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THE GLOBAL IMPACT OF EXERCISING EXTRATERRITORIAL JURISDICTION OVER TRANSNATIONAL CORPORATE ENVIRONMENTAL CRIMES IN EXTRACTIVE INDUSTRIES

Abstract. This article relates to contemporary topic, deals with subsoil use crimes and explores this as a subtype of environmental crimes committed by transnational corporations discussing the importance of choosing proper jurisdiction, and examines crimes in the field of subsoil use as a specific component of environmental crimes committed by transnational corporations involved in resource extraction and mining across the world. Their environmental harm, contribution to poverty and unfair utilization of resources is driven by greed and lure, and has long been heavily protected by legal jurisdictional cover-ups, which are now under scrutiny due to the globally evolving trend of exercising extraterritorial jurisdiction over certain torts committed by extractive industry operators.

Appropriate criminological theories and studies of general and green criminology along with environmental justice are reviewed and reflected on. The author refers to unfair correlation of natural wealth and poverty, comes across the Brantinghamian definition of "crime" before turning to Sutherland's conception of white-collar crime. The article also presents content analysis and case studies of the undergoing litigations, namely the case of Trafigura and Royal Dutch Shell.

In concluding notes suggestions are offered for the future of environmental justice and the prevention of environmental crimes *in extractive industries and mining.*

KEYWORDS: Environmental crime; subsoil use; extractive industry; extraterritorial jurisdiction; alien tort.

Choice and rational behavior are present in the structure of various crimes. The system of penalties and control over crimes streamlines human choice and rational behavior, may remedy the consequences and damages, and may deter repeated offence of the laws or, at least, prevent further crimes. As a specific component of environmental crimes, *crimes in the field of subsoil use* (hereinafter, *subsoil use crime*) encompass the extraction of various raw materials and aggregates from the earth, mostly during operations *in extractive* industries; however, it is not limited to them, but includes the *excavation of archaeological and paleontological items,* although these crimes are comparatively limited in value and hard to evaluate in the structure of subsoil use crimes. Therefore, when tackling subsoil use crimes in this paper, attention is drawn to the extractive industry only. Out of an approximately estimated USD110b-worth annual illicit gain from environmental crimes committed globally, around 60 % are attributed to subsoil use crimes during the extraction of resources; thus, a vast majority of such environmental crimes pertain to *crimes in extractive industries* (hereinafter, *extractive industry crime*), while the value of crimes committed at archaeological and paleontological excavations is still hard to evaluate. Subsoil use crimes reflect motivated rational behavior within a wider category of so-called enterprise crime as a part of motive-led rational guilty practices, often within organized groups, with the aim of gaining a certain benefit or other value by performing unlawful opportunistic entrepreneurial transactions or business activities[1].

Subsoil use in general, and resource extraction is particular, as a form of entrepreneurship at a national and transnational scale, is able to generate wealth and value, although these activities may cause long-term damage to human lives, health and the environment. A significant part of resource extraction is performed in developing countries, which suffer from their colonial heritage and are still deprived of the rights to fully dispose of their natural wealth in a free and fair manner, as declared in Article 1, Part 1 of the International Covenant on Economic, Social and Cultural Rights[2].

Such evident unfairness is obvious and manifested by the fact that, based on the reports of the World Bank in 2002, around 4 billion people lived in

[1] M Price and D Norris, 'White-Collar Crime: Corporate and Securities and Commodities Fraud' [2009] 37 (4) Journal of the American Academy of Psychiatry and the Law 538–44.

[2] Secretary General of the UN, UN General Assembly. International Covenant on Economic, Social and Cultural Rights (1966) <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (accessed: 23.03.2020).

56 key resource extracting and mining nations, where 90 % of inhabitants represented developing or transitional economies, with 40 % of such nations having a daily per capita income of a humiliating USD 2. In other words, two-thirds of the poorest populations lived in countries responsible for 90 % of the global extractive and mining industries[3]. In 2017, exactly 30 out of 50 nations with the highest levels of mining and resource extraction are referred to as low and low-to-middle per capita income economies[4]. In the opinion of the author, such an unfair correlation of natural wealth and poverty in major mining and resource extracting economies is the direct sign of deficit and the inefficiency of subsoil use crime prevention in these countries in particular and globally in general, thus leading to deficiencies in the protection of fundamental human rights and freedoms under harmful environmental and other impacts of subsoil use.

Criminology of environmental harm by extracting industries

Until the twentieth century, nuisance in the form of environmental damage and pollution had been tackled by many nations similarly; however, the major impact is brought about by the British court system and English laws, since they historically dealt with almost half, specifically 40%, of the areas polluted during global industrialization, and added value to local regulations, laws and customs of the former dominions, colonies and members of the British Commonwealth, when dealing in English courts with the first foreign environmental nuisance claims[5]. For a fairly long period of time, English courts and English judges were more favorable to resident subsoil users, especially transnational corporations, and made it unlikely for alien claimants to bring polluters and criminal subsoil users to justice under the English laws by means of English judges. Precedents and customs protected British resident legal entities well from claims from the victims of environmental crimes committed in developing countries, since financially and legally those claims were badly substantiated and supported. Tort victims residing in the host states where crimes were committed had to struggle under legal systems hardly capable of providing effective compensation. Hence criminal justice had nothing to do with such subsoil use and mining industry crimes. Over the course of time, from the 1980-s, more impact has been delivered to the subsoil use crime prevention system, by the global trend of bringing extraterritorial justice through international, supranational and regional legislation into domestic courts and legal enforcement procedures.

