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by Vicent Bartholomew Mtavangu

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### **ABSTRACT**

Administrative orders and sanctions take a lion's share among the environmental regulatory techniques in the Tanzanian mining areas. They are preferred by environmental enforcement agencies to regulate corporate environmental crimes, among others because they are administered at low cost. Despite such prevalence, most of the mining companies, even those that were previously served with environmental administrative orders and sanctions, have never stopped committing environmental crimes. Thus, this paper argues that environmental administrative measures do not have a deterrent effect against mining companies that largely commit environmental crimes. As such, they should be amalgamated with the civil and criminal modes of enforcement for effective regulation of corporate environmental crimes in mining areas.

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## INTRODUCTION

Administrative orders and sanctions are among the common techniques in regulating environmental crimes. They are imposed by the judiciary or quasi-judicial bodies against an individual or an entity that violates the terms and conditions stipulated in the licence. Largely, these measures are taken against a person that commits trifling offences, which can be dealt with administratively.

Public authorities in Tanzania frequently use administrative orders and sanctions to enforce compliance with environmental legislation. Essentially, administrative measures take a lion's share among other regulatory environmental techniques in the country. The environmental enforcement agencies, such as the National Environment Management Council (NEMC) and environmental inspectors predominantly use these measures against persons that have committed or are likely to commit environmental crimes in mining areas.

Tanzania hosts some of the flagship gold mining companies in the continent. They include the North Mara Gold Mine Limited (NMGM), Geita Gold Mine Limited (GGM), Bulyanhulu Gold Mine Limited, Williamson Diamonds Limited and Pangea Mineral Limited. Foreign mining companies, such as Barrick Gold Corporation, Anglo-Gold Ashanti, Petra Diamond and Shanta Mining Co. Ltd,<sup>1</sup> operate some of these large-scale mines.

In operating mining activities in Tanzania, some mining companies have been committing serious environmental crimes resulting in the pollution of the environment adjacent to the mining areas. The common environmental crimes committed include discharging harmful untreated or partially treated effluents into the environment, dumping hazardous waste, water and air pollution.<sup>2</sup> These negative environmental impacts caused by mining companies are referred to as

corporate environmental crimes.<sup>3</sup> In Tanzania, they are mostly dealt with administratively by environmental law enforcers. However, the deterrent effect of the administrative orders and sanctions against corporate offenders is questioned, among others, because bodies corporate have not refrained from committing environmental crimes.<sup>4</sup>

Therefore, this article examines the efficacy of administrative orders and sanctions in regulating corporate environmental crimes in mining areas in Tanzania Mainland.<sup>5</sup> It starts by contextualising and demystifying concepts of administrative orders and sanctions as well as corporate environmental crimes. It then provides a general overview of the mechanisms used to regulate corporate environmental crimes.

This article also examines the environmental legal framework governing administrative measures. Merits and demerits of administrative measures are covered as well. Further, the efficacy of the selected administrative orders and sanctions in regulating corporate environmental crimes in mining areas is also analysed. Further, this article highlights the challenges of enforcing environmental administrative measures against mining companies.

<sup>1</sup> Shanta Mining Co. Ltd operates the New Luika Gold Mine (the 4<sup>th</sup> largest mine in Tanzania) found in Songwe Region and Singida Gold Mine located in Singida region

<sup>2</sup> Geoffrey Mhini, 'Prosecution of Environmental Crimes: A Critical Assessment of the Environmental Management Act: Case Study of Tanzania' (LLM Dissertation, Open University of Tanzania 2017) 30

<sup>3</sup> Hanifa Massawe, 'Regulating Corporate Crimes: Comparative Appraisal of the Legal Framework on Environmental Crimes by Mining Companies in Tanzania and Germany' (PhD Thesis, Technische Universität Chemnitz 2016) 10

<sup>4</sup> Mhini (n 2) 66

<sup>5</sup> The United Republic of Tanzania is a union of the two former independent States: Tanganyika (Tanzania Mainland) and Zanzibar. However, the discussion in this article deals only with Tanzania Mainland because Zanzibar has its own environmental legal framework. Further, large scale mining is mostly operated in Tanzania Mainland

## CONTEXTUALISATION AND DEMYSTIFICATION OF ADMINISTRATIVE MEASURES AND CORPORATE ENVIRONMENTAL CRIMES

Environmental law is mostly enforced by public authorities governed by administrative law. As such, there is an interwoven relationship between administrative law and environmental law. This explains why environmental law sometimes is defined as an administrative law in action.<sup>6</sup> The justification for this definition is that the enforcement of environmental law squarely depends on the public authorities or Government agencies.<sup>7</sup> Further, most of the decisions in environmental law are administrative in nature and are made by environmental enforcement agencies regulated by administrative law.<sup>8</sup>

One of the functions of the public authorities is to issue administrative orders and sanctions. In environmental law, orders issued by public bodies are also known as environmental administrative orders. They can be defined as the 'legal, independently enforceable orders issued directly by enforcement program officials that define the violation, provide evidence of the violation, and require the recipient to take corrective action within a specified time period'.<sup>9</sup> Generally, they entail all measures of abating pollution that do not involve pure judicial mechanisms.

These orders are sometimes referred to as Administrative Orders on Consent (AOC) or Civil Ad-

ministrative Orders (CAO).<sup>10</sup> They are normally issued to compel individuals or bodies corporate to take some environmental actions or pay for the environmental harm caused by their operations. AOC normally prescribe a specific period for their compliance. Non-compliance with them may attract the imposition of monetary sanctions or civil imprisonment.<sup>11</sup>

Apart from environmental administrative orders, the public authorities may administratively regulate compliance with environmental laws through Administrative Monetary Penalty (AMP), sanction or fine. AMP may be defined as 'a punitive measure for committing an administrative offence, established by the state, and it shall be administered for the purpose of preventing the commission of new offences either by the offender himself or by other persons'.<sup>12</sup> Thus, AMP is designed to have deterrent effects to the environmental offender and other prospective polluters. It entails 'a notification procedure setting out the details of the violation and the financial penalty determined to be applicable'.<sup>13</sup> It is common knowledge that fines may also be imposed by the judiciary on a person convicted of committing environmental crimes.

Administrative monetary sanctions are distinguished from formal enforcement mechanisms or judicial techniques, such as criminal and civil sanctions because they are imposed by administrative personnel like environmental enforcement officers. These functionaries are sometimes recognised as environmental quasi-judicial bodies. Nonetheless, in some instances, it is not easy to draw a line between administrative and quasi-judicial functions.<sup>14</sup> The reason is that a function may be suggested as both administrative at some stages and quasi-judicial for some other purposes.<sup>15</sup> In dealing with corporate offenders, sometimes an environmental enforcement

<sup>6</sup> Jan Glazewski, *Environmental Law in South Africa* (Butterworths 2000) 97

<sup>7</sup> Annika K Nilsson, *Enforcing Environmental Responsibilities: A Comparative Study of Environmental Administrative Law* (Degree of Doctor of Laws 2011) 209

<sup>8</sup> Louis J Kotze, 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' (2004) 7 *Potchefstroom Electronic Law Journal* 64

<sup>9</sup> U.S Environmental Protection Agency, *Principles of Environmental Enforcement* (1992) 2-3

<sup>10</sup> *ibid* 7-5

<sup>11</sup> *Energy and Water Utilities Regulatory Authority (EWURA) v Zhang Zhi Xin*, Miscellaneous, Civil Cause No. 593 of 2019 High Court of Tanzania at Dar es Salaam

<sup>12</sup> Art. 3(1) of the Code of Administrative Offences of the Russian Federation No. 195-FZ of December 30, 2001

<sup>13</sup> Jamie Benidickson, *Environmental Law* (4<sup>th</sup> edn, Irwin Law 2013) 156

<sup>14</sup> US Environmental Protection Agency (n 9) 7-5

<sup>15</sup> George Paton and David Derham (eds), *A Textbook of Jurisprudence* (4<sup>th</sup> edn, OUP 2003) 336

agency may be required to mix both administrative and quasi-judicial functions.

