BEYOND ECOCIDE: EXTRATERRITORIAL OBLIGATIONS OF DUE DILIGENCE AS AN ALTERNATIVE TO ADDRESS TRANSNATIONAL ENVIRONMENTAL DAMAGES?

By Anna Carolina Canestraro[*] and Túlio Felippe Xavier Januário[**]

Abstract

The aim of the present essay is to analyse whether extraterritorial obligations of due diligence in environmental matters could be an effective alternative when dealing with the phenomenon of the 'relocation of dangerous companies'. In other words, since environmental damages caused outside a state of war are still not considered international crimes and an eventual inclusion of ecocide in this list faces serious difficulties, we will explore if and to what extent due diligence procedures imposed by the home state have the potential to achieve the intended purposes of penalties applied to international crimes.

1 Introduction

The regulation of activities that may affect directly or indirectly the environment and the prevention of their potential damages are undeniably in the current agenda of national and supranational legal systems. These facts became even clearer after the forest fires in the Amazon Rainforest in 2019[1], whose effects crossed borders of Brazil and relighted the discussions about the infectivity of national policies and the possible need of interference from International Courts.

However, if on the one hand the efforts of some countries to reinforce their preventive-regulatory framework on environmental matters are visible, on the other, they go against the economic interests of some corporations, which, even though having their head offices in developed countries, decide to invest in subsidiaries in developing ones, aiming to escape from higher standards concerning human rights and environmental

[*] PhD Student in Criminal Procedure at the University of São Paulo - USP, M.Sc. in Law by the University of Coimbra, with a research internship of the 'ERASMUS+' Program at the Georg-August-Universität Göttingen. Had Graduate Studies in Economic Criminal Law and Crime's Theory at the University of Castilla-La Mancha, Graduate Studies in Compliance and Criminal Law at IDPEE – Coimbra and Graduate Studies in Criminal Procedural Law at IBCCRIM/IDPEE – Coimbra. Holds a Bachelor´s Degree in Law by the Universidade Presbiteriana Mackenzie. Is currently a Lawyer.

[**] PhD Student in Law at the University of Coimbra, with a fellowship from the *Fundação para a Ciência e a Tecnologia – FCT*, M.Sc. in Law by the University of Coimbra, with a research internship of the 'ERASMUS+' Program at the Georg-August-Universität Göttingen. Had Graduate Studies in Economic Criminal Law and Crime's Theory at the University of Castilla-La Mancha, Graduate Studies in Compliance and Criminal Law at IDPEE – Coimbra and Graduate Studies in Criminal Law – General Part at IBCCRIM/IDPEE – Coimbra. Holds a Bachelor´s Degree in Law by the Universidade Estadual Paulista – UNESP.

[1] See Leonardo Simões Agapito, Matheus de Alencar e Miranda and Túlio Felippe Xavier Januário, 'A Political Agenda in Conflict with Environmental Protection: A Critical Policy Essay from Brazil' (2022) International Criminology <https://doi.org/10.1007/s43576-021-00041-y> accessed 10 February 2022.

protection, consequently reducing production costs. In other words, as pointed by Gert Vermeulen, in the current globalized world, dislocation of polluting or environmentally substandard activities to regions with lower and fewer standards is an unethical, but logical choice to transnational corporations.[2]

The seriousness of this situation is compounded if we observe that its eventual confrontation by the International Criminal Court (ICC) is hampered by the inexistence of international criminal liability of corporations and the current lack of international responsibility for environmental damages when disassociated from a state of war. Moreover, fundamental changes in the issues mentioned above – such as the inclusion of ecocide as the fifth international crime – still depend on major doctrinal discussions, besides facing resistance from states interested in attracting foreign investments.

That being said and seeking to identify more immediate – but not exclusive – alternatives to the increasing environmental issues, the aim of the present essay is to analyse to what extent extraterritorial application of due diligence obligations could help to face the phenomenon of 'relocation of dangerous companies'.[3] In other words, after a brief explanation of the obstacles encountered by international criminal law in the fight against environmental damages, we will analyse what we mean by due diligence obligations and how they are imposed by some legislations. At the end of the article, we

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[2] Gert Vermeulen, 'International Environmental Norms and Standards: Compliance and Enforcement. Promoting Extensive Territorial Jurisdiction, Corporate Chain Responsibility and Import Restrictions' (2016) 87(1) RIDP 37, 38. As an example of the various situations of extraterritorial environmental damage, we can mention the case *Vedanta v. Lungowe,* recently judged by the United Kingdom Supreme Court. The English company Vedanta Resources Plc was sued, under tort law, to fully repair damages caused by its subsidiary, Konkola Copper Mines Plc. It was alleged that the Nchanga Copper Mine in the Chingola District of Zambia was discharging 'toxic emissions into the watercourses used by exceptionally poor members of local rural farming communities for drinking, irrigation and other essential purposes'. See Samvel Varvastian and Felicity Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' (2020) 9 Transnational Environmental Law 323 and *Vedanta Resources Plc and Anor v. Lungowe and Ors* [2019] UKSC 20. Another notable case is that of Royal Dutch Shell, a parent company, and Shell Petroleum Development Company (SPDC), a Nigerian subsidiary, which were sentenced in the Netherlands by the Hague Court of Appeal for damages caused to four farmers by oil spills in Niger Delta. See *Oguru and others v. Royal Dutch Shell and others* (2021) GHDHA 1825. See also Wubeshet Tiruneh, 'Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell' (*EJIL: Talk!*, 19 February 2021) <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/> accessed 12 February 2022 and Lucas Roorda and Daniel Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6 BHRJ 368.

