones of comparable criminal sentences).
- Administrative orders are not self-enforcing: if the order is not complied with, further enforcement action must be pursued through the judicial system.

Although civil fines can be substantial, the loss of a licence may be catastrophic for an organisation. The denial of permission to operate within the law potentially incapacitates it. It is the corporate equivalent of a custodial sentence (or possibly execution).

In addition, many countries seek to balance the rights of individuals with the government's need to act – often quickly – on behalf of the public. Several processes may be used to ensure fairness of enforcement responses:

- Notice: Some enforcement programmes require that a notice of violation must be issued before any formal enforcement action is pursued. The violator may be offered an opportunity to contest the finding of the violation and/or to correct the violation within a specified time to avoid further government action.
- Appeals: There are often several points in the enforcement process when a

violator can appeal the finding that there is a violation; the remedial action required by the enforcement programme; or the severity of the proposed sanction.

- Dispute resolutions: Most enforcement responses are bound to create disputes between programme officials and facility representatives. In such cases, programmes often use special procedures to resolve disputes.
  - In general, the more an enforcement action denies an individual his or her rights, the more protection the enforcement process provides, and the longer the process may take before final action is initiated.

4.1.1 Parallel proceedings

In practice, enforcement agencies may pursue criminal and civil/administrative enforcement options in response to the same environmental violation.

Civil/administrative action is usually taken where there is a need to stop or prevent an imminent threat to human health or the environment.

Parallel proceedings are appropriate, for example, when in the course of the civil case the government receives evidence of deliberate violations of the law, meriting criminal prosecution, or when a criminal investigation uncovers evidence of an ongoing violation causing environmental contamination, which should be stopped quickly through an injunction.

Although they may be appropriate in particular circumstances, parallel proceedings must be handled carefully for example to avoid allegations of abuse of process.

4.2 Why use criminal law?

The criminal law may be an effective tool for deterring or punishing many of the human activities that harm the environment.

4.2.1 Social, economic and ecological impacts of environmental crimes

- Improperly disposed pollutants poison community water supplies, contaminate fisheries, and injure human beings.

4.2.2 Points to consider

- The harms that environmental laws seek to prevent can be just as significant, and sometimes even more serious than those implicated by more traditional criminal acts.
  - For example, pollution of a public drinking water supply can imperil the health of an entire community, even with fatal results.
- The moral culpability of those who violate environmental laws can be as great as those who commit any of the more traditional crimes, such as murder, robbery or assault.
- In the absence of criminal sanctions, particularly those directed at individuals (including corporate officers), companies may view sanctions for violating environmental laws as a mere cost of doing business.
  - Companies may gamble that the government enforcers will not discover

their violations and, even if that gamble fails, that they can offset those costs with the excess profits they gained through past noncompliance.
    - Depending on market conditions, companies that are sanctioned may be able to pass the costs of civil penalties onto consumers by charging more for their goods and services.
    - However, the mere threat of the imposition of criminal sanctions will force corporate officers to take notice. Prison sentences can apply to officers and employees in their personal capacities and are not simply a cost of doing business – their impact can be devastating. The moral stigma associated with a criminal conviction can irreparably destroy existing and future economic relations, and social and familial relations as well.

The economic effect of criminal sanctions imposed on a corporation (as opposed to an individual) can likewise be more devastating than civil penalties. Business can suffer from the stigma of a conviction. A conviction may subject the defendant company to a 'debarment', that is, the company will not be eligible to enter into a contract with the government for a specified period.

The criminal enforcement of environmental laws therefore serves three purposes:

4.2.3 Deterrence

- All criminal prosecutions seek to deter criminals and would-be criminals from committing crimes.
- Criminal sanctions are the most effective means of deterrence, because of their power to impose severe penalties, such as loss of freedom.
- In the context of the environment, the use of criminal law reflects society's wish to ensure that business in particular does not view the penalties for environmental misconduct as merely a cost that can be passed on to the consuming public.
    - Imposition of personal criminal liability on corporate officers and employees is one way of ensuring that businesses take their environmental obligations seriously.
    - Because corporate officers and employees are normally shielded from personal liability by the corporate entity, criminal sanctions prove to be a particularly effective means of deterrence.
- The deterrence function of criminal law also supports an important objective of environmental law, namely to prevent irreversible, irremediable harm to the natural environment, the precise magnitude of which is often highly uncertain, given the inevitable complexity of ecosystems.
    - It is often quite hard, if not impossible, to put the pieces of an ecological puzzle back together again in the aftermath of serious environmental degradation. Monetary remedies do not address the damage issue.
    - In these circumstances, deterrence can be essential to the achievement of the preventive objective of environmental law to avert such harms, rather than merely to address harms once they have occurred.

4.2.4 Retribution

- Criminal law also exerts retribution for the crime in the form of punishment.

- Here, criminal law expresses society's sense of moral outrage and condemnation because the actor's conduct is considered culpable.
- Thus the beliefs of society play an important role in determining whether an act is criminal and to what extent that act should be punished.

4.2.5 Remediation and public protection

The need to expedite remediation of an environmental problem is an important consideration, since the protection of human health and the environment is a central goal of criminal environmental enforcement.

Because the criminal justice system frequently moves more quickly than civil litigation or even administrative action, criminal prosecutions may be pursued when there is a need for quick remediation.

Group activity: Questions for discussion

- Are we doing the right thing by protecting the environment?
- Is criminal enforcement more desirable than administrative/civil enforcement? Why should we use the criminal law and when is it appropriate?

5 CHALLENGES IN ENFORCING ENVIRONMENTAL CRIMINAL LAW

The imposition of criminal sanctions in the environmental context presents a number of formidable challenges:

- Ideally, criminal standards should be clear and determinate. If they are not clear, criminal law cannot serve its deterrent function well. Nor does social retribution in the form of a criminal sanction seem just when society has not given fair notice of what type of conduct warrants such an extreme sanction. In addition, criminal standards tend to reflect settled societal norms of conduct, rather than sharply disputed matters
  - In contrast, environmental law is often indeterminate and evolutionary. Environmental law seeks to reduce the likelihood of harm occurring in the future (for example cases of cancer), rather than punish harms after they occur. Environmental contamination often gives rise to injuries that do not become manifest until long after the contaminants were released into the environment. When injuries do become manifest, scientific uncertainties may render the accurate assignment of blame nearly impossible, which arguably necessitates the ex ante risk reduction approach.
  - This tendency presents a difficulty for criminal enforcement: whereas criminal law usually concerns itself with conduct that actually causes (or imminently threatens) tangible harm, environmental laws regulate conduct that poses uncertain risks of harm, sometimes in the distant future.
  - The evolutionary nature of environmental law creates uncertainty about what the law is or is likely to be, including what conduct will be considered criminal. The unpredictability of the governing legal standards thus may

implicate questions of fairness in the context of criminal enforcement.

- Many environmental problems, such as pollution, are inevitable and pervasive. As we know, pollution occurs constantly, whenever there is human contact with the environment. Nor would elimination of all pollution be a desirable result, for the simple reason that may socially beneficial activities cause pollution, either directly or indirectly. This explains why pollution regulations seek to limit and redirect pollution, as opposed to eliminating it.
  - Because of its pervasiveness and inevitability, pollution cannot be regarded in any meaningful sense as an activity that is morally blameworthy.
  - For this reason, culpability must be assessed through a much more complicated, context-driven analysis.
- Many environmental laws and regulations are aspirational in their objectives, rejecting traditional practices in an attempt to achieve dramatic improvements in environmental quality: for example, 'all waters shall be safely fishable and swimmable by 1997 and all discharges of water pollution shall be terminated by 1999'.
  - Should violators of such aspirational laws be considered criminally culpable or blameworthy?

5.1 Strict liability

Environmental crimes are often strict liability offences, which presents various challenges.

Strict liability offences do not require the government to prove culpability or intent. Instead, the prosecution merely has to prove that the prohibited act occurred. It does not matter that the act, for example an oil spill or pollution incident, was accidental. Once the prosecution has proved that the prohibited act occurred, the burden shifts to the defence to persuade the court that it did not occur or that there were exculpatory factors or circumstances.

In strict liability offences, the defendant is therefore guilty, regardless of his or her state of mind.

As a general rule, an offence falls into the strict liability category if no *mens rea* (mental element) needs to be proved as to one or more of the elements of the *actus reus* (prohibited act or inaction).

- This means that it may be essential for the prosecutor to establish *mens rea* in relation to other elements of the crime.

In common usage, strict liability often means merely that the relevant mental state will be presumed by the court, and this presumption is sometimes rebuttable.

- For example, vicarious liability is the imputation of liability from an agent to his supervisor. Under the doctrine of respondeat superior, employers are liable for the conduct of their employees if those employees were acting within the scope of their employment.
- Vicarious liability reflects a utilitarian judicial decision to force business to bear the risks of its conduct by allocating liability to those in the best position to adopt and enforce safe practices.
- From the perspective of the supervisor, vicarious liability is also necessarily strict liability.

6 TRANSBOUNDARY ENVIRONMENTAL CRIMES

Many environmental crimes are transboundary in nature and involve cross-border criminal syndicates. Their operations are facilitated by globalisation, including the ease of communication and movement of goods and money. Therefore, they are difficult to detect and punish. For example:

- An ivory tusk passes through many hands from the poaching site to the final buyer.
- A tree felled illegally can travel around the world from the forest via the factory to be sold on the market as a finished wood product.

In addition, enforcement of environmental criminal laws is frustrated by issues such as jurisdiction, which restrict efforts to foster better cross-border cooperation.

To manage transboundary environmental crimes, regional and international co-operation is necessary. Indeed, such cooperation is already taking place. Examples include:

6.1 The United Nations Convention against Transnational Crime

The United Nations Convention against Transnational Organized Crime, which was adopted by the General Assembly in 2000 and came into force in 2003, is the main international instrument in the fight against transnational organised crime.