[3] 'Treasure or Trouble? Mining in Developing Countries' *(The World Bank Group Department)* <http://www.worldbank.org/ogmc/files/treasureortrouble.pdf> (accessed: 23.03.2020).

[4] M Ericsson and O Löf, 'Mining's Contribution to Low- and Middle-income Economies' (2017) 148 WIDER Working Paper 6.

[5] E Blanco and B Pontin, 'Litigating Extraterritorial Nuisances under English Common Law and UK Statute' [2017] 6 (2) Transnational Environmental Law 285–308.

As a result, extraterritorial norms of justice can be applied to alien torts within the domestic jurisdictions of the European continent and the United Kingdom (hereafter, UK), including foreign (extraterritorial) subsoil use crimes committed outside formal domicile by physical and legal bodies, in particular by transnational corporations headquartered in Europe and the UK.

Amongst the most prominent causes of people choosing criminal behavior are *greed* and *lure*. For instance, Larry Siegel states that a shortcut rationally chosen by certain representatives of enterprise crime is explained by their confidence in personal intellectual dominance over public servants in charge of the identification of criminal behavior; thus, they believe that their crimes will never be uncovered and punished. Also, loopholes in legislation for such 'smart criminals' serve as honey for bees, creating criminal opportunities and generating 'lure' to bring benefits from illegal enterprise crimes to businesses in general and to themselves personally[6].

In many cases, transnational subsoil users lack a sense of the inevitability of punishment for environmental crimes to be committed; therefore, they normally behave as if they are above the law or untouchable by law. On the other hand, it is *perceptual deterrence* that has to be the pivotal preventive brake as a consequence, on the road to the obstruction of criminal deviant actions and felonies[7]. Starting in the eighties, more and more cases have broken barriers for extraterritorial jurisdiction over transnational subsoil use crimes. This new counter-criminal wave of preventive measures surely adds value to fighting criminal mining and resource extraction, and raising the efficiency of pre-emptive measures of environmental justice. Since the eighties, various fundamentalists of environmental criminology have focused on the determinants of criminal behavior as a target for reaching effective preventive results in the minimization of crime. Notably, P. J. and P. L. Brantingham defined crime as a function of motive and criminal opportunity, that is, the mathematical formula of a crime is derived as the following: $C = f(M, O)$[8]. Thus it may be concluded from the formula that an increase in the risk of punishment for a crime to be committed and a corresponding sense of the inevitability of justice against a crime, in particular criminal subsoil use, will rationally minimize choice for criminal opportunities and bring down the rate of associated subsoil use crimes in the mid- and long-term range.

Another key contribution to the process of extraterritorial environmental litigations is made upon the introduction of Brussels Regulations, first approved in 2001, later amended in 2012 and effective as of 2015 within the European

[6] L Siegel, *Criminology: Theories, Patterns, and Typologies* (Cengage Learning, 12th ed 2014) 473.
[7] R Apel and G Pogarsky and L Bates, 'The Sanctions-Perceptions Link in a Model of School-based Deterrence' (2009) 25 Journal of Quantitative Criminology 203.
[8] P J Brantingham and P L Brantingham, *Environmental Criminology* (Waveland 1991) 240.

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Union, along with the long-standing, and since 1789 slightly forgotten in the USA, revolutionary Alien Torts Statute[9], which also acquired its second breath in the early 1980-s, with respect to alien torts caused by transnational polluters and subsoil users incorporated in the USA[10].

Subsoil use crimes as a form of enterprise crime, as mentioned above, are widely referred to in a wider-ranging category of *environmental crimes* or *green crimes* in other sources[11]; they may be defined as a kind of criminal activity that causes *environmental harm* as a result of the violation of environmental laws[12]. Subsoil use crimes came into the focus of criminology relatively recently and embrace a variety of areas within the scope of *environmental justice*[13], such as mineral resources, raw materials and components within the subsoil environment.

Even if a person is not physically involved in operations of subsoil use, that is, extraction of minerals, or archaeological or paleontological components within the subsoil environment, but is a part of, or in the course of their responsibilities and powers is personally in charge of actions violating laws, then as a rule these formal criminal abuses of laws and regulations fall within the category of white-collar crime. This kind of crime is generally determined by the conceptual founder Edwin H. Sutherland as 'a crime committed by a person of respectability and high social status in the course of his occupation'[14]. Another complementary view by H. Croall on this type of crime adds value to the understanding of its essence by pointing out that white-collar crimes are the 'crimes of the powerful' and *corporate crimes* are attributed to the individuals who commit them while having high status and respect within a certain sociological and professionally hierarchical cluster[15]. White-collar crime may lead to damages in kind, economically estimated, including damage to the ecosystem due to criminal subsoil use. White-collar crimes are very hard to identify and prosecute, since this kind of criminal deviant behavior is build upon loopholes in existing legislation and regulations, and the body of evidence is hardly discoverable and lacks proof of a criminal offence; however, in the opinion of society, empirical studies demonstrate the perception that the gravity of harm to the human homosphere and living environment, and

[9] L Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' [2014] 10 (1) Utrecht Law Review 44.