[3] This term refers to situations in which multinationals, mostly based in developed countries, invest abroad, attracted by very low or non-existent standards of protection of human and environmental rights, carrying out harmful activities in these places, which are often countries under development. See Ana Sofia Barros, *Multinacionais e a Deslocalização de Indústrias Perigosas: Ensaio sobre a Proteção dos Direitos Humanos perante o Dano Ambiental* (Coimbra Editora 2012) 16. For a comprehensive analysis of this issue and its possible solutions, see also Anabela Miranda Rodrigues, *Direito Penal Económico: Uma Política Criminal na Era Compliance* (2nd edn, Almedina 2020) 123-129.

will seek to demonstrate which purposes of environmental crimes persecution through international criminal law can be achieved applying these instruments, and also their insufficiencies and difficulties to overcome.

2 On the Difficulties of Facing Environmental Damages under International Criminal Law

Due to the insufficiency of the current main instruments of environmental protection, several specialists sustain the need of a new and autonomous international crime, recognizing the environment as a fundamental interest to the international community. If included in the Rome Statute, the so-called 'ecocide' would be the fifth international crime, alongside with genocide, crimes against humanity, war crimes and aggression.[4]

According to Rosario de Vicente Martínez, environmental damages gather all the conditions observed in crimes that threaten the peace, security and well-being of the world, what would justify their inclusion in the catalog of international crimes. Besides that, from the moment that a multinational corporation endangers the environment, the situation is no longer exclusively local but becomes of interest of the international sphere.[5]

Highlighting the length of this discussion, the International Association of Penal Law already stated the need to recognize serious environmental damages as international crimes in 1994, in its XVth International Congress on Criminal Law.[6]

However, this eventual criminalization faces some difficulties that must be pointed out. A first obstacle is the lack of consensus on the definition of 'ecocide'. Even though there is not so much divergence about the need to protect the environment from huge damages, the controversies are in how to do it. As presented by Liemertje Sieders, the definitions differ from proposal to proposal.[7] For example, in the 'Higgins Proposal',

[4] Rosario de Vicente Martínez, 'Hacia un Derecho Penal Internacional Medioambiental: Catástrofes Ambientales y "Ecocidio"' in Eduardo Demetrio Crespo and Adán Nieto Martín (dirs), Manuel Maroto Calatayud and Maria Pilar Marco Francia (coords), *Derecho Penal Económico y Derechos Humanos* (Tirant lo Blanch 2018) 260ff.

[5] Ibid 251 and 264.

[6] '23. Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions'. See José Luis de la Cuesta, Isidoro Blanco and Miren Odriozola (eds), *Resolutions of the Congresses of the International Association of Penal Law (1926 – 2019)* (Maklu 2020) 137.

[7] According to the Author, 'the absence of a uniform definition of the crime is a thorn in ecocide's foot. With few, if any, authoritative normative instruments to provide guidance, ecocide remains a malleable concept, bearing seemingly as many definitions as there are authors writing about it'. Although some might say that 'the lack of a common definition of ecocide does not affect the emerging common notion that planet safety is a matter of undeniable concern', others 'argue that the lack of uniformity around the definition of the crime constitutes an important obstacle to its recognition and criminalisation, whether in the Rome Statute or elsewhere, as it denotes an uncertainty and lack of consensus that does not sit well with international law. Moreover, it risks flagrantly conflicting with the nullum crimen sine lege

ecocide is understood as 'the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'.[8] The 'End Ecocide on Earth Amendments' defines it as causing 'significant and durable damage to: (a) any part or system of the global commons, or (b) an ecosystem function relied upon by any human population or sub population'.[9] The 'Neyret Ecocide Convention' presents a list of intentional acts that can configure ecocide, all on the condition of being 'committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet'.[10] Finally, for the 'Stop Ecocide Foundation', it 'means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'.[11]

Besides that, the political obstacles on recognizing environmental damages as international crimes are also undeniable.[12] As pointed by Sieders, some of the most polluting states are not States Parties to the Rome Statute and the ones that are probably won't sign any amendments to include ecocide. In other words, approval by State Parties is a major challenge. Once we are in a very polarized scenario, it is very unlikely that two-thirds of State Parties will support this idea in short-term.[13]

Last but not least, we cannot forget that transnational crimes generally involve organizational and financial resources of economic actors.[14] In the specific case of environmental crimes committed overseas, the involvement of huge corporations is a general rule, since these aggressions are majorly linked to the industrial activity itself.[15]

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principle'. For a comprehensive analysis of this issue, see Liemertje Julia Sieders, 'The Battle of Realities: The Case for and Against the Inclusion of 'Ecocide' in the ICC Rome Statute' (2020) 91(1) RIDP 29, 36ff.