Fundamentally, environmental administrative orders or sanctions imply notices or penalties that are administrative in nature and issued in an environmental context. They include measures such as warnings, administrative fines, seizure or confiscation of the instrument or object of an administrative offence, administrative arrest, administrative deportation of a foreign citizen or a stateless person and administrative suspension of the activity.<sup>16</sup> The list comprises the Compliance Order, Prevention Order, Emergency Protection Order, Banning Order and Protection Order.

As noted from the above list, a corporation that commits an environmental crime, unlike a natural person, is likely to be issued with warnings, a variety of orders or administrative fines. Some of the measures, such as administrative arrest or imprisonment, that are usually inflicted against a natural person may not be enforced against a corporation. Essentially, any incorporated company is regarded as an artificial person, juridical person, fictitious person, corporation, legal entity, enterprise or juristic person formed, especially to do business.<sup>17</sup> Pragmatically, a corporation or company is treated as a separate legal entity having its own rights and obligations independent of its directors.<sup>18</sup> Therefore, corporate environmental liability has to do with the liability of the legal entity distinct from its members or directors.

Generally, corporate environmental liability means that a body corporate, which commits an environmental crime must be responsible for it, normally by using municipal laws. In other words, corporate environmental liability is more prominent in municipal environmental law than international environmental law. The reason is that corporations are usually held liable under domestic environmental law as opposed to interna-

tional environmental law.<sup>19</sup> The concept of corporate environmental liability is further associated with the payment for pollution prevention and damage.<sup>20</sup> It is usually implemented through the Polluter Pays Principle (PPP). Nevertheless, most corporations have limited liability. This signifies that they can easily mitigate and escape liability for injuries caused by environmental crimes.<sup>21</sup>

Corporate environmental liability is distinguished from director's liability whereby in the latter concept a director of the company may be personally held liable for environmental crimes committed by his/her company. Personal liability of the director may occur when the offence is committed by the corporation through his consent or connivance or failure to exercise due care and diligence on his/her part.<sup>22</sup> Normally, a company is said to commit environmental crimes via its officers who are responsible to carry out daily functions.<sup>23</sup> Thus, to hold liable a company for environmental crimes, it is mandatory to deal with persons who were authorised to perform the company's activity that has resulted in environmental crimes. This may be enforced through the Responsible Corporate Officer (RCO) doctrine.

Under the RCO doctrine, the corporate veil is lifted and any corporate officer who was in charge or had the decision-making power during the commission of the environmental crime may be held liable.<sup>24</sup> The liability may be imposed against such an official who was a directing mind or corporate brain regardless of whether he/she took an active role or not in the commission of the en-

<sup>16</sup> Art. 3(2) of the Code of Administrative Offences of the Russian Federation

<sup>17</sup> Bryan Garner (ed), *Black's Law Dictionary* (8<sup>th</sup> edn, West Publishing 2004) 61

<sup>18</sup> *Salomon v Salomon & Co. Ltd* (1897) AC 22

<sup>19</sup> Elisa Morgera, 'Benefit Sharing as A Bridge between the Environmental and Human Rights Accountability of Multinational Corporations' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015) 41.

<sup>20</sup> Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Approach* (University of New South Wales Press 2006) 32

<sup>21</sup> Amanda Kessarar, 'Corporate Liability for Environmental Harm' in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 362

<sup>22</sup> S 201(1) of the EMA

<sup>23</sup> Ameen Ashour and Harlida Wahab, 'Criminal Liability of Corporate Bodies for Polluting the Environment: Sharia and Law Perspectives' (2016) 2 *International Journal of Management and Applied Science* 227 and *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957]1 QB 159

<sup>24</sup> Kelvin Ewing and Jason Hutt, 'Enforcement and Liability' in Thomas Sullivan (ed), *Environmental Law Handbook* (22<sup>nd</sup> edn, Bernan Press 2014) 104

vironmental crime. Since a corporation may have several directing minds, all of them may be held liable under the RCO doctrine.<sup>25</sup> In other words, officers who had been expressly delegated with the governing executive authority or who have been left with the decision-making power are the ones to be prosecuted.<sup>26</sup> In using this doctrine, the court has to prove the knowledge, position and responsibility of the alleged responsible officer.<sup>27</sup> The court is also enjoined to ascertain the damage caused and the causal relationship.<sup>28</sup>

Corporate environmental liability comes into play when a company commits an environmental crime. However, most people think that a crime is a creature of a Penal Code. In this perception, an offence that is not established by the Penal Code is likely not to be termed a crime. In the same line of argument, one may think that 'environmental crimes' are those offences that are reflected in the Penal Code only. This observation may not be correct because normally a Penal Code creates most of the offences related to a person and property as distinguished from ecological crimes. In fact, if a thorough examination of the Penal Code is made, one may find that only a few offences relate to environmental components. This is because a significant part of environmental crimes is not found in the Penal Code; rather are reflected in the environmental-related statutes, which are administrative in nature.<sup>29</sup>

For example, the Tanzanian Penal Code contains few generalised environment-related offences.<sup>30</sup> They comprise fouling of air, fouling of water and common nuisance.<sup>31</sup> Though these environmental offences may be committed by individuals and companies, are also rarely prosecuted.<sup>32</sup> One of the reasons is that they are considered trial crimes not worthy of being reported either to the

police or prosecution department.<sup>33</sup> Despite that fact, it is not deniable that there is a close link between environmental offences and criminal law.

Defining precisely what is an environmental crime is a daunting task. Currently, there is no standard, comprehensive and universal definition among environmental criminologists and environmental scholars of what amounts to environmental crime either in municipal or international law.<sup>34</sup> The problem is that a theoretical understanding of environmental crime, to mean all actions that diminish environmental quality, significantly differs from the legal concept that usually refers to the intentional breach of any provision of the environment-related statute.<sup>35</sup> Certainly, the parameters of environmental action to be termed as environmental crime are unclear. Consequently, each scholar may define environmental crime depending on his/her perception.

For instance, some people regard international environmental crimes to include mainly five environmental offences.<sup>36</sup> These are illegal trade in wildlife, illegal trade in ozone-depleting substances and dumping and illegal transport of hazardous waste. They further comprise illegal fishing and illegal logging or illegal trading with timber.<sup>37</sup> Fundamentally, there is a disparity in understanding the concept of environmental crime.

Nonetheless, environmental crime is sometimes defined as 'an act committed with the intent to harm or with the potential to cause harm to ecological and/or biological systems, for the purpose of securing business or personal advantage, and in violation of state or federal statutes for

<sup>25</sup> *R v Canadian Dredge & Dock Co* [1985] 1 SCR 662, 693.

<sup>26</sup> *The Rhone v The Peter B Widener* [1993] 1 SCR 497, 520-21

<sup>27</sup> *Ewing and Hutt* (n 24) 105

<sup>28</sup> *ibid*

<sup>29</sup> Michael Faure, 'Environmental Crimes' in Nuno Garoupa (ed) *Criminal Law and Economics* (Edward Elgar 2009) 320

<sup>30</sup> Cap. 16 RE 2019

<sup>31</sup> *ibid* ss 85, 84 & 170

<sup>32</sup> Vicent Mtavangu, *Assessment of Corporate Liability for Environmental Pollution in Context of Polluter Pays Principle in Tanzania* (PhD Thesis, University of Dar es Salaam 2021) 303

<sup>33</sup> *ibid*

<sup>34</sup> Mary Clifford and Terry Edwards, 'Defining Environmental Crime' in Mary Clifford (ed), *Environmental Crime: Enforcement, Policy and Social Responsibility* (Aspen Publishers 1998) 21 and Nyka Maciej, 'Crime Against the Natural Environment - Ecocide - from the Perspective of International Law' (2022) 6(2) *Eastern European Journal of Transnational Relations* 11

<sup>35</sup> Clifford and Edwards (n 34) 21

<sup>36</sup> Environmental Investigation Agency, 'Environmental Crime: A Threat to Our Future' (2008) <[https://www.unodc.org/documents/NGO/EIA\\_Ecocrime\\_report\\_0908\\_final\\_draft\\_low.pdf](https://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf)>

<sup>37</sup> *ibid*

which criminal sanctions apply'.<sup>38</sup> This signifies that crimes of this nature are committed intentionally to get personal financial gain. It is this aspect that makes environmental crimes to be among the predicate offences listed in the Anti-Money Laundering Act.<sup>39</sup>

The above definition also takes on board environmental offences such as pollution, illegal logging, poaching and illicit trade in hazardous waste. However, the definition does not include omission by the polluter and it presupposes that there must be the existence of both *actus reus* and *mens rea* to prove the environmental crime. It further excludes those acts that might be done negligently by the corporate polluter, which may ultimately cause irreparable damage to the environment.