Although the convention deals with transnational crimes in general, its attempts to enhance international cooperation will benefit the fight against environmental crimes. States parties to the convention commit themselves to undertaking a series of measures against transnational organised crime, including the creation of new domestic criminal offences (participation in an organised criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

6.2 The International Conference of the Great Lakes Region's Protocol against the Illegal Exploitation of Natural Resources

This protocol recognises that the illegal exploitation of natural resources in the Great Lakes Region is one of the factors causing or aggravating conflicts and insecurity in the region, exacerbates environmental degradation, and deprives states of the resources needed to fight poverty.

It seeks to promote and strengthen the development of effective mechanisms to prevent, curb and eradicate the illegal exploitation of natural resources in each member state. More significantly perhaps, it seeks to enhance cooperation among member states in fighting the illegal exploitation of natural resources, and to harmonise their laws, policies and procedures dealing with such exploitation. In addition, it calls upon member states to criminalise the illegal exploitation of natural resources and the laundering of the proceeds of such exploitation.

It also provides a framework for the extradition of offenders, and cooperation

between investigation and prosecution services. Member states undertake to assist one another in dealing with requests from competent authorities. Each member state is required to designate a central authority to make and receive any requests for cooperation and assistance; central authorities may communicate directly with one another. At regional level, the protocol establishes a Committee against the Illegal Exploitation of Natural Resources to coordinate the work of national agencies.

6.3 East African Protocol on Environment and Natural Resources Management

This is a protocol of the Treaty for the Establishment of the East African Community, which calls for cooperation on environment and natural resources management. It provides that the partner states will develop mechanisms to ensure sustainable utilisation of transboundary ecosystems; and common policies and strategies for the sustainable management of transboundary natural resources.

It establishes a Sectoral Committee on Environment and Natural Resources, which is composed of country directors responsible for water, environment, energy, wildlife, minerals, forestry, and fisheries and the heads of the national environment agencies. The sectoral committee coordinates the implementation of the protocol. It also requires partner states to designate national focal points to coordinate the implementation of the protocol at the national level.

6.4 Lusaka Agreement Task Force

The Lusaka Agreement Task Force (LATF) is a law enforcement institution which is also the secretariat of the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora of 1994. The agreement was a response to the lack of cooperation faced by national law enforcement agencies when combating international wildlife smuggling syndicates. Its main objective is to reduce and ultimately eliminate illegal trade in wild fauna and flora. LATF was established to facilitate the achievement of this objective.

The task force consists of field officers and an intelligence officer, and is commanded by a director appointed by a governing council. The task force carries out cross-border operations and investigations in close cooperation with national bureaus. These bureaus provide and receive information on illegal trade in flora and fauna, and coordinate with the task force on investigations. The governing council is the decision-making body of the task force.

LATF works with national bureaus and other national law enforcement agencies. It facilitates cooperative enforcement operations, collects intelligence, investigates cases, participates in arrests and supports prosecution of wildlife law offenders.

Six countries have acceded to the agreement, namely the Republics of Congo (Brazzaville), Kenya, Uganda and Zambia, the Kingdom of Lesotho and the United Republic of Tanzania. The Republics of Ethiopia, South Africa and the Kingdom of Swaziland are signatories to the agreement.

The task force also works with non-party states through their wildlife entities and law enforcement agencies, especially on issues affecting party states, including capacity-building programmes.

6.5 Interpol

Interpol is the world's largest police organisation, with 187 member countries. It was established in 1923, and facilitates cross-border police cooperation. It supports and assists all organisations, authorities or services whose mission is to prevent or combat international crime.

Interpol seeks to facilitate international police cooperation, even where diplomatic relations do not exist between particular countries. It acts within the limits of existing laws in different countries. Further, Interpol acts only if it is requested to do so by a member country.

In particular, Interpol assists its member countries in the effective enforcement of national and international environmental laws. It has been involved in fighting environmental crime since 1992, when it established the Interpol Environmental Crime Committee. Its programme has grown significantly over the years, and continues to expand as member countries become more active in the two working groups, namely the Wildlife Crime Working Group, and the Pollution Crime Working Group.

Group activity

- What challenges do you encounter in enforcing environmental criminal laws?
- In your view, how can such challenges be dealt with?

The trainer should divide the participants into small groups (between two and four groups, depending on the size of the class). Ask each group to discuss these questions. Each group should appoint someone to take notes and report back to the class. The trainer should provide opportunities for class discussions after each group presentation, or after all the groups have made their presentations, as appropriate.

MODULE 3

Environmental inspection and investigation

Objectives

At the end of this module, the participants should be able to:

- Explain the components of the process of environmental inspection
- Explain the components of the process of criminal investigation
- Explain the factors that should be taken into account in deciding whether to institute criminal investigation

Contents

Environmental inspection and investigation

INTRODUCTION

In general, environmental enforcement agencies are given powers by law to carry out inspection of all kinds of industrial and other facilities, with the objective of ensuring that they comply with environmental laws and regulations. This process is known as environmental inspection.

At the same time, such agencies are given powers to carry out investigations, with a view to, among other things, establishing violations of environmental laws and regulations. Once they have established that there are violations, they can decide whether to proceed with civil/administrative or criminal enforcement action, or do nothing.

This module examines these twin processes of inspection and (criminal) investigation, which go hand in hand. These processes are critical in the collection of evidence, which we will study in **module IV**.

1 ENVIRONMENTAL INSPECTION

Inspection may be defined as the collection of information that may be used to determine compliance status.

Inspection is usually carried out by 'inspectors', who are the field personnel employed by the enforcement agency.

A good inspector seeks and gathers verifiable information, through the concisely organised presentation of a narrative report. The inspector must be thorough, since he or she will invariably be a witness for a fact determination. For example, an inspector will usually be called upon as a witness before a court to testify about his or her experience.

Fairness, equity and integrity are the cornerstones of the inspector's job.

- An inspector must never abuse his or her authority.
- An inspector must always strive to report objectively, thoroughly, and without personal bias.
- In addition, an inspector must use his or her authority in a fair, friendly, patient and professional way.

1.1 The process of inspection

1.1.1 General considerations

First, inspectors conduct an investigation, in which information of verifiable quality is gathered and organised.

- Information of verifiable quality is usually referred to as 'documentation'.

In the second phase, inspectors organise their observations and supporting documentation into a body of data (usually a narrative report) which is reviewed against standards set out in the applicable laws.

The role of the inspector can thus be summed up as follows: to inspect for compliance; gather documentation; and provide testimony that can be entered into evidence.

- The inspector is therefore a 'witness of fact', rather than a 'trier of fact'.
- Although we will study the rules of evidence in **module IV**, it is useful to remember that:
  - It is up to the court of law to determine whether any given information is a (relevant) fact.
  - The role of the inspector is simply to provide information to the court.

1.1.2 Safety

Environmental compliance inspections can be dangerous. Numerous chemicals are produced, stored, transported, and used every day. Industrial sites that produce or use these chemicals have process machinery, transporting equipment, structures and conditions that present their own hazards.

The inspector must therefore be careful and take responsibility for his or her own safety. For example, the inspector must gather the necessary information, plan ahead and acquire personal protective equipment, and take precautions against all hazards before entering a potentially dangerous area.

1.1.3 Preparation and organisation

An inspector should acquire a logbook for taking field notes.

TIPS

The trainer should ask the participants where they are aware of any situation in which safety was compromised, and what the effects were.

- Field notes are brief notes, taken during the inspection, which can be referred to later to construct a more comprehensive narrative report.
- Each logbook should be site/event specific. It may become evidence and it becomes burdensome to maintain the confidentiality of other sites and events that may be in the same logbook.
- The logbook should be properly identified and dated – the name of the site/event and the date should be recorded on each page, as well as the inspector's name or initials.
- Entries in each logbook should be objective, factual and not include subjective conclusions. For example, 'Follow up to verify statements by Mr Ali' would be acceptable. On the other hand, 'Mr Ali is a dirty rotten liar' would not be

acceptable because the logbook may be disclosed in future litigation.

- Field notes should be made as contemporaneously as possible – so that relevant information can be documented while it is still fresh in the inspector's memory.
  - The longer the time between the inspection and the report, the greater the possibility that the inspector's memory or credibility will be brought into question.

A typical compliance inspection includes these activities:

- Site selection
- Pre-inspection preparation
- Entry
- Opening conference/meeting
- Investigation of facility (including interviewing and collecting evidence)
- Documentation
- Closing conference
- Report writing
- Referral for follow-up or enforcement

1.2 Inspection in practice

Let us now examine these activities.

1.2.1 Site selection

The environmental enforcement authority will select the site it intends to inspect based on four common criteria:

- Random selection of sites from all of the identifiable members of a regulated community
- Targeted inspection of a specific sector of the regulated community – based on enforcement history, potential threat, or other clearly researched criteria
- Information received from the public or other external sources such as tips or complaints
- Emergency responses

Case study of an emergency response: A dam disaster and disregard for compulsory EIA procedures (Ethiopia)

Kenticha Tantalum Mining Enterprise is located 553 km from Addis Ababa. In October 2007, two storage dams, used to collect waste water from the mining area, cracked and released their contents. The muddy water trailed its way through the forest and dwelling houses for 8 km until it discharged into the Mormorra river. The federal Environmental Protection Agency and the Environmental Protection Bureau of Oromiya regional state rapidly made joint inspection of the state of affairs and released a report in November 2007.

According to the report, the cause of the incident and the total loss incurred could not be established with any accuracy. It was estimated that the flood reached a height of 5 m in some areas. The incident polluted the domestic water system of the nearby community, caused the death of one mine employee, disrupted the region's ecosystem, killed 13 goats, 4 cattle and 2 donkeys, and destroyed the cropland of 24 households. The sediment blocked waterways and ponds, causing a critical water shortage to 56 households and their cattle.

The report confirmed that the mining enterprise had been established in 1990, 12 years before EIA legislation came into force. Despite this, the inspection team established that expansion work requiring an EIA had been carried out in 2004, without regard for the mandatory requirements. In addition, an environmental audit conducted at the enterprise by the EPA in 2004 had made it clear that there was a possibility of dam failure, and that such a failure would result in a catastrophe. The company appears to have paid no attention to this warning. According to the report, there was an apparent violation of Article 26 (3) of Mining Proclamation No 52/93 which states that a licensee shall conduct mining operations in such a manner as to ensure the health and safety of its agents, employees and other persons, and to minimize damage or pollution to the environment.