[8] On this concept, see Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime Law Soc Change 251, 257ff <https://doi.org/10.1007/s10611-013-9413-6> accessed 21 July 2021.

[9] See 'Article 8 *ter*' at: End Ecocide on Earth, 'Ecocide Amendments Proposal' (2016) <https://www.endecocide.org/en/amending-the-rome-statute/> accessed 22 July 2021.

[10] Laurent Neyret (sup), *From Ecocrimes to Ecocide: Protecting the Environment through Criminal Law* <https://iuc.hr/file/1113> accessed 22 July 2021.

[11] Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (2021) <https://www.stopecocide.earth/legal-definition> accessed 10 February 2022.

[12] De Vicente Martínez (n 4) 254-255.

[13] Sieders (n 7) 45-46. See also Mark A. Drumbl, 'International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?' (2000) 6(2) ILSA Journal of International & Comparative Law, 323ff <https://nsuworks.nova.edu/ilsajournal/vol6/iss2/5> accessed 22 July 2021.

[14] Kai Ambos, *Direito Penal Internacional Econômico: Fundamentos da Responsabilidade Penal Internacional das Empresas* (Livraria do Advogado 2019) 24.

[15] De Vicente Martínez (n 4) 267. See also Jacqueline Hellman, 'The Fifth Crime Under International Criminal Law: Ecocide?' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 277; Raphael Boldt, 'Ecocídio e Responsabilidade Empresarial nos Crimes Ambientais', (2021) 29(175) RBCC 91, 100-103.

However, despite the precedents of the Nuremberg Courts[16] and on the contrary of the AIDP Recommendations from its XIIth and XVth International Congresses,[17] currently no international criminal court or tribunals allows the criminal responsibility of corporations, since international treaties bind only states.[18]

Of course, it is possible to circumvent some of these difficulties by proposing a new treaty and creating a new court with jurisdiction to judge only international environmental crimes. In favor of this solution, we highlight that, even though ICC is an internationally recognized independent body, it is sometimes criticized for being biased depending on the political interests at stake. This could be the case of ecocide, putting in check the perception of independence that it boasts.[19] Besides that, while the incorporation of ecocide into the Rome Statute would avoid the complications of starting a new convention and creating a new court, with all the economic implications of it, the ICC judges and prosecutors are not specialized in environmental cases.[20]

However, the approval of a new treaty and the creation of a new infrastructure, which could minimally attend to the needs imposed by complex transnational environmental crimes, would also take a huge amount of time,[21] and time, as we can see, is something urgent when protecting the environment.

That being said, we believe that, despite the importance of facing the most serious environmental damages through international criminal law, we also need some alternatives that could be taken more immediately in the prevention of transnational environmental damages. Could extraterritorial obligations of due diligence play a relevant role in this toolbox? To what extent? What would be their limitations?

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[16] For a comprehensive analysis on these precedents, with special mention of the cases *Flick, Krupp, I.G. Farben and Zyklon-B*, but also on the precedents from the British Military Trials of Hong Kong, see Ambos (n 14) 28ff.

[17] It is important to highlight that among the Recommendations of the XIIth International Congress on Penal Law (Hamburg 1979), AIDP disposed about the need of penal, civil or administrative liability of corporations for environmental crimes (Section II, Recommendation 6) and that serious and intentional environmental aggressions should be faced by international criminal law (Section II, Recommendation 13). These Recommendations were reinforced in 1994 (Rio de Janeiro), at the XVth Congress (Section I). See De la Cuesta, Blanco and Odriozola (n 6) 89-90, 133ff.

[18] Ambos (n 14) 34-35.

[19] Sieders (n 7) 43. See also Payal Patel, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?' (2016) 14(2) Loyola University Chicago International Law Review 175, 176ff <https://lawecommons.luc.edu/lucilr/vol14/iss2/5> accessed 22 July 2021.

[20] Sieders (n 7) 43 and Drumbl (n 13) 327.

[21] As pointed by Rosario de Vicente Martínez, international prosecution of environmental crimes could be achieved by two means: I) expanding ICC's competence to cover environmental crimes; II) creating an International Court for the Environment. Both solutions have pros and cons. However, according to the author, the first one is preferable because ICC already have a consolidated infrastructure. Besides that, it would avoid the multiplication of international jurisdictions (and the necessary time to consolidate them). For more details, see De Vicente Martínez (n 4) 274.

3 Extraterritorial Due Diligence Obligations

According to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, due diligence is understood as 'the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems'. In other words, is the procedure applied by companies, often with the support of artificial intelligence or other technologies, to check whether a business partner would pose risks to the company itself.

In order to do so, when hiring employees, entering into contracts with third parties or carrying out mergers and acquisitions, corporations accomplish an investigation into the third party, analyzing social media, operations and, especially, the existence of legal proceedings it may be involved in. It also analyzes all publicly available information about that particular company and, sometimes, even requests clarification from the legal department, which will respond as satisfactorily as possible, but, of course, respecting professional and commercial secrecy.