The Environmental Investigation Agency defines environmental crimes as 'illegal acts which directly harm the environment'.<sup>40</sup> They comprise the unauthorised acts or omissions that violate international or national laws governing the environment; such as discharging or emitting large quantities of noxious substances into air, water or land.<sup>41</sup> Environmental crimes are usually established by environmental legislation. In other words, any act or omission prohibited by the law that may result in damage to the environmental media can be described as an environmental crime. Thus, one may argue that every prohibition reflected in environmental legislation, if it can cause death, serious injury, or an adverse and momentous impact on human health and the environment, is a part and parcel of an environmental crime.<sup>42</sup> Put differently, a mining company is likely to have committed an environmental crime if it pollutes environmental

media or generally causes harm to the environment.<sup>43</sup>

Since every act that damages the environment, in one way or another, is connected with environmental crime, the list of environmental crimes may not be exhaustive. The result of all these types of crimes is to cause direct or indirect negative impacts on human health and environmental components. Environmental crimes are also called crimes against the public. This is because they are committed against public goods.<sup>44</sup> In most cases, these crimes infringe on the right to a clean and healthy environment, especially for the local communities surrounding the mining facilities. Unlike other crimes that affect an individual or property, environmental crimes may directly or indirectly affect a person as well as his/her surroundings. The damage to the environment caused by corporations may take a long time to be physically manifested; hence it becomes difficult in detecting and investigating them.

There is also a close relationship between environmental crime and ecocide crime. Nonetheless, environmental crimes are attributed to human activities rather than natural calamities.<sup>45</sup> Further, ecocide crimes are regarded as international crimes committed during war or peacetime. The Rome Statute of the International Criminal Court and the Additional Protocol to the Geneva Convention describe ecocide as an environmental crime in the context of a war crime.<sup>46</sup> Under these instruments, ecocide is defined as 'the intentional launch of an attack in the knowledge that it will cause 'widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.<sup>47</sup> The attack in ecocide crime is usually targeted at the natural environment. Eco-

<sup>38</sup> Clifford and Edwards (n 34) 24

<sup>39</sup> Cap. 423 [RE 2019], s 3(dd). See also *Director of Public Prosecutions v Julieth Simon Peleka*, Criminal Appeal No. 94 of 2019, Court of Appeal of Tanzania at Dar es Salaam

<sup>40</sup> Environmental Investigation Agency (n 36) 1

<sup>41</sup> Eugene McLaughlin and John Muncie, *the SAGE Dictionary of Criminology* (3<sup>rd</sup> edn, Sage Publications 2013) 155

<sup>42</sup> European Parliament, Workshop: Environmental Criminality in Developing Countries' (2022) 1 <[https://www.europarl.europa.eu/thinktank/en/document/EXPO\\_STU\(2022\)702565](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2022)702565)>

<sup>43</sup> Center for Environmental Rights, 'When Mines Break Environmental Laws. How to Use Criminal Prosecution to Enforce Environmental Rights' (2013) 7 <<https://cer.org.za/wp-content/uploads/2013/02/When-Mines-Break-Environmental-Laws.pdf>>

<sup>44</sup> Massawe (n 3) 96

<sup>45</sup> Maciej (n 34) 11

<sup>46</sup> Art 8(2)(b)(iv) of the Rome Statute of the International Criminal Court and Article 35(3) of the Additional to the Geneva Convention.

<sup>47</sup> *ibid*

cide crime is also associated with crimes against humanity and crimes of genocide.<sup>48</sup>

In the context of this paper, environmental crimes are those grave offences committed intentionally or negligently by corporate mining during the whole process of extracting minerals thereby causing damage to the environment, people's health and sometimes causing death. These are offences that harm or negatively affect or have the potential to harm or negatively affect the environment.<sup>49</sup> They include for example, seepage of tailings from the Tailing Storage Facility (TSF) and pollution of water and air.

Several mining companies in Tanzania have been accused of committing the listed above environmental crimes. In 2009 toxic water from the TSF belonging to NMGM leaked into Tigithe River, the local river in Mara region that is used by the neighbouring communities. The incident caused the death of more than twenty people as well as health problems for the majority of the villagers.<sup>50</sup> The seepage also destructed crops, pastures and the death of livestock.<sup>51</sup> Apart from NMGM, GGM company has been accused several times of committing environmental crimes. Pollution of water by GGM at Nyakabale village is extensively reported.<sup>52</sup> Recently, Williamson Diamond Mines Limited has been complained about by the local communities for the rupture of its TSF resulting in flooding and thereby causing damage to the houses, farms, water wells and the environment generally.<sup>53</sup>

<sup>48</sup> European Law Institute (ELI), 'Report on Ecocide: Model Rules for an EU Directive and a Council Decision' (2023) 6 <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Report\\_on\\_Ecocide.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Ecocide.pdf)>

<sup>49</sup> Center for Environmental Rights (n 43) 23

<sup>50</sup> William Walwa, 'Large-scale Mining and the Right to Clean, Healthy and Safe Environment in Tanzania' (2016) 43 *African Review* 107

<sup>51</sup> *ibid*

<sup>52</sup> Massawe (n 3) 9, Mtavangu (n 32) 238 and Willy Maliganya and Renuat Paul, 'The Impact of Large-scale Mining on the Livelihoods of Adjacent Communities: The Case of Geita Gold Mine, Tanzania' (2016) REPOA, Research Report 17/1, 26, <<http://www.Willy%20Maliganya%20Impacts%20of%20mining%20on%20livelihood.pdf>>

<sup>53</sup> Suzy Butondo, 'Production at Williamson Diamond Mines Halted' <<https://www.thecitizen.co.tz/tanzania/news/national/production-at-williamson-diamonds-mines-halted-4016362>> and Mining Review Africa, 'TSF Wall Breach at Williamson Mine in Tanzania' <<https://www.miningreview.com/diamonds-gems/tailings-storage-facility-wall-breach-at-williamson-in-tanzania/>>

As has been noted above, environmental crimes threaten some of the fundamental human rights entrenched in most Constitutions and environmental pieces of legislation. They include the right to life,<sup>54</sup> the right to health<sup>55</sup> and the substantive right to a clean, safe, decent and healthy environment.<sup>56</sup> As such, environmental administrative orders and sanctions address issues relating generally to the control of environmental pollution, as among the environmental crimes, for the purpose of ensuring that people enjoy freely the aforementioned basic rights. Further, environmental administrative measures implement in one way or another some environmental principles such as the PPP, the Precautionary Principle, the Principle of Ecosystem Integrity and the Prevention Principle.<sup>57</sup>

## AN OVERVIEW OF MECHANISMS FOR REGULATING CORPORATE ENVIRONMENTAL CRIMES

Corporate environmental crimes are among the environmental problems facing the globe and Tanzania in particular.<sup>58</sup> Their effects directly touch human health and the economic activities of the local communities. In dealing with corporate environmental crimes there are myriad techniques. They comprise judicial and administrative mechanisms. Judicial ways consist of civil and criminal liability, whereas administrative methods relate to orders and sanctions. To a great extent, environmental enforcement agencies or regulators are given wide discretion about the choice of the mechanism.<sup>59</sup> The usefulness of any of the techniques depends on various factors, such as the level of development of the

<sup>54</sup> The Constitution of the United Republic of Tanzania, Art 14

<sup>55</sup> *ibid*, Art 30(2)(b)

<sup>56</sup> EMA, s 4(1)

<sup>57</sup> *ibid*, ss 5(3) and 7(3)

<sup>58</sup> Massawe (n 3) 4

<sup>59</sup> Susan Wolf and Neil Stanley, *Wolf and Stanley on Environmental Law* (5th edn, Routledge 2011) 10



State, the strength of the environmental enforcement agencies, the robustness of the judiciary and general public awareness of environmental issues.