Source Rose Mwebaza et al, Situation report: Environmental crimes in Ethiopia (ISS, 2009)

Whichever criteria an agency uses to select a site for inspection, it must act objectively, so that the public can be convinced that the agency is making such selections in a fair and transparent manner. After all, enforcement agencies are not likely to achieve much if they do not have the support of the public.

1.2.2 Pre-inspection preparation

The inspectors should learn all that is available about the facility, its history, processes and potential concerns.

- Sources of information include staff, other inspectors who have experience with the facility, permits, current litigation, agency negotiated agreements, databases, business licensing data, property records, and other relevant agencies.

Question: Should the inspector notify the facility that he or she will be conducting an inspection?

Other pre-inspection preparation activities include:

- Completing all the necessary paperwork before entering the site, including obtaining the necessary approvals;
- Preparing to take samples, including informing the laboratory of the intention to do so
- Reconnaissance: for example, drive by and scout the facility before attempting to enter, consider site layout, safety considerations, places and operations to be included in the inspection.

1.2.3 Entry

Factors to consider include:

- The legal basis for entering a facility to conduct an inspection
- Conditions that the inspector must fulfil to request permission to enter a facility

As a matter of policy, most agencies will first seek consensual entry. Generally, the facilities to be inspected are entitled to:

- An inspection at a reasonable time, so that their business is not unduly inconvenienced
- Information about the nature of the inspection
- The identity/particulars of the inspectors

In general, the law will give the enforcement agency the legal authority to enter a facility to conduct an inspection that is specified by the law.

- However, this does not mean that the inspector is free to enter whenever or wherever he or she pleases.
- Accordingly, the inspector is usually required to cite the statutory authority to enter the facility, the name of the agency he or she represents, and the scope of the inspection activities.

- If these steps are not followed, the facility may allege misrepresentation or trespass, and the inspection will not take place.

Where the inspector follows the law, but is denied consensual entry, the agency may request a court to enforce the agency's legal authority by issuing a warrant.

- The agency will apply for such a warrant on the basis that there is a 'reasonable cause' to believe that a violation has occurred or is occurring.
- In addition, an agency may apply for such a warrant where it has reason to believe that its inspectors will be denied entry, based on previous experience.
- Such warrants will define the scope and conditions of authorised entry and the protection of individual rights to privacy.
- While courts in most countries will usually uphold an agency's statutory authority to enter a facility to conduct a compliance inspection, the inspector should not assume authority without thorough knowledge of the law and adherence to required procedures.
  - For example, the inspector may be required to adhere to certain legal requirements such as notifying the facility before the inspection.
- Such legal requirements must be taken seriously, since they protect the legitimacy and acceptability of the inspection process.
- In addition, there are numerous legitimate reasons that facility management may not want inspectors on their sites until they fully understand their purpose and authority.
  - For example, facility management may be concerned about industrial spying, which is a serious issue around the world. Many industries compete tenaciously for marketing advantage or for a process or technology that might give them a competitive advantage.
- Above all, the most significant key to gaining entry is to adopt a manner that is cordial, direct, assertive and professional. It is usually better to err on the side of politeness.

1.2.4 The opening conference

Questions

- In your country, what happens when a facility refuses to be inspected?
- Should inspectors be accompanied by police officers?

This is the initial meeting between the inspector and the management of the facility being inspected. It provides an opportunity for the inspector to explain the inspection process to the facility management, including the scope of his or her activities.

At this meeting, the inspector explains to management the methods he or she will use to document the inspection, including making copies of records, drawing diagrams, taking samples, talking to employees, taking written or tape recorder notes, and taking photographs or using video.

1.2.5 Investigation of facility

The two most common methods of investigating a facility are a facility tour and a process-based investigation.

The process-based investigation refers to an investigation that is based on the processes of the facility in question.

- Thus most processes can be divided into smaller parts. Raw materials are gathered and enter the process. Energy goes into the process. Something happens during the process that produces a product, releases energy, and produces a by-product and waste.
- In each of these phases there is usually some means of monitoring what is happening.

The interview is also an essential tool for gathering information in these investigations.

- An interview may consist of a simple exchange of information or a staged and planned series of interrogations.
- Effective interviews require planning: review background information; organise the kind of information you will be seeking; plan the questions you will ask and how you will ask them; establish a time and location for the interview; and ensure the subject's security and comfort during the interview.
- When conducting an interview, identify yourself and the reason for the interview to establish a trusting and honest rapport with the subject; be open and friendly; explain that you are conducting a compliance inspection and that you value and respect what the subject has to offer.
- The way in which you ask a question is often more important than the question itself.

Tips on conducting a good interview

- Plan your interview: What do you want to get from the subject? What are the major topics you will ask about and in what order?
- Avoid questions that may be answered with a simple yes or no, unless you have previous knowledge of the issue in hand.
- Keep your questions clear and uncomplicated: ask one question at a time, and avoid compound questions (a compound question requires several responses).
  - Such questions can confuse the interviewee and make it impossible to answer.
- Avoid leading questions
  - A leading question gives the answer as part of the question.
  - Example: 'You poured the chemicals into the river, right?'
  - Such questions may prevent you from getting a broader perspective on the issue in hand.
- Maintain control.
- Try to understand the interviewee's body language by being observant.
- Ask follow-up questions to verify assertions (for example, 'Why do you say that?' 'How do you know that?').
- Repeat or rephrase information to verify that you have understood accurately and completely.
- Evaluate the completeness and reliability of the answers.
- Listen carefully and actively: no one wants to talk openly to someone who is not paying attention. The interviewee must be confident that you are listening to him or her.
- While conducting the interview, switch off your cellphone.
- Remain neutral and non-judgmental
- Show concern for the subject's comfort and situation.
- Conclude your interview by summarising and verifying the important information you noted. Give the interviewee a chance to correct anything you may have misunderstood.
- When closing your interview, express your appreciation for the subject's time, and provide him or her with a means of contacting you if he or she remembers something or wishes to provide further information.

1.2.6 Documentation

This refers to the collection of all relevant information that is of a verifiable nature. Some documentation will be necessary to provide evidence in a court of law.

The inspector should document everything, including photographs, records and samples.

It is better to document something from several approaches. For example, taking a sample may be good; but a sample combined with a thorough record and a photograph is much better. If one piece of documentation fails, the other may be enough to establish the facts.

Photographs

A photograph is an image made with light, including processes such as photocopies of documents, film, video and digital imagery.

Photographic evidence tends to have more real and subjective influence on a case than solid technical data because of its ability to tie things together and add perspective.

A photograph is usually entered into evidence by the legal counsel asking the following question to a witness who was present when the photograph was taken: 'Is this a fair and accurate representation of what you saw?'

- Accordingly, witness testimony is critical to the admissibility/acceptance of photographs as evidence.
- This is especially true since that there may be arguments about film speed, camera, lighting, angle, and other similar considerations. In addition, technology can be used to alter images.
- Indeed, it is said that all photographs are manipulated and are never true copies of reality. Someone other than the person who took the picture usually processes the photography and manipulates colour and exposure manually or through automation.
- The inspector must have a secure archive of negatives, videotapes and original digital images.

Records

A record is any means of memorialising or accounting for an event, person, place, or thing.

In general, laws that authorise inspections also authorise inspectors to review 'relevant' records to determine compliance.

Examples of records

- Annual reports, shipping reports, inventory records, process records, quality control records, licences, maintenance records, safety records, production records, sales reports, waste management records, discharge monitoring reports, and accident reports.

The inspector should have a general outline of the records he or she will need to review during the inspection.

Wherever possible, the inspector should review original records.

- These are also known as 'primary' records.
- For example, summary reports should be cross-checked with the original data whenever possible.

Sampling

Sampling and sample analysis may be necessary to document potential evidence of noncompliance.

- Sample analysis is expensive, and should only be done when necessary.
- The sample should be representative of what the inspector intended to evaluate for compliance, for example, a specific waste stream, site, event, or time period.
- The sample containers should be clean and unused prior to collecting samples.
- It is also important to prepare a means of transport to transport the sample containers to the sampling site (such as a plastic tub lined with an absorbent pad).
- The inspector must establish a 'chain of custody': that is, prove where the sample came from, where it went, what was done to it, and show that there was no opportunity to compromise the sample along the way.
  - To establish a chain of custody, it is useful to prepare a standard form that tracks everyone who handled the sample, and when it entered and left their possession.

1.2.7 The closing conference

Some inspections end with a closing conference, in which the inspector may make facility managers aware of any violations, how to correct those violations, and what the future consequences of continuing non-compliance may be. A closing conference therefore helps educate the regulated community.

However, information conveyed by the inspector could undermine subsequent legal action taken against the facility.

- For example, facility managers could claim that the information conveyed by the inspector contributed to non-compliance if the information was in any way misleading or not sufficiently comprehensive.
  - In addition, if litigation should take place at a later date, opposing counsel may argue that improprieties, inspector negligence, or even incompetence were involved, for example that the inspector did not indicate anything was a problem.
- For this reason, programme lawyers may prefer that inspectors do not draw conclusions and do not convey information about compliance.

1.2.8 The inspection report

The primary objective in generating an inspection report is to organise and coordinate all documentation and potential evidence in a comprehensive, understandable and usable manner.

The report and supporting documentation (such as attachments) must be:

- Accurate: All information must be factual and based upon sound practices. All observations must be verifiable.
- Relevant: It is pertinent to the subject and objectives of the inspection. Information that is not material to the objectives should be omitted.
- Comprehensive: Everything that could contribute to an accurate determination of the facts or support the objectives of the inspection should be included.
- Organised: It should be well organised and flow in logical sequences. Readers with less technical experience or knowledge should be able to reach rational conclusions based on the narrative and supporting evidence.
- Objective: Factual information should be presented objectively without drawing conclusions. Let the narrative and logical presentation of information lead the reader to draw his or her own conclusions.
- Clear: The report should be written at a level for its intended audience. It should be brief and to the point.
- Professional appearance: Use acceptable grammar with proper spelling and punctuation. Make the document legible, neat in appearance and well organised for easy use.