Usually, due diligence is conducted with a particular focus on reputational risks, but that should not be all. Indeed, these procedures must go beyond, also addressing risks to human rights, which may involve 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed'.[22]

When talking about human rights' protection[23], in addition to a domestic due diligence, it is essential to draw attention to the importance of carrying out also an extraterritorial due diligence[24]. And this is because, for example, in terms of mineral extraction practices or even in the matter of hiring labor, there is sometimes fiscal and economic incentives for hiring companies in foreign territory. In fact, there are multinational companies that develop international supply chains to avoid responsibility for their harmful impacts on

[22] OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 34 <http://dx.doi.org/10.1787/9789264115415-en> accessed 02 August 2021.

[23] 'It is clear that environmental damage is a human rights issue. It has long been recognized that environmental damage can have both direct and indirect impacts on the enjoyment of a wide range of human rights and, in some circumstances, damage to the environment can be a violation of human rights laws. Since all human rights are universal, indivisible, interdependent, and interrelated, a healthy, functioning environment, therefore, is a necessary basis from which most other human rights are possible, including the human rights to development, food, water, health, and even the right to life itself'. See Karen Hulme, 'Using a Framework of Human Rights and Transitional Justice for Post-Conflict Environmental Protection and Remediation' in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP 2017) 123.

[24] According to the 'Principle 14' of the UN Rio Declaration on Environment and Development, 'States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'. See United Nations, 'Rio Declaration on Environment and Development' (1992).

local communities, specially by hiding behind the 'corporate veil' and exploiting weak and poorly enforced domestic regulations.[25]

That being said, it is clear that domestic due diligence is not enough to prevent or discourage these highly harmful and dangerous behaviors. To avoid the facilitation, permission or even encouragement of these occurrences at the host State, procedures that overcome the barriers of the home State are necessary.

In this sense, at the international level, the United Nations (UN) Human Rights Council approved in June 2011 the Guiding Principles on Business and Human Rights, written by Professor John Ruggie. With the pillars *protect, respect* and *remedy,* the document also provided some principles, which were divided into 'foundational' and 'operational' principles. They were conceived precisely so that companies and states really commit to their implementation and deepen the debate on companies' human rights obligations.[26]

The foundational principle n. 15 stands out, expressly stating that in order to fulfill their responsibility to respect human rights, companies must have appropriate policies and procedures, depending on their size and circumstances. And among the policies and procedures, it is suggested the conduction of 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights'.

Regarding the parameters, the document states that the due diligence must include an assessment of the actual (already occurred and must be repaired) and potential (related to mitigation and prevention) impacts of the activities on human rights, besides integrating and acting upon the findings (foundational principle 17).

Thus, human rights due diligence, which has to be continuous and vary in complexity depending on the size, nature, risks and context of business operations, must cover the negative impacts on human rights that were caused by or had the contribution of the company through its activities, or that were directly related to its operations, products or services provided by its commercial relations.

In addition, the document states that due diligence procedures must:

> (Principle 18) Draw on internal and/or independent external human rights expertise and involve meaningful consultation with potentially affected groups and other

[25] Daniel Sharma and Franz D. Kaps, 'Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia' (*DLA Piper,* 26 March 2021) <https://www.dlapiper.com/en/japan/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/> accessed 23 July 2021.

[26] UN. Humans Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (United Nations 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 2 August 2021.

relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation; (…)

(Principle 19) (…) integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(Principle 20) (…) track the effectiveness of their response. (…)

(Principle 29) Provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected.[27]

Therefore, even though it is not very clear so far to what extent the legal entity and its directors can in fact be held responsible, the principles make it clear that they have an obligation to protect human rights.

Following the same idea, OECD presents in its 'Guidelines for Multinational Enterprises', human rights' due diligence recommendations.[28] Also within the European Union there are some provisions that mentions the need of human rights' due diligence, as is the case, for example, of the Regulation 2017/821, which establishes due diligence obligations in the supply chain for Union importers of tin, tantalum and tungsten, ores and gold originating from conflict-affected and high-risk areas.[29] It is also important to mention the EU Directive 2014/95, about disclosure of non-financial information and information about the diversity, which says:

In order to enhance the consistency and comparability of non-financial information disclosed throughout the Union, certain large undertakings should prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters and should be included in the management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. [30]

The main problem here, however, is that most of these guidelines still leave it up to the States to establish procedures of extraterritorial due diligence and to sanction non-

[27] Ibid.

[28] OECD (n 22) 23.

[29] Regulation of the European Parliament and of the Council (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.

[30] Directive of the European Parliament and of the Council 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ 330/1.

compliance with due diligence obligations. Also, many of them are not mandatory, having, in fact, a further moral than a legal reach.[31]

That being said, according to Vermeulen, the possibility of the states commanding companies or establishments headquartered within their territory to require from their subcontractors and suppliers located abroad to comply with higher standards and norms is a major help on protecting the environment. It has the potential to prevent or punish deliberate transference of criminal practices or environmentally harmful to states with lower or otherwise more lenient norms and standards.[32]

Although domestic legislations that set out this real extraterritorial obligation and, more importantly, penalties for not carrying out human rights due diligence, are not that numerous, it seems that the scenario is fortunately changing.