For many years, environmental protection has been the function of public law, especially criminal law. Criminal law has been employed as a desideratum tool in enforcing compliance with environmental standards and in ensuring that the environment is not harmful to human health. Regulation of the environment through criminal law has been praised, among others, based on the stringent penalties that are provided against environmental offenders. Criminal law in the form of Command and Control (CAC) approach is the common way in protecting the environment. CAC works in such a way that the administrative authority fixes the limits of discharge or emission (in the law or permits) for potential polluters and whoever exceeds the threshold may face criminal penalties. Thus, CAC deals with prohibition followed by sanction/penalty in cases of deviation from the prohibition.

A person who commits an environmental crime is likely to face stern sanctions, such as imprisonment. Nevertheless, imprisonment is imposed against the corporate executives unlike the entity itself. Since criminal law plays a retributive function, it is also argued to have more deterrent effects than administrative and civil liability techniques.<sup>60</sup> To some extent, corporations refrain from committing environmental crimes fearing the stringent criminal penalties that sometimes may result in adverse economic impacts on the business. Generally, severe punishments offered by criminal law play both *ex-ante* and *ex-post* functions against environmental offenders.

Nonetheless, the need to prove both *actus reus* and *mens rea*, with an exception to strict liability crimes, are some of the setbacks of using criminal law to regulate environmental crimes. The fact is that it is an uneasy task to establish the guiltiness of the corporation, namely, *mens rea*, in environmental crimes. Further, the underlying tenet in criminal procedure is that the prosecutor has to prove the environmental crime beyond a reasonable doubt. Any doubt may result in the exoneration of the corporation from environmental

liability. Generally, criminal law is mostly useful for grave corporate environmental crimes.<sup>61</sup>

The civil regime is another mechanism for regulating corporate environmental crimes. Although they are termed environmental crimes, they may as well be dealt with by using civil law. Civil judicial enforcement is mostly reflected in private laws, especially the law of torts. Civil regulation is understood as the liability of a natural or legal person for infringing international or national environmental rules.<sup>62</sup> This regulatory mode deals with curative measures as opposed to *ex-ante* measures. As such, one of the demerits of the civil regime is that it does not carry preventive measures, a significant aspect of environmental matters. The underlying goal of employing civil regimes in environmental issues is to remedy the damaged environment and compensate individuals affected by environmental crimes.

The positive aspect of civil liability is that it can be enforced *mutatis mutandis* with criminal sanctions. This partly explains why a company that has been convicted of environmental crimes is not exonerated from any civil liability originating from the same crime.<sup>63</sup> This means that victims of environmental pollution have an avenue to prosecute under civil law the mining company that has been held guilty of committing environmental crimes. Civil courts also have mandates to challenge and enforce environmental administrative orders and sanctions imposed by administrative agencies.<sup>64</sup>

The third category is the administrative regulatory technique. This is an alternative to criminal and civil mechanisms. It is mostly employed by administrative agencies vested with discretionary powers to regulate environmental crimes. Inspection and monitoring are the key tools in

<sup>60</sup> Faure (n 29) 322

<sup>61</sup> European Union, 'Environmental Liability of Companies' < [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2020\)651698](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)651698) >

<sup>62</sup> Philippe Sands and others, *Principles of International Environmental Law* (3<sup>rd</sup> edn, Cambridge University Press 2018) 870

<sup>63</sup> EMA, s 192(1)

<sup>64</sup> *Amooti Godfrey Nyakaana v National Environment Management Authority and Six Others* Constitutional Appeal No. 05 of 2011, [2015] UGSC 14 (20 August 2015)

regulating the environment administratively.<sup>65</sup> Essentially, there is no exhaustive list of all environmental administrative orders and sanctions. The problem is that there is no clear demarcation between criminal and administrative offences.<sup>66</sup> Nonetheless, various laws take cognisance of administrative techniques as described below.

## LEGAL FRAMEWORK GOVERNING ENVIRONMENTAL ADMINISTRATIVE ORDERS AND SANCTIONS

Administrative orders and sanctions are widely used in enforcing environmental compliance in many jurisdictions. Unlike other countries, in Tanzania, there is no specific law or Code governing the issuance of administrative orders and sanctions.<sup>67</sup> This signifies that there is no list of offences corresponding to administrative orders or sanctions. As such, it is not uncommon to find that even grave environmental offences are dealt with administratively. In other words, environmental crimes are not consolidated in the environmental framework law; rather they are scattered in various environmental sector legislation.<sup>68</sup>

The Constitution of the United Republic of Tanzania<sup>69</sup> sets a framework for the establishment of administrative agencies that perform quasi-judicial functions. Article 13(3) of the Constitution provides that 'the civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other

state agencies established by or under the law'. This article seems to acknowledge state agencies established by other statutes. Further, the Constitution emphasises a need for fair hearings in courts of law and other state agencies.<sup>70</sup> Therefore, it is without any iota of doubt that the two constitutional provisions impliedly recognise the determination of disputes by administrative agencies other than the courts of law. Similarly, they affirm the issuance of administrative orders and sanctions by administrative agencies, including environmental enforcement agencies.

While interpreting the afore-mentioned constitutional provisions, the Court of Appeal of Tanzania in *Attorney General v Lohay Akaanay and Joseph Lohay* emphasised that the Constitution allows the establishment of administrative agencies or quasi-judicial bodies.<sup>71</sup> However, the Court noted that the Constitution does not allow the courts to be ousted of their jurisdiction by conferring exclusive jurisdiction over other non-judicial bodies.<sup>72</sup> Apart from providing the legal set-up of the administrative agencies that issue administrative orders and recognising the need for fair hearings, Articles 13(3)(6) of the Tanzanian Constitution do not expressly stipulate the issuance of administrative orders and sanctions, unlike the Constitutions of Uganda and Kenya.<sup>73</sup>

As far as environmental matters are concerned, the Environmental Management Act (EMA) is the higher law below the Constitution.<sup>74</sup> This Act provides for a legal framework and institutions responsible for environmental management in Mainland Tanzania. The EMA also establishes NEMC as an environmental regulator and enforcement agency.<sup>75</sup> This is the agency that issues most of the environmental administrative orders and sanctions.

<sup>65</sup> Benedict Thomas Mapunda, 'Environmental Law and Policy in Tanzania: Reflections on the Enforcement of the Environmental Management Act' (2019) 46(2) *The Eastern Africa Law Review* 156, 174.

<sup>66</sup> OECD, 'Determination and Application of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries' (2009) <<https://www.oecd.org/env/outreach/42356640.pdf>>

<sup>67</sup> Examples of countries that have laws on administrative orders include Russia, Germany, Kazakhstan, Armenia and Lithuania

<sup>68</sup> Mhini (n 2) 5

<sup>69</sup> Cap. 1 RE [2019]

<sup>70</sup> Art 13(6)

<sup>71</sup> (1995) TLR 80, 92

<sup>72</sup> *ibid*

<sup>73</sup> Art 42 of the Constitution of Uganda, 1995 guarantees the right to just and fair treatment in administrative decisions; whereas Art 47 of the Constitution of Kenya, 2010 assures every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, Kenya has specific legislation on administrative action, i.e., the Fair Administrative Action Act, No. 4 of 2015

<sup>74</sup> Act No. 20 of 2004, Cap 191

<sup>75</sup> EMA, s 16(1)

The EMA also empowers the Minister responsible for the environment to appoint or designate environmental inspectors.<sup>76</sup> The inspectors are given mandates to issue various environmental administrative measures. Further, the EMA guarantees the issuance of various environmental administrative orders, such as Environmental Restoration Orders, compounding of offences, prevention orders, protection orders, emergency environmental protection orders and environmental compliance orders.<sup>77</sup> Most of these orders are coupled with monetary sanctions.