2 CRIMINAL INVESTIGATIONS

Inspections often lead to criminal investigations. That is, the inspection process may reveal that an environmental crime has been committed, or is about to be committed, and that there is some likelihood of identifying a responsible party.

Criminal investigation is the deliberate examination or inquiry of available evidence aimed at finding out whether and by whom a crime has been committed.

- The investigation should show the origins, cause or causes, motives, offenders and surrounding circumstances of the offence.
- Some investigations may reveal insufficient evidence, and therefore will not warrant a prosecution in court, in which case the matter will be closed.
- On the other hand, investigations may reveal sufficient evidence to warrant a prosecution, yet a prosecution may not be mounted.
  - In **module V** we will see the factors that are taken into account in deciding whether to mount a prosecution.

A number of agencies are involved in the investigation of environmental crimes, including environmental enforcement authorities, the police, the office of the Attorney-General, and the courts.

The investigation of environmental crimes also requires the use of expert witnesses, depending on the offence being investigated.

- These witnesses include document examiners, ballistic experts, finger-print lifting experts, and environmental experts.

The trainer should ask the participants: Please name the agencies that are involved in investigating environmental crimes in your country.

2.1 Deciding whether to investigate

Criminal provisions of environmental laws should not be used lightly. Criminal enforcement should be reserved for the most significant and egregious violators.

Lesser violations should be dealt with through administrative or civil enforcement mechanisms.

However, the exercise of investigative discretion should be clearly distinguished from the exercise of prosecutorial discretion. We will study prosecutorial discretion in **module V**.

The investigating agencies should set out to verify:

- Whether the violation was done knowingly and wilfully (these elements are included in most environmental crimes).
- Whether the violation was isolated or was part of a pattern of continuing conduct.
- The extent of environmental harm or potential health risks.
- The degree of harm threatened by the conduct of the particular type of pollutant involved.
- The financial motivation behind the environmental violations.
- Whether the violator has a previous criminal record or a history of civil/administrative action.
- The interests of the state in moving forward with criminal prosecution of the matter.

The inspection process can therefore be an important aid in making the decision as to whether or not to initiate a criminal investigation.

In addition, where an inspector is conducting an investigation and believes that there is potential for a criminal action, he or she should do the following:

- If there is no obvious need (for example preservation of evidence, continuing wilful activity) to initiate a criminal investigation immediately, the field investigation should be completed as if it were a normal civil case.
  - For example, where information supplied by the facility under investigation reveals serious discrepancies indicating false reporting.
- But where there is an obvious need to initiate a criminal investigation immediately, the inspector should contact the police or other agency responsible for criminal investigations at once.
  - For example, where an employee of the facility under inspection tells the inspector that 'the toxic chemicals will be dumped in the river tonight'.

2.2 Teamwork and cooperation

A team approach is critical when organising and planning a case, as is communication between team members.

- Often multiple government agencies are involved with a case, which makes communication challenging.
- Each team member must have a clear objective and do a thorough job on his or her own piece of investigation.
- Interaction with other team members is important, as it ensures continuity.
- It is often useful to have a lead criminal investigator, who takes charge of the overall process of investigating an environmental crime.

  - The lead investigator develops an understanding of allegations of criminal activities, and consults with witnesses, peers, and experts to decide what evidence can prove the case.
- A typical case requires knowledge of many fields in science, technology and law.
  - For example, the lead investigator may need team members with knowledge of engineering (chemical processes and technology, field techniques and instrumentation), chemistry (laboratory sample analysis, chemical reactions and processes) and law (environmental regulations).
  - Choosing the appropriate team members and experts will depend on the type of case being pursued and personnel resources.

The lead criminal investigator should maintain contact with the team members involved in evidence collection.

- The team members should be informed about the progress of the case and given an opportunity to have input regarding conclusions about the evidence collected.
- In advance of the trial, each person should be contacted about potential testimony so he or she can prepare.

2.3 Experts

Experts can be valuable, especially when they understand and communicate the interplay between legal requirements, science and technology, and the crime allegedly committed.

Experts should not only understand their own field, but also be able to explain

Case study: Successful cooperation in fighting wildlife crime in Ethiopia

After a 2004 CITES training event, which took place in collaboration with the Secretariat and the Ethiopian Wild Life Conservation Organization, members of a newly constituted committee spent four months preparing for a law enforcement operation targeting souvenir shops in Addis Ababa. The activities of the committee included covert inspection of retail outlets selling ivory, and planning and coordination among participating institutions. It was supported by the Addis Ababa City Council, the Police Commission and the Ministry of Agriculture and Rural Development. In January 2005, 66 outlets in the sub-cities of Addis Ketema, Arada, Bole, Kirkos were raided through the combined efforts of 262 officers, including 50 code enforcement guards, 136 policemen, 66 security guards and 10 wildlife inspectors. Around 500 kg of ivory and other illegal wildlife products were confiscated – valued at ETB1 million* – and charges were lodged against personnel in all the 66 outlets. The alleged offenders faced an ETB5 000 fine and up to two years' imprisonment. This operation marked a change in the attitudes of the traders towards ivory sales. Traders are now more reluctant to engage in ivory trade, citing higher levels of enforcement as the main reason.

In September 2004, the Ethiopian Wildlife Conservation Department (now known as the Ethiopian Wildlife Conservation Authority) confirmed the existence of 6097,02 kg ivory including 3786,25 kg in the Addis Ababa Government Store and Mago National Park, as well as 1790,16 kg registered ivory in the hands of wildlife traders. However, it was also reported that around 1700 kg ivory had been stolen in the first half of 2003. After the 2004 training event, legal action was also taken against the former storekeeper of the Addis Ababa Government Store who was found guilty and fined ETB1 000 and sentenced to five years, imprisonment. He was subsequently released on bail after serving six months.

*ETB: Ethiopian birr

Source Mwebaza et al, Situation report: Environmental crimes in Ethiopia (ISS, 2009).

their opinions clearly and openly to other team members, the prosecutor, and the court without bias or condescension.

2.4 Searching for evidence

It is often necessary to conduct searches to obtain evidence.

In general, the law regulates how searches may be conducted, and any evidence that has been obtained in violation of the requirements of law may be rejected by the court.

- Such legal requirements seek to protect the constitutional rights of those under investigation.

If a search warrant is deemed necessary (for example a consensual search has been denied), then the criminal investigator should articulate the 'probable cause' or likelihood that a crime has been committed (or is being committed) and that the location requested for the search contains the evidence of the crime.

- The criminal investigator may articulate probable cause through evidence gathered from a variety of sources including witness interviews, surveillance of suspects, use of informants, as well as sampling of suspected discharges from the targeted facility.
- The criminal investigator should anticipate who will be physically present, what samples will be collected, and what documents will be seized.

If releases of regulated pollutants to air, water or land are suspected and sample evidence is to be collected, then a field team leader should be identified.

- The field team leader is responsible for ensuring that conditions are safe for workers, that the proper evidentiary samples are collected, and that field activities and observations of on-site conditions are documented.
- Any field measurements must be performed according to accepted procedures, and must be documented.

The field team leader should maintain contact with laboratory personnel to discuss sampling activities, to ensure that appropriate analytical techniques are available for use, and to ensure that resources are available to complete the analyses within applicable holding times (that is, the established time limitations for sample analysis).

- Laboratory personnel should be involved as early as possible in the planning process.

2.4.1 Safety first

The safety of the field team should always take precedence over evidence collection.

- Safety considerations include hostile individuals, chemical exposure and/or chemical incompatibility hazards, and difficult work conditions (for example

Case study: Birds' Eggs Act of 1933 (Seychelles)

This act gives powers of seizure to any officer of the Department of Agriculture (who at the material time had the responsibility for the matter in question) and the police. They are empowered to seize any item where there are sufficient grounds to suppose that it was used in the commission of an offence under the act. The court may order any eggs obtained in contravention of the act or a boat, fishing tackle, appliance or article to be sold by auction. Any government or police officer has the right to enter, remain in or visit and inspect any island or place where birds' eggs are laid and deposited in order to enforce the act. Any customs officer, officer of the government or police officer has the power to search and inspect any vessel and any boxes or articles found on the vessel where he or she has reason to believe that there are eggs on board.

working under unpleasant and/or toxic conditions, collecting samples or searching in high places such as the top of tanks, working around heavy equipment or industrial machinery, or working in confined spaces).

The crime scene should be secured, checked carefully for safety hazards, and documented using photography, video recordings, and extensive written notes.

2.4.2 Preservation of evidence

Evidence preservation is a critical step in prosecuting any case.

- For example, challenges may be made to every step of the investigative process in an attempt to show that evidence was handled improperly.
- These steps include sampling, transportation, physical and chemical analysis, and sample storage.
- If care is not taken to properly preserve evidence and maintain the chain of custody in every step of the investigative process, then the evidence may be inadmissible at trial.

Suggested question for group discussion

What procedures are set out by the law of your country to guide the processes of conducting inspections and criminal investigations?

Suggested group exercise

You are an inspector employed by the National Environment Management Authority. You have received a tip that an industrial company that manufactures paper will be discharging untreated waste water containing significant quantities of mercury into your country's main river before midnight tonight. Before your received this tip, you had visited the company to conduct a routine inspection, and had promised to return next day, since you were informed that the manager of the plant was not available that day. What should you do?

Suggestion to trainer

The trainer should divide the participants into small groups (between two and four groups, depending on the size of the class). Ask each group to resolve this problem. Each group should appoint someone to take notes and report back to the class. The trainer should provide an opportunity for class discussion after all the groups have made their presentations.