An important example is France, which has adopted in 2017 the 'Business Supervision Law'.[33] It enforces companies with more than 5,000 employees (directly or indirectly) with headquarters in French territory or companies with at least 10,000 employees considering their direct or indirect subsidiaries headquartered in France *or abroad,* to implement a surveillance plan, which must include reasonable surveillance measures to identify risks and prevent serious violations against human rights, fundamental freedoms, human health and safety, and environment, arising from the activities of the company and the companies it controls. The Law also established that companies that fail to comply with their due diligence obligations are subject to sanctions and are liable for damages caused by an improperly prepared vigilance plan, even if these damages are directly caused by third parties.

Also, The Netherlands adopted in 2019 the 'Child Labor Due Diligence Act'[34], which will become effective by 2022 and it will apply to all companies that sell or supply goods or services to Dutch consumers, regardless of where the company is based or registered. The Act also imposes significant administrative fines, criminal sanctions for non-compliance and a reporting obligation to the regulatory body. And, although this Act 'only' mentions human rights violations and not environmental harm of companies' supply chains, it is a really important step for human rights' extraterritorial due diligence.

Finally, more recently, European Parliament presented in March 2021, a resolution with recommendations to the Commission on corporate due diligence and corporate accountability, which considers that, to enforce due diligence, Member States should set

[31] Ambos (n 14) 40-41.

[32] Vermeulen (n 2) 50.

[33] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[34] Eerste Kamer, vergaderjaar 2016–2017, 34 506, A, Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid).

up or designate national authorities to share best practices, carry out investigations, supervise and impose sanctions[35]. In addition, the Resolution also mentions that future legislation on due diligence and corporate responsibility for European companies must have extraterritorial effects, which, of course, contributes to achieving the objectives of the Union's policy.

Therefore, given the importance of extraterritorial due diligence in relation to human rights risks and the new global perspective that has been given to this matter, it is important now to analyze the pros and cons of preventing environmental damage through these extraterritorial obligations of due diligence.

4 On the Pros and Cons of Preventing Environmental Damages through Due Diligence Obligations

What is the purpose of international criminal law? What do we expect when we define an action or omission as an 'international crime' and, also, what to expect from the penalty applied to the ones who commit it? Exploring possible answers to these questions is crucial to ascertain the extent to which extraterritorial due diligence obligations are capable of meeting the purposes of international criminal law and, more specifically, of eventually replacing the inclusion of ecocide as an international crime.

International criminal law is characterized by constituting a response by the international community to behaviors that most seriously affect its fundamental values.[36] It protects the peace, security and well-being of humanity against behaviors bearing an 'internationalizing element', that is, a context of systematic and massive exercise of violence.[37] International crimes thus differ from transnational crimes[38], because on the latter there is no direct liability under international law, nor can states use universal principle of jurisdiction to prosecute the offenders. However, transnational crimes affect the interests of more than one state, presenting a transnational element that justifies the existence of more than one jurisdiction over them and cooperation agreements between the affected states.[39]

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[35] Resolution of the European Parliament 2020/2129(INL) with recommendations to the Commission on corporate due diligence and corporate accountability [2021].

[36] Héctor Olasolo Alonso, *Derecho Internacional Penal, Justicia Transicional y Delitos Transnacionales: Dilemas Políticos y Normativos* (Tirant lo Blanch 2017) 50.

[37] Gerhard Werle and Florian Jessberger, *Tratado de Derecho Penal Internacional* (3 edn, Tirant lo Blanch 2017) 88-91.

[38] The so-called *treaty crimes* refer to 'provisions of national Law which have their origin in an obligation imposed by an international treaty'. Their purpose is 'effectively fighting and prosecuting cross border criminality'. See, with multiple quotations, Helmut Satzger, *International and European Criminal Law* (C.H. Beck, Hart and Nomos 2012) 184.

[39] Robert J. Currie and Joseph Rickhof, *International & Transnational Criminal Law* (2nd edn, Irwin Law 2013) 19-22. Also on this distinction, see Robert Cryer, 'International Criminal Law' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 521-522.

As well as in national legal systems, international criminal law also accepts as one of the functions of the penalty the idea of (I) *retribution*. This fact became even clearer after the sentences of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). For example, in the case *Prosecutor v. Aleksovsk*i, it was understood that by retribution one must understand as indignation by the international community with the facts.[40]

However, it is interesting to highlight that one of the alleged positive aspects of the retributive purpose, which is the proportionality between the crime and the punishment, is sometimes contested in international criminal law. Therefore, in face of major atrocities, would it be feasible to apply proportionate measures?[41]

Despite some criticism related to its utilitarian character, (II) *deterrence* is also one of the most consolidated purposes of the punishment. Several precedents from the ICTY, such as *Prosecutor v. Erdemovic*, *Prosecutor v. Tadic* and *Prosecutor v. Furundzija*, expressly mentions it. Besides that, the Preamble of the Rome Statute clearly foresees that one of its purposes is the prevention of international crimes.[42]