Any person dissatisfied with administrative orders or sanctions may appeal to the Minister responsible for environmental affairs or the Environmental Appeals Tribunal.<sup>78</sup> Equally, the aggrieved person may apply before the High Court for judicial review of the decision of an environmental authority.

The EMA creates various environmental crimes, for instance, those related to discharging and emitting noxious substances but it does not specify environmental crimes that may be dealt with administratively by the agencies and those that may be judicially enforced.<sup>79</sup> Therefore, it is the discretion of the environmental enforcement agency to choose the appropriate regulatory mechanism against the corporation.

The regulations that complement EMA provide numerous environmental administrative orders and sanctions. An Environmental Compliance Order, for example, is granted against a person that violates the terms and conditions prescribed in

the certificate or permit.<sup>80</sup> Environmental officers also have mandates to issue Environmental Stop Orders. This order may be served in the situation where the environmental officer believes that further delay will occasion more serious harm to human health or the living environment.<sup>81</sup> An Environmental Stop Order aims at halting the performance of an activity whose continuance may cause deleterious damage to the environment.

An Environmental Protection Order is another measure served against any activity that may cause irreversible impacts to the air, soil, water, public health or environment in general.<sup>82</sup> This order may be issued against a corporation requiring it to contain further environmental damage by taking some actions. There is also an Emergency Protection Order, which may be imposed against a person that emits pollutants or discharges contaminants into the environment.<sup>83</sup>

Environmental Prevention Order may be served against the person who is or will be carrying an activity, possessing or controlling a substance that might result in an adverse impact on the environment.<sup>84</sup> It aims at preventing and minimising environmental harm. The order may be served in a situation where there is no contravention of statutory provisions.<sup>85</sup>

<sup>76</sup> *ibid* s 182

<sup>77</sup> *ibid* ss 151, 194 as repealed by the (Miscellaneous Amendments) Act No. 2 of 2021 (this section neither provides the maximum amount to be compounded nor the type of environmental crime), 195-198

<sup>78</sup> *ibid* ss 18(3) and 206(2)(b). Unfortunately, the envisaged tribunal remains a white elephant in the EMA

<sup>79</sup> EMA, ss 184-192.

<sup>80</sup> Regulation 22(1)(3) of the Environmental Management (Air Quality Standards) Regulations, 2007, GN. No. 237 published on 7/12/2007, regulation 49 of the Environment (Solid Waste Management) Regulations, 2009, GN. No. 263 published on 24/07/2009, regulation 25(1) of the Environmental Management (Water Quality Standards) Regulations, 2007, GN. No. 239 published on 7/12/2007, regulation 58(1) of the Environmental Management (Control and Management of Electrical and Electronic Equipment Waste) Regulations, 2021, GN. No. 388 published on 14.05/2021, regulation 63(1) of the Environmental Management (Hazardous Waste Control and Management) Regulations, 2021, GN. No. 389 published on 14/05/2021 and regulation 21(1)(b) of the Environmental Management (Standards for the Control of Noise and Vibrations Pollutions) Regulations, 2015, GN. No. 32 published on 30/01/2015

<sup>81</sup> Regulation 23(1) on Standards for the Control of Noise and Vibrations Pollutions

<sup>82</sup> For instance, regulation 23(1) on Air Quality Standards, regulations 24(1) and 25(1) on Soil Quality Standards, regulation 26(1) on Water Quality Standards and regulation 22(1) on Standards for the Control of Noise and Vibrations Pollutions

<sup>83</sup> Regulation 26(1) on Air Quality Standards and regulation 28(1) on Solid Waste Management

<sup>84</sup> Regulation 57(1) on the Control and Management of Electrical and Electronic Equipment Waste and regulation 48 on Solid Waste Management

<sup>85</sup> Benidickson (n 13) 151

The compounding of environmental offences is regulated by various regulations. These include the Environmental Management (Air Quality Standards) Regulations, the Environmental Management (Water Quality Standards) Regulations, the Environmental Management (Prohibition of Plastic Carrier Bags) Regulations and the Environmental Management (Standards for the Control of Noise and Vibrations Pollutions) Regulations.<sup>86</sup> These regulations also govern other orders such as warning, confiscation, revocation of permit and repatriation.<sup>87</sup>

Other sector legislation that to a great extent takes on board environmental administrative measures than others include the Fisheries Act, the Water Resources Management Act and the Forest Act.<sup>88</sup> The Fisheries Act, for instance, mandates the Director of Fisheries and other officers to seize and retain any fish, fish product, fishing gear and any other thing that might constitute evidence of the commission of an environmental crime.<sup>89</sup> Additionally, they have the power to arrest any person suspected of committing acts or omissions prohibited by the statute.<sup>90</sup> The officers also are authorised to compound offences, which are limited to 100,000 Tanzanian shillings.<sup>91</sup> Further, they can release any vessel or thing seized upon payment of the fine not exceeding the value of the released article or payment of the fine of not less than 10,000 Tanzanian shillings.<sup>92</sup> Nonetheless, compounding of offences does not apply to those offences for which a minimum sentence of fine or imprisonment is prescribed.<sup>93</sup>

The Water Resources Management Act contains two environmental administrative measures: Environmental Restoration Order (ERO) and compounding of offences. The Director responsible

for water resources or the Basin Water Officer may request NEMC to issue the ERO.<sup>94</sup> This order is issued to manage the environment in relation to water resources. Compounding of offences can be done by the Basin Water Officer. It is limited to a fine not exceeding 500,000 Tanzanian shillings.<sup>95</sup>

The Forest Act provides administrative orders such as warnings and compliance notices.<sup>96</sup> Other administrative measures in the Act comprise stop order seizure and detention of forest produce or any instrument used in the commission of the offence, selling order of seized perishable article as well as arresting without warrant any person reasonably suspected to have committed the crime.<sup>97</sup> Compounding of offences for the offences which do not exceed two million Tanzanian shillings is also reflected in the Act.<sup>98</sup>

## APPRAISAL OF THE EFFICACY OF ADMINISTRATIVE ORDERS AND SANCTIONS IN REGULATING CORPORATE ENVIRONMENTAL CRIMES

Environmental orders are the main instruments used in enforcing administrative sanctions.<sup>99</sup> They usually point out authoritatively the environmental crimes committed by the regulated facility, the responsibility and the penalty against the addressee. This part discusses the efficacy of the selected environmental administrative orders and sanctions in regulating corporate environmental crimes in mining areas in Tanzania. These measures are ERO and AMP.