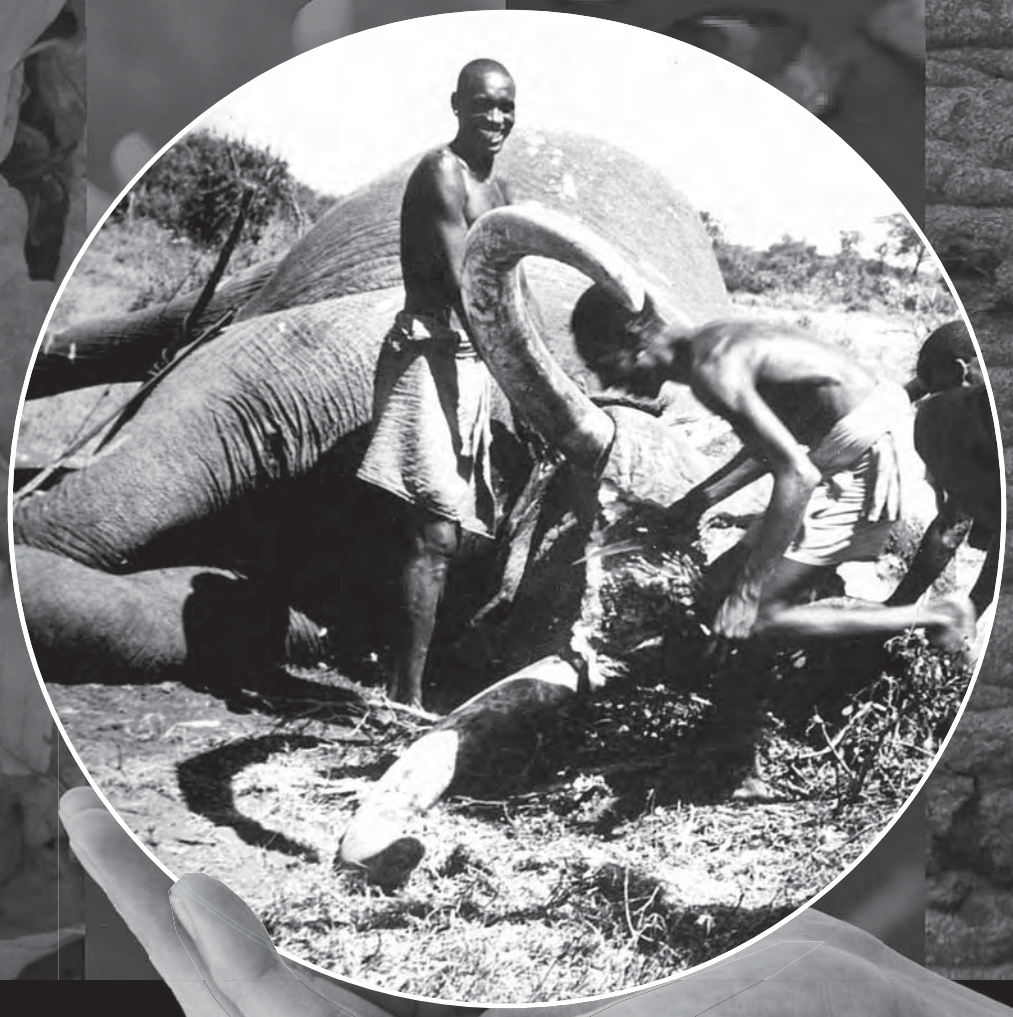
MODULE 4

Gathering evidence

Objectives

At the end of this module, the participants should be able to

- Explain what evidence is
- List and explain the basic rules of evidence
- Explain the importance of evidence in the enforcement of environmental criminal law



Contents

Gathering evidence

INTRODUCTION

Enforcement agencies, including inspection teams, should always prepare to conduct and document their investigations thoroughly, for the simple reason that cases often end up in a court of law.

- By preparing adequately, they enhance the probability that their court cases will be successful.

Enforcement agencies must understand what is required to establish credible evidence in a court of law, and to apply that knowledge at the earliest opportunity while conducting their investigations.

- Indeed, enforcement personnel – such as inspectors – should have the mindset that every inspection will go to court.
- They should anticipate arguments for the defence and provide solid evidence against those arguments before they are presented in court.

1 WHAT IS EVIDENCE?

Generally, evidence is 'any information or proof that clarifies or helps establish the truth'.

Legally, evidence may be defined as 'any type of proof that is presented legally at a trial for the purpose of inducing belief in the minds of the court'.

Therefore, evidence is any fact, item or documentation that satisfies the 'rules of evidence' for admissibility in a court of law.

- Documentation is anything that provides verifiable information that can be used to establish, certify, prove, substantiate or support an assertion or allegation (see module III).
  - Photographs, notes, reports, statements, samples, diagrams, models, and records are all examples of documentation.

2 WHEN IS EVIDENCE ADMISSIBLE OR ACCEPTABLE?

Any kind of evidence will be admissible or acceptable so long as it aids in understanding the truth of a matter in question.

Before documentation is 'entered into evidence' for use in deciding a fact, it must be verifiable and satisfy the 'rules of evidence' for admissibility.

- The three primary criteria that form the cornerstones of credible information are **foundation**, **authenticity**, and **relevance**.
- These criteria should be thought of as links in a chain; failure to satisfy just one criterion means that the entire chain will fail.

Let us examine the three criteria more closely.

2.1 Foundation

A foundation is 'a basis on which something stands or is supported'.

In giving evidence, it is important to establish that each piece of information leads to the next in a logical sequence. In other words, one piece of information builds on another.

- For example, 'John Doe works at ACME Dumping. Mr Doe operates the outflow valves at the discharge pipe. On 3 March, Mr Doe was at his duty station when Joseph Smith, the plant manager, directed Mr Doe to discharge untreated waste into the storm drain. On 4 March the Environmental Protection Agency took a sample from the pipe and from the storm drain that subsequently indicated levels of chromium that were higher than the permissible limits. Process information from the plant reveals that chromium is a waste material commonly found in ACME Dumping's untreated waste.'
  - This foundation of related information is used to show that ACME Dumping was responsible for illegally discharging chromium waste in a manner that was contrary to the established regulations.

2.2 Authenticity

A thing is authentic if 'it is worthy of acceptance or belief as conforming to or based on fact' or if it is 'fully trustworthy as according with fact'.

In our context, this means that the evidence must be demonstrated to be what it is claimed to be.

- For example, was the sample taken from the discharge pipe at ACME Dumping really representative of what was in the pipe? Was the sample analysis conducted properly so that the results accurately show the true concentrations of chromium in the discharge? Are the lab reports accurate?
- If there is a perception that the information could have been compromised, then the information will not be accepted into evidence.
- Sampling, analysis of quality assurance efforts, and chain-of-custody procedures are examples of practices that demonstrate the authenticity of the information.

2.3 Relevance

A thing is relevant if it provides 'evidence tending to prove or disprove a matter at issue or under discussion'.

Thus evidence must pertain to the fact in question, tending to make the existence of the fact either more or less probable than it would be without the evidence.

- In gathering evidence, enforcement officials should therefore ask themselves: Will this documentation have anything to do with the case to be decided?

3 DISCHARGING THE BURDEN OF PROOF

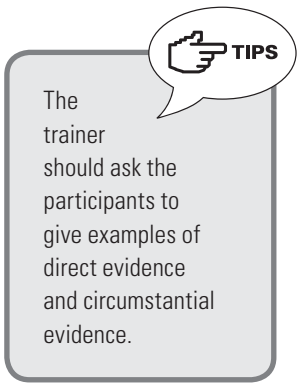
As they gather evidence, enforcement officials should remember that they will be required to provide evidence that meets the thresholds of proof established for environmental crimes, which may differ from case to case.

- Thus the elements of proof in a crime that requires a mental element will be different from one that is a strict liability offence.
- In the ACME Dumping example, the enforcement officials will try to prove that 'ACME Dumping broke the law by discharging an illegal concentration of a regulated substance'. What elements of proof are required to establish this as a fact?
  - That John Doe was told by Joe Smith to discharge the substance
  - That John Doe was in a position to do so
  - That the pollutant came from only one source, namely ACME Dumping
  - That the substance was indeed a regulated substance
  - That analysis of samples indicated that concentrations found in the storm drain were above the legal limits
- The total body of evidence should tell a story that will reveal the whole truth being considered.

4 THE 'BEST-EVIDENCE' RULE

The rules of evidence require that the best evidence should be presented to determine the facts of an issue. This means that evidence must be reliable, authentic and in its most original form.

- The best-evidence rule prohibits the introduction of any secondary evidence (that is, a copy) unless it is shown that the original document has been lost or destroyed. Thus a copy of a document is not as good as the original. A good copy is acceptable only if the original no longer exists.
- Authentication: Before information is received into evidence, it must be authenticated with proof that shows that it is what it claims to be.
  - For example, a sample must have proof that it came from a specified place and has not been altered on purpose or by mistake.
- A chain-of-custody must be established. This is the complete, unbroken record



of all individuals who have maintained control over the evidence since its acquisition.

- Without a complete record of custody, it becomes impossible to prove that the evidence has not been compromised and therefore may not be authentic.
- For example, the evidence could have been altered or changed between the time it was collected and the time it is presented in court.

5 TYPES OF EVIDENCE

There are two classes of evidence:

5.1 Direct evidence

This is evidence that establishes a fact without inference or presumption. It may involve a witness or take the form of a photograph, signed statement, film or record.

5.2 Circumstantial evidence

This is evidence that proves a fact indirectly by proving another fact from which an inference or presumption may be drawn.

These two classes of evidence may take several forms:

5.3 Real evidence

This consists of tangible objects that can be seen or felt. It may be documentary, physical, or scientific.

- **Documentary evidence**: This is written material that 'speaks for itself'.
  - For example, inspector's or investigator's field notes, documents from the company (such as messages, letters, accounting ledgers, computer printouts or files, and manuals), inspection reports, sample results
- **Physical evidence**: This consists of something tangible that was part of, or related to an actual event.
  - For example, a sample of contaminated water
- **Scientific evidence**: Scientific evidence consists of an analysis, based on known and established methods, materials and means of measurement.
  - Authentication is required to establish precision and accuracy of the analysis
  - Quality assurance (QA) and quality control (QC) are critical requirements

5.4 Testimonial evidence

This consists of information supplied by witnesses.