The application of negative and positive special preventions (incapacitation and rehabilitation) in the context of international crimes faces some difficulties. Even if recognizing that the prosecution of international crimes has a general deterrent effect, it is important to point out that due to the unique characteristics of international crimes, and their perpetrators, the resocialization may be less accentuated. That is, criminal acts may have been committed in accordance with the system in which they are inserted, demanding not only punishment of the perpetrator, but also an institutional reform.[43] Against these critics, Werle and Jessberger point out that this argument ends up disregarding the possibility of personal continuation in state institutions after an eventual political transition, which may include putting themselves at the service of other regimes that violate human rights, which should be avoided.[44]

In any case, what seems clear to us is that both retributive and preventive ideals undergo a certain re-signification when analysed from the point of view of international criminal law. As pointed by Ambos, 'the tribunals do not seem to understand the importance of retribution and deterrence as a pure demand of the international community for revenge

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[40] Carlos Eduardo Adriano Japiassú, *Direito Penal Internacional* (Editora Tirant lo Blanch 2019) 27-30. See also *Prosecutor v. Zlatko Aleksovski* [2000] ICTY IT-95-14/1-A [185] and William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 555ff.

[41] About this discussion, see Japiassú (n 40) 29ff.

[42] Ibid 31ff. See also *Prosecutor v. Drazen Erdemovic* [1996] ICTY IT-96-22-T [58], *Prosecutor v. Duško Tadic* [2000] ICTY IT-94-1-A and IT-94-1-A [48] and *Prosecutor v. Anto Furundzija* [1998] ICTY IT-95-17/1-T [288].

[43] For a comprehensive analysis of this issue, see Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (OUP 2013) 68-70 and Naomi Roht-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (OUP 1995) 14ff. See also Japiassú (n 39) 33-34.

[44] Werle and Jessberger (n 37) 96.

but rather as an expression of its determination not to leave these crimes unpunished'[45]. According to the author, this can demonstrate a certain proximity to an 'integrative prevention'. In fact, due to the limitations faced by traditional theories in this scope, he sees as more convincing those broader and more holistic perspectives that seek to establish and consolidate a legal order of common values, reaching didactic and educational functions[46].

These didactic and educational purposes could be inserted in a broader finality, which is the (III) *communication between the agents, victims and society,* to understand the nature and circumstances of the crime. However, one possible objection to this goal is pointed by Japiassú, who explains that international criminal law is not a part of the community which it aims to educate and communicate with. Because of that, it would not be able to achieve it.[47]

Despite the alleged difficulties on their effective participation on the trials,[48] (IV) *providing justice for the victims* is also an important function of the international criminal law sanctions. Even tough is undeniably a hard task for the Court, is expressly determined to go 'beyond mere imprisonment or pecuniary sanctions, to 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[49]

Some might also say that international trials are an important mechanism of (V) *promoting the historical record of the event,* that is, of assisting the creation of the historical narrative of the facts. As explained by Werle and Jessberger, since those directly involved in repressive systems tend to distort the truth about human rights violations that occurred in a given period of time, the judicial investigation of these facts and the consequent convictions of those responsible can be effective means to contradict the denials presented by them and represent an official recognition of the facts and suffering experienced by the victims[50].

According to Japiassú, even though this purpose was already pursued by some precedents of international courts[51], there are doubts about whether a trial for international crimes would be the appropriate occasion to seek the historical record of periods marked by great political differences, especially if we consider that the

[45] Ambos (n 43) 70.
[46] Ibid 70-71. See also Werle and Jessberger (n 37) 94-95.
[47] Japiassú (n 40) 34-35.
[48] Ibid 35-36.
[49] Ambos (n 43) 72 and Article 75 (2) ICC Statute. For a comprehensive analysis on the victim reparation issue, see M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013) 692ff.
[50] Werle and Jessberger (n 37) 96.
[51] See, for example, *Prosecutor v. Krstic* [2004] ICTY IT-98-33-A.

contextual element in which the conducts were practiced will not always be effectively understood in the context of a criminal judgment[52].

In any case, this goal is directly related to another that is sometimes invoked in international criminal trials, especially in transitional justice contexts: (VI) *the reconciliation.* Briefly, transitional justice encompasses mechanisms that seek to promote justice in societies marked by social, political or ethnical conflicts. Therefore, they presuppose a project of reconciliation between the actors and groups involved in order to implement the ideals of justice and peace[53]. Seeking to materialize the ideal of *no peace without justice*, Latin American experience seems to make clear the inclusion of reconciliation as one of the possible purposes to be pursued by punishment.[54]

Regardless of the numerous controversies about which of these purposes should in fact be pursued by international criminal law, we must ask ourselves whether any of them can, in fact, be achieved by imposing extraterritorial due diligence obligations on environmental matters.