<sup>86</sup> Regulations 34(1), 37(1), 20(1)(2), 20

<sup>87</sup> For example, regulation 17 of the Environmental Management (Prohibition of Plastic Carrier Bags) Regulations, 2019, GN. No. 394 published on 17/05/2019, regulation 64 on Hazardous Waste Control and Management, and regulation 61 on the Control and Management of Electrical and Electronic Equipment Waste

<sup>88</sup> Act No. 22 of 2003; Act No. 11 Of 2009; Act No. 14 of 2022

<sup>89</sup> Act No. 22, ss 36(c) and 37

<sup>90</sup> *ibid* s 36(d)

<sup>91</sup> *ibid* s 40(1)(a)

<sup>92</sup> *ibid*

<sup>93</sup> *ibid* s 40(1)(6)

<sup>94</sup> S 19

<sup>95</sup> S 104

<sup>96</sup> *ibid* s 56(1)(7)(b)

<sup>97</sup> *ibid* ss 57, 93(c), 94(3), 93(d)

<sup>98</sup> *ibid* s 95(1)(4)

<sup>99</sup> Nilsson (n 7) 161

## Environmental Restoration Orders (ERO)

ERO may be issued by an environmental administrative agency or a court of law. As such, it is both an administrative and court order. The main purpose of this order is to ensure that the environment is restored to its former status as far as possible following environmental damage.<sup>100</sup> The underlying object of the order is to return back the environment to its original state.<sup>101</sup> ERO as issued by NEMC, can perform three roles: preventive, curative and compensation. This means that a person served with this order may be required to restore the damaged environment to its originality as near as possible, to prevent the responsible person from activities that may likely cause environmental damage or to compensate people who have been affected by the environmental damage.<sup>102</sup>

Theoretically and based on the above functions, ERO is argued to be effective in dealing with corporate environmental crimes because it bars depletion of the environment as it contains both preventive and curative aspects of environmental management.<sup>103</sup> Nonetheless, the Tanzanian environmental enforcement agencies, especially, NEMC have never served this order against mining companies that committed environmental crimes in mining areas.<sup>104</sup> The agencies are reluctant to serve this order, among others, due to the lack of clear regulations and technicalities surrounding it, such as proof of a causal link.<sup>105</sup>

Unlike in Kenya and Uganda, the environmental legal framework in Tanzania is inadequate as it does not avail an opportunity to be heard before issuing the ERO.<sup>106</sup> The Supreme Court of

Uganda in *Amooti Godfrey Nyakaana v National Environment Management Authority and Six Others*<sup>107</sup> ruled that it is mandatory for an authority that exercises quasi-judicial functions to give an alleged violator the right to be heard before serving him/her with the ERO. This is because the environmental authorities are clothed with enormous powers, which include investigation, prosecution and adjudication. These powers if not well-checked, may be easily abused. In sum, this order is rarely and scarcely granted in developing countries.<sup>108</sup> This perhaps explains why most mining companies in Tanzania commit environmental crimes with impunity.

## Administrative Monetary Penalty (AMP)

An AMP or fine means 'a notification procedure setting out the details of the violation and the financial penalty determined to be applicable'.<sup>109</sup> It may be imposed by the environmental officer following the compounding of environmental crimes. This may occur when the perpetrator acknowledges to have committed an environmental crime and is willing to pay for it. Such an admission must be in writing and should take place prior to the commencement of a proceeding by a court of competent jurisdiction.<sup>110</sup> The main purpose of this administrative sanction is to settle the dispute out of court. Compounding of environmental crimes can be done by authorised environmental officers.<sup>111</sup>

Compounding environmental crimes signifies that the environmental regulator or an enforcement agency decides neither use criminal machinery nor civil proceedings against the corporate offender. Issuance of fines against mining companies that commit environmental crimes is the leading sanction imposed by environmental enforcement agencies.<sup>112</sup> Though there are several factors that may guide the adminis-

<sup>100</sup> *ibid* 231

<sup>101</sup> Edrine Wanyama, 'A Critical Analysis of Restoration Orders under the National Environment Management Act Cap. 153: The Case for Amooti Godfrey Nyakana vs NEMA and Other Constitutional Petition No. 3 of 2005' <[https://www.academia.edu/14919465/A\\_critical\\_analysis\\_of\\_restoration\\_orders\\_under\\_the\\_National\\_Environment\\_Management\\_Act\\_Cap\\_153\\_the\\_case\\_for\\_Amooti\\_Godfrey\\_Nyakana\\_vs\\_NEMA\\_and\\_Others\\_Constitutional\\_Petition\\_No\\_03\\_of\\_2005](https://www.academia.edu/14919465/A_critical_analysis_of_restoration_orders_under_the_National_Environment_Management_Act_Cap_153_the_case_for_Amooti_Godfrey_Nyakana_vs_NEMA_and_Others_Constitutional_Petition_No_03_of_2005)>

<sup>102</sup> EMA s 151(2)(a)(b)(c)

<sup>103</sup> Wanyama (n 101) 12

<sup>104</sup> Mtavangu (n 32) 17

<sup>105</sup> *ibid* 258

<sup>106</sup> EMA s 152

<sup>107</sup> Constitutional Appeal No. 05 of 2011

<sup>108</sup> Wanyama (n 101) 14

<sup>109</sup> Benidickson (n 13) 156

<sup>110</sup> EMA, s 194 as repealed by the (Miscellaneous Amendments) Act No. 2 of 2021

<sup>111</sup> *ibid*

<sup>112</sup> Mtavangu (n 32) 324

trative body in calculating the amount of money to be paid, in most cases, the discretion of the enforcement officer overrides other factors.

The EMA does not provide specific offences that can be compounded. As such, even grave environmental crimes may be compounded. Put differently, environmental crimes in the Act may be administratively dealt with by environmental enforcement agencies or other relevant environmental officers despite their enormity.<sup>113</sup> The outcome of this practice is that 'the deterrent effect of criminal law or civil regime may be reduced administratively through the compounding of environmental offences'.<sup>114</sup>

To some extent, fines tend to deter other potential corporate polluters. Further, AMP induces compliance with environmental laws, especially in mining areas. Nonetheless, most fines imposed against mining companies are below their economic gain. This makes fines sometimes an inefficient form of regulating environmental corporate crimes. In fact, most of these entities are well off economically and can pay a significant amount of money which to them is just a peanut compared to what they gain from a polluting activity.

The report of the National Audit Office of Tanzania (NAOT) indicates that in 2010/2011 nine mining companies out of eleven were imposed with fines for committing various environmental crimes.<sup>115</sup> NMGM has been several times inflicted with fines for causing environmental pollution.<sup>116</sup> For example, on 9 January 2019, had to pay 300,000,000 Tanzanian shillings for discharging

harmful chemicals into the environment.<sup>117</sup> The same year, on 24 May 2019 was inflicted with another fine of 5.6 billion Tanzanian shillings for the same environmental crime.<sup>118</sup> Despite the infliction of such monetary administrative sanctions, NMGM never stopped committing environmental crimes. In July 2019 NEMC suspended the use of the TSF.<sup>119</sup>

GGM is another mining company that has been slapped several times with AMP for committing environmental crimes. For example, in 2017 the Minister responsible for the environment imposed a fine of 10 million Tanzanian shillings against GGM for causing pollution of water sources.<sup>120</sup> Fines against this company have not been a panacea for committing environmental crimes.<sup>121</sup>

Although the extent of compliance with AMP among the mining companies is high, however, this measure seems to be ineffective in regulating corporate environmental crime because of the repetitiveness nature of the same punished offences committed by mining entities. It is often argued that the fines paid by mining companies are regarded by them as part of the cost of carrying out the business.<sup>122</sup>

Though there is no unanimous agreement on the efficacy of the fine as an environmental administrative sanction in containing corporate pollution, however, majority of the respondents were of the view that a fine does not deter pollution caused by bodies corporate.<sup>123</sup> Therefore, following the deficiency of AMP against businesses, the Government and their environmental en-

<sup>113</sup> *ibid* 185

<sup>114</sup> *ibid*

<sup>115</sup> United Republic of Tanzania (URT), National Audit Office of Tanzania (NAOT), 'A Performance Audit on the Enforcement of Environmental Control Systems in the Mining Sector in Tanzania. VP's Office-Division of Environment and National Environmental Management Council. A Report of the Controller and Auditor General (CAG) of the United Republic of Tanzania' (March 2015) 50

<sup>116</sup> See for instance, JamiiForums, 'Barrick Gold Mine Inflicted with a Fine of One Billion Tsh for Environmental Pollution in Mara' <<https://www.matukiodaimamedia.co.tz/2022/04/mgodi-wa-barrick-wapigwa-faini-bilioni.html>>, Legal and Human Rights Centre, *Human Rights and Business Report* (LHRC Publishers 2014) 127, Walwa (n 50) 97&123 and Mtavangu (n 32) 237.