- A witness may testify to the limit of his or her five senses (I saw, I heard, I smelt, I touched, I tasted something) and competency.
  An oath or affirmation is required.

- The validity or value of the testimony depends on the truthfulness of the person talking, his or her expertise and believability.
- There are two types of witnesses:
  - **Lay or fact witnesses:** They are allowed to testify only to experiences detected through their five senses. Opinions are allowed only under very limited circumstances.
  - **Expert witnesses**: They are used where the average person would not be able to make a reasonable judgment based on the facts or data presented.
    → In general, these are highly complex or technical issues where professional standards and credentials are required.
- Inspectors will usually be called as fact witnesses, unless they have professional credentials in disciplines such as engineering or chemistry.
  - Caution should be taken if an agency wishes to establish an inspector as an expert witness because it places unnecessary emphasis on the inspector's category of professional competency rather than the credibility of the evidence brought to the court by the inspector.

5.5 Demonstrative evidence

This includes diagrams, photographs, models, maps, flow charts, representations, or illustrations that are used to help prove a fact.

- Demonstrative evidence is usually used to assist testimonial information and make it more understandable to the court.

6 EVIDENCE AND ENVIRONMENTAL CRIME

What kinds of evidence might be collected to document an environmental crime?

Examples include:
- A witness who saw what happened
- Sample of waste stream
- Letter authorising discharge
- Process information such as flow diagrams
- Sketches of an area
- Photographs

Suggestion for group activity: Problem solving

On the morning of 3 June 2009, the executive director of the National Wildlife Service (NWS) received a telephone call from a field officer who said that she had found ten dead elephants in the National Game Park. Three days later, a customs official, John Charles, came upon eight elephant tusks while inspecting some cargo scheduled for shipment to China, which had been labelled 'precious stones'. The customs official, Inspector Mike, then alerted the police and the NWS.

The police arrested Mike Gordon, who was in possession of the eight elephant tusks at the time of the pre-shipment inspection, and charged him with illegally trading in elephant tusks.

At the trial, the prosecution's case against Mike Gordon, among other evidence, included the testimony of a resident of Panari Village, which is adjacent to the National Game Park. The resident, Alert Ali, testified that on the night of 2 June 2009 at about 10 pm, he saw a Toyota pick-up truck

that carried things that looked to him like elephant tusks, which appeared to have blood stains on them. He testified that he remembered the first four digits of the registration number of the truck, which he wrote down. However, he admitted that he could not tell how many people were in the vehicle or who they were.

The prosecution also offered testimony that the said truck was later found parked at a warehouse owned by a company of which Mike Gordon is a director. But the prosecution was unable to locate the driver of the truck.

The prosecution's final witness was a fuel attendant, Keen Mercy, at a petrol station, which is located about 50 km from the National Game Park. Keen Mercy testified that she remembered seeing a Toyota pick-up truck, which was whitish in colour and had what looked like dried blood stains on it. She testified that the back of the truck was covered by a canvas, and that the truck appeared to be overloaded. Further, she testified that the driver and his companion looked nervous and were in a great hurry. She thought of calling the police, but since her shift was ending, and she was in a hurry to get home, she decided not to.

The prosecution then closed its case, satisfied that it had established its case against Mike Gordon.

Question

What evidentiary issues are presented by the prosecution's case? Does the prosecution have a good case?

For this exercise, the trainer should divide the participants into small groups (between two and four groups, depending on the size of the class). Ask each group to resolve this problem. Each group should appoint someone to take notes and report back to the class. The trainer should provide opportunities for class discussions after all the groups have made their presentations.

MODULE 5

Prosecuting the case

Objectives

At the end of this module, the participants should be able to:

- Explain the components of the criminal trial process
- Explain the factors that should be taken into account in deciding whether to prosecute
- Draft proper charges

Contents

Prosecuting the case

INTRODUCTION

To successfully prosecute an environmental crime case, the government must prove, beyond a reasonable doubt, that an individual or a corporation knowingly violated an environmental statute containing criminal sanctions.

Proving environmental cases can be difficult because of technical and legal complexities.

1 DECIDING TO PROSECUTE

Under most criminal justice systems, prosecutors have wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of the criminal law. The prosecutor has power to:

- Initiate or forgo prosecutions
- Select or recommend specific charges
- Terminate prosecutions

Prosecutions should contribute to the fair, even-handed administration of the criminal law.

- The manner in which prosecutors exercise their decision-making authority has far-reaching implications, in terms of justice and effectiveness in law enforcement, and of the consequences for individual citizens.
- A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances.
  - While serious violations of the criminal law should be prosecuted, prosecution entails profound consequences for the accused and the family of the accused, whether or not a conviction ultimately results.
- Other prosecutorial decisions can be equally significant:
  - For example, decisions regarding the specific charges to be brought, or concerning plea dispositions

Prosecuting environmental crimes typically involves a number of challenges:

- Using tools effectively for gathering intelligence, surveillance, field screening and measurements, laboratory analysis, and modelling pollutant behaviour in the environment
- Presenting scientific and technical conclusions cogently so that the court can clearly understand that the defendant committed the crime
- Convincing a prosecutor of the importance of an environmental case when he or she has competing high-visibility cases, involving high-profile crimes such as murder and drugs

- In view of the seriousness of the power to prosecute, there is a need to:
  - Ensure the fair and effective exercise of prosecutorial responsibility
  - Promote confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case

1.1 General factors to consider

Therefore, a number of factors will typically be taken into account before a decision to prosecute is made.

- These factors include the existence of *prima facie* evidence to warrant a prosecution, the accused person's culpability, attitude of the complainant, the health of an accused person, the humanitarian factor, the public interest, nature and seriousness of the offence, the deterrent effect of the prosecution and the jurisdiction of the court.
- In the context of environmental crimes, factors to be taken into account include voluntary disclosure, cooperation, pervasiveness of noncompliance, existence of effective internal disciplinary action, efforts to remedy ongoing noncompliance.

1.1.1 Existence of prima facie evidence

This is a very important factor. Once an investigation is completed, it is the duty of the prosecutor to weigh up all the evidence and then decide whether the evidence warrants a prosecution.

But what constitutes *prima facie* evidence?

- It means evidence upon which a court, properly directing itself upon law and evidence, is likely to convict in the absence of an explanation from the accused person.

1.1.2 Accused person's culpability

Even where the prosecutor has sufficient evidence of guilt, it may be appropriate for him or her to consider the degree of the accused person's culpability in connection with the offence, both in the abstract and in comparison with any others involved in the commission of the offence.

- For example, if the accused person was a relatively minor participant in a criminal enterprise conducted by others, or his or her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that a course of action other than prosecution would be appropriate.

1.1.3 Attitude of complainant

In minor offences, the attitude of the complainant (who is the victim of the crime committed) is taken into account in deciding whether a prosecution is warranted.

- This factor is seldom regarded as important, since crimes in law are deemed to be committed against the state, not the victims of the crimes in question.

1.1.4 Health of an accused

A prosecution may not be initiated, or continued, where the accused person is suffering from poor health.

- In general, where the accused is suffering from mental illness, a prosecution can be mounted only after the accused has been certified fit to stand trial.

1.1.5 Humanitarian factor

The condition and circumstances of the accused, other than his or her health, may be taken into account.

- This is because it is a cardinal rule that a prosecution has to be fair and not oppressive.
- This factor should therefore be taken into account when deciding whether a prosecution is warranted.

1.1.6 Public interest

The prosecutor has to decide whether it is in the public interest to mount a prosecution.

- 'Public interest' is notoriously difficult to define.
- Nevertheless, it expresses the idea that something is of great public or national concern.
- Many environmental crimes are likely to be in the public interest, given that, for example, they pose a great danger to human health.
- The question that the prosecutor needs to answer: Will the prosecution promote or prejudice the public interest?
- Ultimately, the decision to prosecute involves striking a balance between the competing forces of the public interest demands and compliance with the requirements of the law.

1.1.7 Nature and seriousness of offence

How grave is the offence? The prosecutor should take into account the circumstances surrounding the commission of the offence.

- Limited public resources should not be wasted on prosecuting inconsequential cases or cases in which the violation is only technical.
- One relevant factor is the actual or potential impact of the offence on the community and on the victim.

1.1.8 Deterrent effect of prosecution

As we have learned, deterrence of criminal conduct is one of the primary goals of the criminal law.

- This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offence that appears to be relatively minor.
- Although some offences may not seem to be of great importance by themselves, they may have a substantial cumulative impact on society if they are committed repeatedly. It may be desirable to prosecute such offences.

1.1.9 Jurisdiction of court

Before a court proceeds to try an accused person, it must be shown that the court has powers to hear the case.

- In the context of environmental crimes, this is likely to be an important factor in the case of trans-boundary crimes.

1.2 Factors to consider in environmental crimes

Many countries try to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community.

- Therefore, they use the threat of prosecution only as an instrument of last resort in enforcing compliance with environmental law. Thus where the accused person or corporation has instituted measures for self-auditing, self-policing and voluntary disclosure, these activities will be viewed as mitigating factors that will be taken into account in the making of the decision as to whether or not to prosecute.

1.2.1 Voluntary disclosure

The prosecutor should consider whether the accused person or corporation made a voluntary, timely and complete disclosure of the matter under investigation.

- Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided.

- Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority had already obtained knowledge regarding noncompliance.
- A disclosure is not considered 'voluntary' if it is already specifically required by law, regulation, or permit.

1.2.2 Cooperation

The prosecutor should consider the degree and timeliness of cooperation by the accused person or corporation.

- Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation.
- Consideration should be given to the violator's willingness to make all relevant information available to investigators and prosecutors – including the complete results of any internal or external investigation and the names of all potential witnesses.
- Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

1.2.3 Preventive measures and compliance programmes

The prosecutor should consider the existence and scope of any regularised, intensive, and comprehensive environmental compliance programme. Such a programme may include an environmental compliance or management audit.

- Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the programme was adopted in good faith in a timely manner.
- In evaluating the compliance programme, the prosecutor should ask the following questions:
  - Was there a strong institutional policy to comply with all environmental requirements?
  - Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring?
  - Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy the circumstances like those that led to the noncompliance?
  - Was environmental compliance a standard by which employee and corporate departmental performance was judged?

1.2.4 Pervasiveness of noncompliance

Pervasive noncompliance may indicate systemic or repeated participation in or condonation of criminal behaviour. It may also indicate a lack of a meaningful compliance programme.

- In evaluating this factor, the prosecutor should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.

1.2.5 Internal disciplinary action

Effective disciplinary action is crucial to any compliance programme.

- The prosecutor should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies.
- Did the disciplinary system establish awareness in employees that unlawful conduct would not be condoned?

1.2.6 Subsequent compliance efforts

The prosecutor should consider the extent of any efforts to remedy any ongoing noncompliance.

- The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered.
- Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with environmental enforcement authorities.
- Full compliance with such agreements should be a factor in deciding whether to prosecute.

2 DRAFTING CHARGES

Once a decision to prosecute has been made, there are rules governing the conduct of prosecutions that have to be complied with until the conclusion of the trial.

- These include the presentation of all the facts to the court.
- This process begins with ensuring that the accused person is charged with the correct offences.

2.1 What is a charge?

A charge is a written statement of complaint brought against an accused person in a court of law. It fulfils a typical constitutional requirement that 'person shall not be convicted of a criminal offence unless that offence is defined and the sentence to be imposed is prescribed in a written law'. In general, charges will be drawn by the prosecutor.

- Therefore, the purpose of the charge is to inform the accused person of the nature and particulars of the offence with which he or she is charged to enable him or her prepare for his or her defence.
- A charge consists of two parts: the statement of the offence; and the particulars of the offence.

  - **The statement of the offence** states the law and the particular sections of the law that allegedly have been breached.
  - **The particulars of the offence** contain the date and place where the offence is alleged to have been committed, the subject matter of the charge, and the identity of the complainant and that of the accused person.
- Because crimes are deemed to be committed against the state, charges will be brought in the name of the state or republic:
  - For example: *Republic versus John Doe*.

2.2 Factors to consider in drafting charges

- First, a charge must be in writing.
- It must be drafted in simple language to inform the accused of the offence with which he or she is charged.
- Where an accused person is charged with more than one offence, each offence must be set out in a separate paragraph, which is known in law as a 'count'.
  - In law, a count which charges two offences is 'bad for duplicity', and a conviction based on it cannot stand.
  - Where the prosecutor is in doubt as to whether the conduct of the accused constitutes either of two (or more) offences, it is permissible to prefer one main charge and another as an alternative charge.
- A defective charge may result in the case being dismissed by the court.
- The charge is issued in the name of a court of law.

In many countries, the law permits the court to amend or replace the charge in the course of a trial, if the prosecutor makes an application.

- This may be done, for example, where the original charge is shown to be defective.
- However, the practice is that such an application should be made at the earliest opportunity before the close of the prosecution case, so as not to disadvantage or prejudice the accused person.

In addition, the prosecutor should charge the most serious offence that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

The selection of charges may also be complicated because different statutes have different proof requirements and provide substantially different penalties.

1. In such cases, considerable care is required to ensure selection of the proper charge or charges.

3 NATURE OF THE TRIAL PROCESS

3.1 Presentation of evidence

The prosecutor should present all the facts of the case to the court, even if some witnesses give unfavourable evidence to his or her case.

Specimen charge Sheet

UGANDA POLICE

ENTEBBE POLICE STATION
CRB 002/2006
Date 21/3/2006

CHARGE

UGANDA vs VIRAN PATEL M/A 50 yrs
A RESIDENT OF MUYENGA

COUNT 1 **STATEMENT OF THE OFFENCE**
Failure to submit a project brief C/S [contrary to section] 20(1) of Environmental Act 1995.
PARTICULARS OF OFFENCE
VIRAN PATEL on 4 January 2006 at Lutembe Beach in Wakiso District failed to submit a project brief to a lead agency, to wit NEMA.

COUNT 2 **STATEMENT OF OFFENCE**
Failure to prepare an EIA C/S 20(3)(a) of Environmental Act
PARTICULARS OF THE OFFENCE
VIRAN PATEL on 4 January 2006 at Lutembe Beach in Wakiso District failed to carry out an EIA on a project to check its impact on the environment.

COUNT 3 **STATEMENT OF OFFENCE**
Obstruction of Environmental Inspectors in execution of their duties C/S 96(a) of Environmental Act.
PARTICULARS OF THE OFFENCE
VIRAN PATEL on 4 January 2006 at Lutembe Beach in Wakiso District obstructed environmental inspectors in execution of their duties by chasing and threatening them.

COUNT 4 **STATEMENT OF THE OFFENCE**
Failure to disclose information about management of waste chemicals or radioactive substance C/S 100 of the Environmental Act 1995.
PARTICULARS OF OFFENCE
VIRAN PATEL on 4 January 2006 at Lutembe Beach in Wakiso District failed to disclose information about the management of waste chemicals to the lead agency, to wit NEMA.

- The prosecutor is a 'minister of justice' for the state; he or she is an agent of justice.
  - The prosecutor represents the public, which is interested in knowing the truth about the crime through a fair prosecution in court.
  - Therefore, the role of the prosecutor is different from that of an ordinary advocate.
- The idea is not to win or lose, but to ensure that justice is done.
- The prosecutor must place before the court all the facts concerning the case and must be fair, frank, courteous and respectful when doing so.
  - It is the duty of the prosecutor to make available to the court all the evidence, both favourable and unfavourable.
  - If the prosecutor has witnesses who are unfavourable to his or her case he should notify this to the defence and the court; in practice, the prosecutor will not call such witnesses, but will offer them to the defence.
- The prosecutor must always try to ensure that justice is not only seen to be done, but that it is done.

Suggestion for group exercise: Drafting charges

Using the facts of the elephant tusks case set out at the end of module IV, ask the participants to draft charges against the accused person.

The trainer should assess the participants' work based on substance rather than form.

- To effectively discharge his or her duties, the prosecutor must maintain a professional detachment in the case.
- Where a prosecutor has an interest in a case, he or she should disqualify him- or herself from such prosecution – for example, where he or she sees the possibility of a conflict of interest in the case he or she is about to prosecute.
- It is not desirable for an investigating officer to prosecute in court the very same case he or she was investigating.
  - Example: *Gamalieri v Republic* (Kenya): A game ranger took part in the investigations and subsequently prosecuted the same case. Court held that the game ranger was a competent witness, and that his triple role (as investigator, witness and prosecutor) was irregular and undesirable as it may prejudice the accused.

3.2 The trial

Once the accused person is charged in a court of law, a plea will be taken.

- The plea takes the form of the accused person being asked to give an answer to the charge, after it has been read to him or her in a language he or she understands.
- In general, the accused person may plead guilty or not guilty.
  - Where the accused person enters an unequivocal plea of guilty, the court will proceed to consider an appropriate sentence.
  - But where the accused person pleads not guilty, the court will set a date or dates on which the case can be heard (in a proceeding called a 'hearing').
- At the hearing, the state or republic (through the prosecutor) opens the case and then calls witnesses in support of the charge.
  - The prosecutor opens the case by outlining the main facts of the case.
- The prosecutor then leads his or her witnesses in what is called 'evidence-in-chief'.
  - Here, the prosecutor is not allowed to ask 'leading questions' (that suggest an answer or direct a witness towards what to answer).
- After each witness has given his or her testimony, the accused person or his or her advocate may interrogate the evidence given by the witness. This process is termed 'cross-examination'.
  - The right to cross-examine a witness is a fundamental constitutional right of the accused person.
  - Here, the accused person or his or her advocate is allowed to ask leading questions.
- Next, the prosecutor has a right to re-examine the witness with a view to clearing any apparent discrepancies or ambiguities arising out of cross-examination in relation to the evidence-in-chief.

- After calling all their witnesses, the prosecution closes its case.
  - The prosecutor may then address the court by way of a submission (or speech), in which he or she asserts that the accused person has a case to answer.
  - The defence also has a right to address the court, and assert that no case has been made out against the accused person.
- The accused person will be called upon to defend him- or herself only if the court determines that the prosecutor has made out a *prima facie* case.
  - A prima facie case is 'one in which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence'.
  - The court should acquit the accused person if it reaches the conclusion, that based on the law and the evidence presented, the accused has no case to answer.
  - On the other hand, if the court reaches the conclusion that based on the law and the evidence presented the accused has a case to answer, the court will then put the accused on his or her defence.
- At this point, the defence will make its case.
  - The defence will open its case and call witnesses.
  - At this point, the accused will be informed of his or her right to remain silent, because it is up to the prosecution to prove its case beyond any reasonable doubt.
  - Like the prosecutor, the accused person or his or her counsel is not allowed to put leading questions to the accused and his or her other witnesses.
- Again, the prosecutor is entitled to cross-examine the accused and his or her other witnesses, and to ask leading questions.
- The defence will then close its case.
- After the defence has closed its case, the prosecution (if permitted by the court) may offer evidence in reply to rebut any new evidence given by the accused that the prosecutor, through the exercise of reasonable diligence, could not have foreseen.
- At the end of these proceedings, the judge or judicial officer deciding the matter withdraws to consider the evidence with a view to deciding the case, and delivering his or her judgment.
  - Judgment is the opinion of the trial court, which determines the issues in dispute between the parties. It contains reasons or explanations for the court's decision.
  - In a criminal case, the issue in dispute is whether the accused person is guilty or not guilty of the offence with which he or she is charged.
  - If the accused is found guilty, the court will proceed to conviction and sentence.
  - But if the accused is found not guilty, the court will proceed to acquit and discharge him or her.
  - A judgment is not a judgment until it is written and delivered in open court. This serves two purposes:
    - → It enables the parties and the public at large to know why the accused is either convicted or acquitted.
    - → It enables the parties to lodge an appeal to a higher court.