In our view, the purpose of prevention can indeed be enhanced. The fact that major environmental crimes are generally committed in the scope of big transnational corporations certainly increases the difficulties on preventing, investigating and prosecuting these offences.[55] To deal with these cases, an undeniable need for integration

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[52] Japiassú (n 40) 36. Even because, 'a situation of conflict and/or authoritarian regimes cannot be marked by simplification and a linear narrative in order to enable a better comprehension of it, at risk of not offering real solutions to it' (translated by the Authors). See Renata da Silva Athayde Barbosa, 'Anistia no Estado de Direito: entre Justiça de Transição e Direito Penal Internacional' in Francisco Figueroa, Eduardo Saad-Diniz, Manuela Parra, Ayelén Trindade and Hernán Kleiman (eds), *RIDP libri 04: Alternativas al Sistema de Justicia Criminal Latinoamericano* (Maklu 2019) 246.

[53] Marcos Alexandre Coelho Zilli and Maria Thereza Rocha de Assis Moura, (2008) 'A Justiça de Transição na América Latina', 16(187) Boletim IBCCRIM 10, 10, Kai Ambos, 'El Marco Jurídico de la Justicia de Transición' in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Justicia de Transición: Informes de América Latina, Alemania y España* (Konrad-Adenauer-Stiftung 2009) 23-28, UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of The Secretary-General' (2004), 8 <https://digitallibrary.un.org/record/527647> accessed 27 July 2021. According to Miller, 'Transitional justice as both literature and practice offers more than just a set of neutral instruments for the achievement of the goals of justice, truth and reconciliation. It also serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity. Ultimately, transitional justice is a definitional project, explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished and radically differentiating a new regime in relation to what actions were taken by its predecessor'. See Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice', (2008) 2(3) The International Journal of Transitional Justice 266, 266-267 <https://doi.org/10.1093/ijtj/ijn022> accessed 27 July 2021.

[54] Japiassú (n 40) 36-38.

[55] For a detailed analysis on the relationship between corporations and environmental crimes, with an especial focus on the relevance that could be achieved by compliance programs, see Leonardo Simões Agapito, Matheus de Alencar e Miranda and Túlio Felippe Xavier Januário, 'A Ganância Econômica e os Crimes Ambientais: a Sustentabilidade como Parâmetro para o Risco Permitido no Direito Penal Ambiental' in Francisco Figueroa, Eduardo Saad-Diniz, Manuela Parra, Ayelén Trindade and Hernán Kleiman (eds), *RIDP libri 04: Alternativas al Sistema de Justicia Criminal Latinoamericano* (Maklu 2019) 311ff.

between rules and authorities of different countries is observed. That being said, the collaboration of private entities themselves, with their financial and technological resources, can be of great value in preventing environmental damage.

Furthermore, if the host state has no interest or conditions to effectively prevent or prosecute environmental crimes, compliance and due diligence imposed by the home state may be one of the only tools to enforce them. Even because, as pointed by Katharina Haider, as promising as the commitments made in codes of conduct may sound, they run the risk of remaining a 'blunt sword' if they rely solely on corporate goodwill.[56]

In addition, the risk of contract terminations and loss of business partners due to environmental crimes could have a substantial *deterrence* effect, especially in terms of *incapacitation* (although not to the same extent and in the same terms as incarceration) and *rehabilitation*, since changes in the supplier's culture will be required.

Finally, if we consider an eventual imposition of publication of parts from the due diligence reports, these mechanisms could perhaps effectively collaborate with the historical reconstruction of the facts.

However, there are still many uncertainties and deficiencies to be addressed. Firstly, it seems very unlikely that we will be able to construct a linkage between due diligence and the purpose of *retribution*, such as the one pursued by the penalties applied by the ICC.[57] This issue has already been pointed out by Billis, who raised the question whether informal enforcement procedures (such as DPA's and NPA's) could achieve the symbolic function of criminal law to the same extent. The Author responds negatively to this question, especially considering the way in which these agreements are usually made, which is 'behind closed doors and between parties that can afford such a costly 'bail-out''. According to him, the fact of corporations cannot be jailed and their individual members are generally not affected financially or otherwise by the penalties, highlights the importance of symbolism and general prevention, which are put in the background by these agreements.[58]

In addition, do the legislations secure means to guarantee that the purposes of compliance measures, internal investigations, due diligence instruments and similar mechanisms have the unique purpose of 'corporate restabilization, smooth cooperation with the authorities, and compliance with the law, and will not be manipulated to

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[56] Katharina Haider, *Haftung von transnationalen Unternehmen und Staaten für Menschenrechtsverletzungen: Eine Untersuchung der Rechtsschutzmöglichkeiten am Maßstab des Völkerrechts, des Internationalen Zivilverfahrensrechts, des (Internationalen) Privatrechts, des Staatshaftungsrechts und des Strafrechts* (Nomos 2019) 41.

[57] Of course we cannot disregard the fact that the penalties applied in environmental matters, especially those imposed on large companies, also have their ability to fulfill their retributive and preventive purposes quite questioned. See Anna Carolina Canestraro and Túlio Felippe Xavier Januário, 'Acordo de Não Persecução Penal como Instrumento de Promoção de Programas de Compliance?' (2021) 29(344) Boletim IBCCRIM 23, 24-25.