<sup>117</sup> Acacia Mining Plc, 'A Competent Persons Report on the Mineral Assets of Acacia Mining Plc' (2019) 102 <<https://www.acaciaming.com/media/Files/A/Acacia/reports/2019/competent-persons-report-on-the-mineral-assets-of-acacia-mining-plc-fullreport.pdf>>

<sup>118</sup> 'Acacia Fined Sh 5.6 Billion for Leaking Toxic Water' *the Citizen* (17 May 2019) 4 <<https://www.thecitizen.co.tz/tanzania/news/national/acacia-fined-sh5-6bn-forleaking-toxic-water-2681434>>

<sup>119</sup> *ibid*

<sup>120</sup> Mtavangu (n 32) 241

<sup>121</sup> *ibid*

<sup>122</sup> Mhini (n 2) 66

<sup>123</sup> Mtavangu (n 32) 328. In this study, the majority of the respondents consisted of 50.4 percent. 33 percent of the respondents were of the view that a fine is an effective sanction against corporate polluters whereas 16.6 percent of the respondents were neutral.

forcement agencies in some sectors decided to establish pollution charges and taxes.

## MERITS AND DEMERITS OF ADMINISTRATIVE ORDERS AND SANCTIONS IN REGULATING CORPORATE ENVIRONMENTAL CRIMES

Environmental administrative orders and sanctions are applied by developed and developing countries. In Tanzania, they take a lion's share among other regulatory methods.<sup>124</sup> They are preferred by both environmental enforcement agencies and business entities. Private corporations are in favour of them because they are less punitive and also do not put criminal records and precedents; whereas public authorities prefer them because they may be administered at a low cost.<sup>125</sup>

Administrative orders and sanctions are regarded as expeditious, reasonable and flexible enforcement mechanisms. They aim at behavioural change than an infliction of punishment.<sup>126</sup> The philosophy behind administrative enforcement of environmental sanction is that 'the enforcer can choose the method and set a level of fine which is proportionate to the risks and type of offence involved, and a sufficient incitement to change the behaviour'.<sup>127</sup>

One of the merits of environmental administrative orders and sanctions is that they save the cost and time of investigating and prosecuting environmental crimes before the courts of law.<sup>128</sup> The reason is that corporate environmental crimes

have adverse and irreversible impacts on human health and the environment if they are not attended to on time. Therefore, they need instantaneous administrative measures by relevant authorities, as opposed to time-consuming court proceedings.<sup>129</sup>

There is no doubt, especially in developing countries such as Tanzania that the court proceedings, whether criminal or civil, take a long time to investigate, prosecute and enter a judgment.<sup>130</sup> One decides to use environmental administrative orders and sanctions as a means of circumventing lengthy legal proceedings and technicalities. Further, administrative authorities such as environmental enforcement agencies are presumed to have more expertise in environmental issues than criminal prosecutors.<sup>131</sup>

Nevertheless, lack of publicity is one of the criticisms of environmental administrative orders and sanctions. Apparently, these measures are confidentially served by environmental law enforcers against private corporations.<sup>132</sup> This means that environmental enforcement agencies do not publicise environmental crimes committed by the mining companies and their reciprocal administrative orders or sanctions imposed against them. Therefore, businesses sometimes treat environmental administrative measures as internal arrangements. In the long run, this practice may exacerbate the deterrent effects of environmental orders and sanctions. Principally, the mining companies do not prefer publicity of sanctions because it may lower their business reputation.

In Tanzania, the environmental administrative orders and sanctions are not backed up with judicial mechanisms. The corporate defaulters of environmental orders and sanctions are not taken before courts of law.<sup>133</sup> This tends to reduce the deterrent effect of those measures. Moreover, compounding of environmental

<sup>124</sup> Mapunda (n 65) 156,174

<sup>125</sup> Benidickson (n 13) 156

<sup>126</sup> Nilsson (n 7) 214

<sup>127</sup> *ibid*

<sup>128</sup> European Union (n 61) 82

<sup>129</sup> Mapunda (n h65) 178

<sup>130</sup> *ibid*

<sup>131</sup> Michael Faure and Nicole Niessen, 'Towards Effective Environmental Legislation in Indonesia?' in Michael Faure and Nicole Niessen (eds), *Environmental Law in Development Lesson from the Indonesian Experience*, Edward Elgar 2006) 280

<sup>132</sup> Mtavangu (n 32) 366

<sup>133</sup> *ibid*

offences has the effect of ousting the jurisdiction of the court to try the compounded offence. A person whose offence has been compounded is insulated from further prosecution either in a criminal or civil case.<sup>134</sup> Put differently, the dominance of administrative regulation has the effect of limiting the scope of criminalising environmental crimes and making criminal law lose its preventive effect.<sup>135</sup>

In most cases, environmental enforcement agencies use command and control for regulating environmental management. Yet, it can be argued that command and control is not efficacious in dealing with corporate environmental crimes, as well as contemporary and complex environmental problems.<sup>136</sup> Further, the use of command and control through the imposition of AMP has made most of the regulatory bodies, including the environmental enforcement agencies turn themselves into revenue collectors than performing their statutory duties.<sup>137</sup> The source of this problem is the fact that most of the Government agencies and regulators, such as NEMC receive a small subvention from the central Government.<sup>138</sup> Therefore, they depend on other sources of income, eg, fines to operate their daily functions.

In sum, the environmental administrative orders and sanctions are argued to have low deterrent effects against mining companies in Tanzania. Most of these measures are regarded by many regulated facilities as soft and non-serious penalties. This is in comparison with judicial actions in terms of criminal or civil proceedings. This perhaps explains why most regulated entities do not comply with environmental administrative measures but also re-commit the same environmental crimes.

## CHALLENGES OF ENFORCING ENVIRONMENTAL ADMINISTRATIVE MEASURES AGAINST MINING COMPANIES

As noted earlier, environmental administrative orders and sanctions are imposed by environmental officers and inspectors. As such, effective regulation of mining entities requires a sufficient number of personnel to oversee compliance with the order and sanctions imposed. Actually, there is an inadequate number of environmental functionaries to enforce the imposed environmental administrative measures against mining companies.<sup>139</sup> For example, in 2021 there were only 448 environmental inspectors in Mainland Tanzania.<sup>140</sup> The actual demand for environmental inspectors countrywide was supposed to be 2000.<sup>141</sup> Primarily, the number of personnel specifically dealing with the enforcement of environmental laws at the NEMC's Directorate of Environmental Compliance and Enforcement is also insufficient.<sup>142</sup>

The NEMC's Lake Victoria zone, which straddles five regions that are leading in hosting giant mines, has only five environmental officers.<sup>143</sup> As such, these NEMC's functionaries are unable to conduct a thorough investigation, serve environmental administrative measures and closely enforce them in all mining facilities within the zone. The few environmental functionaries have not succeeded to use most environmental administrative sanctions stipulated in the EMA as well as in other environmental-related pieces of legisla-

<sup>134</sup> EMA s 192(2)

<sup>135</sup> Faure and Niessen (n 131) 190

<sup>136</sup> Jane Holder and Maria Lee, *Environmental Protection, Law and Policy: Text and Materials* (2nd edn, Cambridge University Press 2007) 419

<sup>137</sup> Rodger Mpogolo, 'Magufuli Emphasises on Paying Tax without Harassment' *Habari Leo* (Dar es Salaam 8 June 2019) 8 & 18

<sup>138</sup> Mapunda (n 65) 156, 176

<sup>139</sup> *ibid*

<sup>140</sup> Mtavangu (n 32) 260

<sup>141</sup> URT, 'Annual Report on the Activities Implemented by the Standing Parliamentary Committee on Industries, Trade and Environment from February 2019 to January 2020'