3.3 Common defences

A defence is the accused person's denial or answer to the allegations that he or she committed a crime.

In defending themselves, persons accused of committing environmental crimes usually offer various defences, including:

3.3.1 Constitutional defences

- That their prosecution has violated constitutional due process requirements.
- That the crime they are charged with is vague, and therefore violates the right to a fair trial.
- That the self-reporting, self-monitoring, and record-keeping provisions of the environmental statutes violate constitutional provisions against self-incrimination.

3.3.2 Other defences

That the accused person reasonably and justifiably relied on and was affirmatively misled by an administrative action (such as an inspection);

That the accused person acted in good faith and voluntarily identified, disclosed and corrected violations;

3.4 Prosecuting corporations

Vigorous enforcement of the criminal laws against corporate wrongdoers can result in great benefits for law enforcement and the public, particularly in the area of white collar crimes, such as many environmental crimes.

- Corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry; thus an indictment often provides a unique opportunity for deterrence on a massive scale.

3.4.1 Who should be charged?

The corporation, and its individual directors, officers, employees and even shareholders may be charged.

- Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing.
- Corporations are 'legal persons', capable of suing and being sued, and capable of committing crimes.
  - Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and other agents.
  - To hold a corporation liable for these actions, the prosecutor must establish that the actions of the agent (i) were within the scope of his or her duties; and (ii) were intended, at least in part, to benefit the corporation.

  - Whether or not the corporation actually benefited from the actions of the agent, all that matters is that the agent acted with the intent to benefit the corporation.
- Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do to individuals.

3.5 Managing witnesses

Witnesses will be required to offer their highest oath of commitment: 'tell the truth, the whole truth, and nothing but the truth'.

- The point of the oath is that the witness swears that there is no higher personal, public or private obligation than to tell the truth to the court.
- The court backs up the vow of affirmation with the threat of severe punishment if the witness does not tell the truth.
  - Failing to tell the truth under sworn testimony is called ***perjury***.
  - Perjury can lead to (i) loss of credibility; and (ii) loss of freedom and incarceration.

In many cases, witnesses will be called to testify long after the occurrence of the crime they witnessed. In some cases, this can be months or even years. By that time, it is natural that time and events may have clouded the memory of the witness.

3.5.1 Preparing witnesses to give testimony

The prosecutor should review the documentation with the witness, and discuss how the documentation will be presented in court.

- At this point, it is important to discuss areas where the documentation is weak, and how they will be addressed.
- It is important to anticipate everything that the counsel for the defence and the court might bring out against the case for the prosecution.
  - One of the worst things that can happen for any prosecutor is for any information to start to emerge that he or she had not prepared for!
- It is often a good idea to visit the court to become familiar with the surroundings. Court rooms can be intimidating, even for counsel!
- The prosecutor should tell the witness how he or she will use the witness in court, including:
  - What questions he or she plans to ask and what answers the witness should give.
  - Recorded statements should be shown to the witness, so that he or she can refresh his or her memory.
  - The idea is to keep the testimony of the witness only to the information he or she can contribute, and not offer the defence an opportunity to deviate from the prosecution's view of the argument.
- It is important to be prepared and to remember that the defence will usually have a chance to review your documentation and anticipate the arguments of the prosecution before the trial begins.

- The witness should not ramble while giving testimony. He or she should answer only the question put to him or her and then remain silent.
  - A common error is to answer a question which is anticipated but has not actually been asked.
  - If you don't know, say 'I don't know'.
  - If you do not understand a question, you should pause and take time to think about it. You cannot answer a question you do not fully understand.
  - Don't allow the defence counsel to intimidate you into answering a question you do not have direct knowledge of.
  - You are allowed to pause to collect your thoughts and emotions as you respond to questions put to you.
- It is usually permissible for the witness to ask for rephrasing or for a complicated or compound question to be broken up.
- The witness may ask the judge to allow him or her to refer to field notes, photographs, and inspection reports.
- Unlike lay witnesses, expert witnesses will usually be open up to greater testing by the defence.
- It is useful to remember that the most common attacks on a witness are competency, credibility, and impeachment.
  - The witness must be credible, and the defence will definitely seek to undermine the credibility of each witness if they can. It is therefore important to establish beforehand whether the witness (i) was qualified to make the observation; and (ii) whether there are any reasons that the court should not believe what he or she will say.
  - The witness must also be informed of the need to be composed while giving evidence. Lack of composure under fire can tarnish the credibility of the witness.
  - Further, while giving evidence, the witness should not elaborate beyond his or her direct knowledge; his or her credibility may be open to attack if he or she does so.
  - There must be no flaws in the testimony of the witness, otherwise the defence will seek to impeach him or her. It is therefore important for the witness to stick to what he or she knows.
- If the witness learns of an inaccurate statement he or she made under oath after giving testimony, he or she should
  - Immediately inform the prosecutor to determine whether the statement was material to the case.
  - Clearly determine what the true information should be.
- The prosecutor will then notify the court and defence counsel.

3.6 Working with scientific evidence

Data and scientific opinions will be admitted into evidence if the scientific information is relevant and reliable. In deciding whether to admit scientific evidence, the court will seek to determine whether:

- **The opinion is relevant**: A number of questions will aid this determination: Does the opinion presented deal with the issues in the case? Do the scientific

studies or research cited to support the opinion have a direct relationship to the issues in the case?

- **The science is reliable**: This determination will be aided by the following questions: Is the methodology that was used good science? (For example, was the method validated?) How were all aspects of the measuring process performed (from sampling to the laboratory analysis)? Were all the necessary quality control actions taken to ensure the reliability of the data? Were established procedures for each action followed in the field, in the laboratory, and in all the steps in between?

3.7 Sentencing

A sentence may be defined as an order of the court made as a consequence of a conviction, whose aim is to protect the innocent victims of society from the harmful acts of criminals.

- To achieve this objective, the courts will hand down various types of punishments, depending on the nature and circumstances of the crime in question.
- Sentences may be divided into two types:
  - **Punitive sentences**: for example, death, imprisonment, and imposition of fines.
    - → These are usually imposed on those who have been convicted of serious crimes such as murder and robbery with violence.
  - **Non-custodial sentences**: for example, probation, extra mural penal employment, and discharge.

In the environmental context, sentencing should be guided by the fact that the protection of the environment is the ultimate goal of environmental management.

- For example, sentences such as fines or imprisonment will not restore the degraded environment.
- This explains why in addition to these typical sentences, courts may be empowered by law to order:
  - That the substance, equipment or appliance used in the commission of an environmental crime be forfeited to the state
  - That any licence, permit or other authorisation given to the defendant be cancelled
  - That the defendant do community work which promotes the protection of the environment
  - That the defendant restores or improves the degraded environment
  - That the defendant adopts specific measures to eliminate the consequences of the conduct on which the criminal liability was founded

3.7.1 Factors influencing sentencing

In deciding on what sentence to impose in a particular case, the court will be influenced by certain factors, including the **antecedents of the convict:** where the defendant has previous convictions, the court will tend towards imposing a severe sentence; but where the defendant is a first offender, the court is likely to be more lenient.

3.8 In the context of environmental crime

The far-reaching impacts of environmental crime underscore the importance of adequate sentencing for such crimes.

- To deter environmental crime effectively, sentences, including imprisonment and monetary penalties, should exceed the economic advantage gained by the defendant from noncompliance.
- Sentences should also be high enough to cover the costs of mitigating the damage inflicted.
- Where the individual defendant is an official or employee of a company, sentencing should account for his or her position in relation to the crime. For example, it may be relevant to consider the defendant's:
  - Rank or position within the company
  - Role in the offence, that is, whether the defendant was a leader or organiser or a mere participant in the crime
  - Knowledge of the illegality of the conduct
  - Knowledge about likely damage, harm or consequence caused by the offence
- Sentencing might also take into account general characteristics of the defendant, such as his or her education and experience.
- The existence and adequacy of a corporation's environmental compliance programme should be considered in fashioning an appropriate sentence.
  - For example, if no such programme existed or if the programme was not sufficiently funded or adequately integrated into the overall business plan of the organisation, it should be considered an aggravating factor at sentencing.
- In determining the sentence of a corporation, a court should consider the pervasiveness of the wrongdoing within the corporation, including complicity in, or condonation of, the wrongdoing by management.
- A court should require the corporation to implement a comprehensive environmental compliance plan (ECP) during the probationary period, if the laws of the country in question permit.
  - The ECP should be designed to ensure overall environmental compliance by the corporation and should specifically address the conditions that led to the offence.
  - The ECP should also include provisions for outside environmental auditing.
  - The corporation's implementation of and performance under the ECP should be monitored by the court throughout the period of probation.
- If the defendant (individual or corporation) has previously been convicted of environmental crimes, the penalty should be increased. A history of administrative or civil enforcement actions for the same or similar violations should be regarded as an aggravating factor during sentencing.
- It may be useful for the country to establish a register of prior environmental convictions, which should then be checked before a defendant is sentenced.

3.9 Appeals

After conviction and sentence, the prisoner may appeal against the conviction, or sentence, or both.

The right of appeal, which is typically granted by statute, must be exercised within a prescribed period.

The appeal serves two main purposes:

- To correct errors committed by the trial court, thereby ensuring that justice is done to the parties; and
- To interpret the law, with a view to setting precedents to be followed by subordinate or lower courts.

Laws dealing with criminal procedure will normally determine who is entitled to appeal, and the grounds for appeal.

- Such laws also restrict the exercise of this right. For example, a person who has pleaded guilty to a charge and is convicted cannot appeal against such a conviction. However, he may appeal against the sentence.

Suggested questions for discussion

- What are the components of the criminal trial? Describe the trial process in your country.
- What factors should the prosecution consider before deciding to prosecute a person accused of committing an environmental crime?
- What should you do as a prosecutor if a witness informs you that she made a false statement under oath after she has given her testimony in court?

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