[58] Emmanouil Billis, 'On the Limits of Informal Enforcement' (2019) 90(2) RIDP 369, 384.

become another 'crime-laundering tool'?', as questioned by Billis?[59] It seems to us that a negative answer to this question is inevitable, at least in most legal systems. Therefore, *leading by example* ends up being fundamental. Corporations with greater capacity and financial resources must develop and scientifically evaluate the standards of ethical behavior in the supply chain and in the contractual networks that they establish.[60]

Furthermore, even though the collaboration from the private parties has the potential to help circumventing institutional cooperation problems[61], a practical difficulty that is raised is related to the technical feasibility of conducting research related to due diligence. Would the legal systems of the host countries, with all the problems already pointed out, have reliable databases that allow the investigations? The response to this query will obviously vary according to the host country, but we can promptly infer that, in many cases, the available data will not be sufficient.

Finally, even though environmental damages are consubstantiated generally in actions and omissions that affect the environment per se, we shall not forget that these crimes affect also mankind (abstractly speaking) and local populations. That being said, we must wonder: in these informal enforcement mechanisms, is there space for compensation, restorative justice and other instruments orientated to the people affected by environmental disasters?

Presently, it seems to us that the analysed legislations do not allow this possibility, which does not necessarily mean that they are impossible to be achieved. As pointed out by Renata Barbosa, in case of environmental crimes, some exemplary forms of reparations can be quoted, such as: (I) *restitution,* as the restoration of a forest; (II) *compensation,* in cases where restoration is not possible (including the affected population as beneficiaries); (III) *satisfaction,* with pubic apologies, acknowledgement of the facts and acceptance of responsibilities and (IV) *guarantees of non-repetition,* such as demonstrations of concrete changes on the corporation policies.[62]

With these possibilities in mind and considering that populations affected by environmental crimes are often and unduly obliterated in these cases, we must wonder about how to integrate compliance and due diligence with compensation (not just financial[63]) of the victims, what would make it feasible to reach also the purposes of

[59] Ibid 375.

[60] See Eduardo Saad-Diniz, *Ética Negocial e Compliance: Entre a Educação Executiva e a Interpretação Judicial* (Thomson Reuters Brasil 2019) 88.

[61] We cannot forget that in the case of multinational and transnational companies, there might exist multiple regulatory and enforcement authorities who claim jurisdiction to the case, creating a very complex landscape 'not designed to guarantee a harmonious institutional cooperation and a clear definition of the aims, scope, methods, and limits of (informal) crime control'. See Billis (n 58) 376.

[62] Renata da Silva Athayde Barbosa, 'Conflict and Environmental Harm: is there Enough (Criminal) Protection in Transitional Measures?' (2020) 91(1) RIDP 53, 59.

[63] As Eduardo Saad-Diniz explains, reparation as a simple financial compensation is unsatisfactory. 'Reparation, beyond financial compensation, must address a broader, deeper and more humanistic historical sense; reparation is reckoning, and, ultimately, the experimentation of new strategies for the

communication between the agents, victims and society, as well as *reconciliation* and *justice for the victims*.

5 Conclusion

As demonstrated throughout the article, the relocation of environmentally dangerous companies, especially to countries where regulatory standards for environmental protection are less stringent, is, unfortunately, a common phenomenon today, which represents a serious risk to the environment.

For this reason, the inclusion of 'ecocide' as a new international crime is a solution that has been increasingly discussed and defended by some scholars. However, despite being very defensible for numerous reasons, this proposal also encounters undeniable obstacles, such as the difficulties in defining what we should understand by 'ecocide', the lack of criminal liability of legal entities in international law and the strong political objections faced by supporters of the creation of this crime. And even if we consider the possibility of approving a new treaty and creating a new court with specific jurisdiction for these crimes, this would be a solution that would require an excessive amount of time.

That being said and without disregarding the importance of including ecocide as an international crime, the question we sought to answer was whether and to what extent extraterritorial due diligence obligations could be considered a solution, albeit partial, but more immediate, for transnational damage prevention.

As noted in topic 3, extraterritorial due diligence obligations are not only being encouraged by OECD and UN Guidelines and EU normative, but also beginning to be imposed by domestic legislations in some countries, such as France and the Netherlands.

These obligations have major potential to help prevent extraterritorial environmental damages, either because of the greater technical and financial capacity of multinational companies to promote the necessary diligences in this complex sector, or because of the changes in the culture of the supply chain that they can generate.

However, it is certain that there are still several risks, difficulties and insufficiencies in these procedures, which still require further reflection and must be overcome so that they fully reach their goals.

For this reason and in conclusion, it seems to us that extraterritorial due diligence obligations have the potential to be an important mechanism in the 'toolbox' of environmental crimes prevention. However, they are not enough, since they do not fulfil all the expected purposes imposed in the context of international crimes, and we are far from solving some of their remaining deficiencies.

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fulfillment of historical memory' (translated by the authors). See: Eduardo Saad-Diniz, 'Justiça de Transição Corporativa: a Nova Geração de Estudos Transicionais' (2020) 28(167) RBCC 71, 103-104.

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