<sup>142</sup> Mtavangu (n 32) 262

<sup>143</sup> *ibid* 260. The regions covered by Lake Victoria Zone are Mwanza, Geita, Mara, Shinyanga and Simiyu. The giant mines found in this zone are NMG, GGM, Bulyanhulu Gold Mine Limited and Williamson Diamonds Limited



tion.<sup>144</sup> In sum, environmental enforcement agencies lack strong regulatory implementation and enforcement capacity.<sup>145</sup>

The inadequate number of environmental functionaries goes hand in hand with limited financial resources. The budget allocated to the environmental enforcement agencies, such as NEMC has always been inadequate.<sup>146</sup> Worse enough, the Government treasury releases only part of the allocated budget not within the prescribed time.<sup>147</sup> This hinders the enforcement of environmental administrative orders as well as environmental laws generally, especially in mining areas.<sup>148</sup>

Another challenge is the lack of the Government's political will. Largely, the environmental enforcement agencies are not autonomous and independent from the Government. The political will of the Government to enforce environmental administrative measures may partly be compromised by the economic influence of the giant mining companies. The Government of Tanzania is also a shareholder in some of the mining companies.<sup>149</sup> Further, inadequate financial and human resources among the environmental enforcement agencies noted above may be explained in terms of the lack of Government political will on environmental issues.<sup>150</sup> Environmental crimes, especially by giant corporations could only be contained where there is a strong political will on the executive part of the Government.<sup>151</sup>

Sufficient coordination and overlapping of mandates among environmental enforcement agencies is another challenge. It is axiomatic that various Government agencies enforce environ-

mental administrative measures against mining entities. Besides NEMC, there are also the Mining Commission and the Local Government Authorities (LGAs).<sup>152</sup> These institutions lack sufficient coordination among themselves as far as environmental administrative sanctions are concerned.<sup>153</sup> Consequently, each institution separately enforces administrative measures against the same mining company. Fundamentally, there is limited sharing of information and outcomes related to the enforcement of those measures.<sup>154</sup> This results in inconsistent implementation and enforcement of environmental measures among environmental enforcement agencies.

The way environmental administrative orders and sanctions are served against mining companies brings another challenge. NEMC has been imposing concurrently both environmental administrative orders and AMP.<sup>155</sup> Corporate polluters have opted to comply with one of them, namely either the environmental administrative order or monetary sanction. In most cases, they have decided to pay AMP than comply with environmental administrative orders, which are more expensive.<sup>156</sup> The impact of this practice is that the environment remains to be damaged.

Further, the issuance of environmental administrative orders and penalties by enforcement officers has been tainted with irregularities. It has been reported that some of the regulated facilities were served with those orders and fines without an inspection report.<sup>157</sup> On other occasions, they were not involved in the investigation process.<sup>158</sup> The unclear formulas for calculating fines, double punishment as well as frivolous and

<sup>144</sup> Legal and Human Rights Centre, *Tanzania Human Rights Report* (LHRC Publishers 2010) 214

<sup>145</sup> Mtavangu (n 32) 261

<sup>146</sup> *ibid* 264 and Mapunda (n 65) 156, 176

<sup>147</sup> URT (n 141) 19

<sup>148</sup> Hans Merket and Elise Foubert, 'Dissecting the Social License to Operate: Local Community Perceptions of Industrial Mining in Northwest Tanzania' (IPI 2019) 16

<sup>149</sup> The Government of Tanzania owns 37 percent of the shares of Williamson Diamond Mines Limited and 16 percent of the shares at the NMG under the consortium known as Twiga Mineral Corporation

<sup>150</sup> Mtavangu (n 32) 276

<sup>151</sup> Legal and Human Rights Centre, *Tanzania Human Rights Report* (LHRC Publishers 2012) 212

<sup>152</sup> Mtavangu (n 32) 282

<sup>153</sup> URT (n 141) 51

<sup>154</sup> Mtavangu (n 32) 279

<sup>155</sup> United Republic of Tanzania (URT) and National Audit Office of Tanzania (NAOT), 'A Performance Audit on the Enforcement of Environmental Control Systems in the Mining Sector in Tanzania. VP's Office Division of Environment and National Environmental Management Council. A Report of the Controller and Auditor General (CAG) of the United Republic of Tanzania' March 2015, 30

<sup>156</sup> Mtavangu (n 32) 315

<sup>157</sup> URT and NAOT (n 155) 50

<sup>158</sup> *ibid*

unjustifiable penalties have been also noted as among the irregularities.<sup>159</sup>

Failure to link environmental administrative measures with the other judicial enforcement mechanisms is another challenge. As noted above, most corporate polluters do not comply with environmental orders. Similarly, corporate defaulters who commit serious environmental crimes are not taken before the courts of law by environmental enforcers.<sup>160</sup> This is done despite the fact that the law empowers the Director General of NEMC and environmental inspectors to enforce an order arising from the compounding of environmental offence the same as other decrees of the courts.<sup>161</sup> Non-institution of a criminal or civil lawsuit against mining companies even in a situation where there is considerable damage to the environment reduces to a great extent the deterrent effect of liability rules.<sup>162</sup>

Likewise, the mining industry in Tanzania, especially large-scale mining is predominated by giant companies known all over the world, for instance, Barrick, AngloGold and Petra Diamonds, to mention just a few. These companies have been associated with the commission of most of the environmental crimes in the country. These entities are well financially to the extent that they can pay any amount of AMP that might be imposed by environmental enforcement agencies. Any fine regardless of the amount may be considered by them as a peanut compared to the financial capital they possess. Moreover, they have political clout and influential power even to the host Governments in the developing countries.<sup>163</sup> Therefore, it becomes very difficult sometimes to regulate them via environmental administrative orders and sanctions. Administrative enforcement against corporate mining is said to have many loopholes in corporate liability for environmental crimes.<sup>164</sup>

## CONCLUSION AND RECOMMENDATIONS

This article aimed at examining the efficacy of environmental administrative orders and sanctions in regulating corporate environmental crimes in the mining areas in Tanzania. The article noted that environmental administrative measures are dominant techniques for regulating corporate environmental crimes in the country. Despite their usefulness, they have not played a significant role in regulating environmental crimes, especially in mining areas. As such, they should only be supplementing rather than supplanting other judicial environmental compliance and enforcement modes.

Repetitive commission of environmental crimes by mining companies that have been previously served with environmental administrative orders and sanctions indicate that those measures do not have a deterrent effect. As has been noted in this article, compliance with environmental administrative measures, especially by the giant mining companies has been lukewarm. This explains why sometimes it is argued that environmental administrative orders and sanctions encourage the continuation of pollution committed by bodies corporate in Tanzania.<sup>165</sup> This problem may partly be explained in terms of the design and application of environmental orders and penal sanctions.

On this ground, there is a need for amalgamating various techniques used in regulating corporate environmental crimes. Environmental enforcement agencies should combine environmental administrative measures with other judicial mechanisms such as civil and criminal liability. The latter technique is argued to have a more deterrent effect in regulating corporate environmental crimes. Apart from that the Government is called upon to strengthen the national environmental legal framework as well as institutions responsible for the enforcement of the environmental laws in the country. This can be possible only where there is an unfettered Government's political will and altruism in environmental matters.

<sup>159</sup> *ibid*

<sup>160</sup> Mapunda (n 65) 156, 178 and Mhini (n 2) 13

<sup>161</sup> EMA s 194

<sup>162</sup> European Union (n 61) 23

<sup>163</sup> Mtavangu (n 32) 46

<sup>164</sup> Morgera (n 19) 40

<sup>165</sup> URT and NAOT (n 155) 66

Since there is no specific law governing environmental administrative orders and sanctions, it is high time for Tanzania to borrow a leaf from other jurisdictions which have the said legislation. Having in place such a kind of law will enable understanding of the type of environmental offences or crimes that can be dealt with administratively by environmental enforcement functionaries. This is because not all environmental crimes may be regulated administratively by using environmental orders or sanctions. Grave environmental crimes aptly to be regulated through criminal law and its machinery. In other words, environmental administrative regulation has to come into play when a mining company, for instance, defaults to comply with the requirements stipulated in the permit or other minor environmental offences.

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