[10] 28 U.S.C. 1350. Alien's Action for Tort (Government Publishing Office of the US Congress) <https://www.govinfo.gov/app/details/USCODE-2011-title28/USCODE-2011-title28-partIV-chap85-sec1350> (accessed: 23.03.2020).

[11] Siegel (n 6) 459.

[12] R White, 'The Four Ways of EcoGlobal Criminology' [2016] 6(1) International Journal for Crime, Justice and Social Democracy 8-22.

[13] M Lynch and P Stretesky and M Long, 'Environmental Justice: A Criminological Perspective' (2015) 10 Environmental Research Letters 1–6.

[14] E Sutherland, *White-Collar Crime: The Uncut Version* (Yale University Press 1983) 7.

[15] H Croall, 'Who Is the White-Collar Criminal?' [1989] 29 (2) The British Journal of Criminology 157–74.

the moral damage and lasting losses to life of upcoming generations may easily exceed any visible financial losses incurred from the other types of typical crimes[16]. White-collar crimes will be compensated to the maximum extent by punitive damages upon completion of the criminal investigation, and explicitly and irreversibly formalized by a court ruling.

As an extension of the point and the origins of subsoil use crimes, corporate crimes in their essence are potentially the most harmful and disastrous among subsoil use crimes of all times[17]. By this time, on the one hand, several European continental countries do not provide formal recognition of corporate criminal responsibility, including Italy, Germany and Ukraine, for instance, limiting remedies to administrative fines and penalties, and preferring to abstain from an introduction of general corporate criminal responsibility into their criminal codes. It is therefore necessary that the national ecological justice of abstaining countries is amended with corporate criminal offences, as was effectively performed in recent years in Portugal and Poland, where general criminal offences were complemented with specific corporate crimes. Regarding Ukraine, it is to be noted that, as a transitional society, it also lacks a proper level of public administration in the field of subsoil use and protection of mineral resources, so it needs to harmonize the balance of public interest and the interest of society (subsoil users and the people of Ukraine as the owners of the subsoil wealth) on the principles of public and private partnership. Accordingly, an improvement of public administration in the field of subsoil use and the protection of mineral resources will be embodied in the further development of normative and legal provision.

On the other hand, there are examples of both civil law and common law nations, specifically the UK and the Netherlands, with explicit and effective existing determination and prosecution of corporate crime, with reference to both an individual physical executive body and a legal body as offenders[18]. Under the circumstance when a corporate body is targeted by the prosecution for committed crime, it is of fundamental importance to identify an offence as an act committed by a natural person (an officer) or a legal person, or both. Article 14 of the UK Bribery Act defines an offence by the 'body corporate etc.' if it is 'proved to have been committed with the consent or connivance of –

(a) a senior officer of the body corporate or Scottish partnership, or

(b) a person purporting to act in such a capacity, the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable

[16] M Dhami, 'White-Collar Prisoners' Perceptions of Audience Reaction' (2007) 28 Deviant Behavior 57–77.
[17] R White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (Routledge 2011) 6.
[18] D Blackburn, *Removing Barriers to Justice. How a Treaty on Business and Human Rights could Improve Access to Remedy for Victims* (SOMO 2017) 47.

to be proceeded against and punished accordingly'[19]. The natural person and the legal person for a corporate crime are closely interconnected and both may be prosecuted and sentenced.

Corporate criminal offence is almost identically determined in the legislation of the Netherlands, Article 51 (criminal liability) of the Penal Code:

1. 'Offences may be committed by natural persons and legal persons.

2. If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments and other measures provided for by law may be implemented where appropriate:

a. against the legal person; or

b. against those who ordered the commission of the offence, and those who were in control of such unlawful behavior; or

c. against the persons mentioned under (1) and (2) together.

3. For the purpose of the application of the above paragraphs legal persons shall be deemed to include an unincorporated company, a partnership and a special fund'[20].

Thus, having analyzed the fundamentals and legal definitions of corporate crimes, similarly to Gottschalk and Gunnesdal's note, it may be concluded that they are committed in the form of an action or a combination of actions in a concealed and non-physical way for the purpose of gaining material benefit (money or property) or personal or corporate business advantage[21].

Exercising extraterritorial jurisdiction over corporate polluters

Corporate environmental crimes (and subsoil use crimes, of course) lead to demoralizing environmental pollution, exhaustive consequences to the biosphere, sometimes irreparable biological and economical losses, and non-renewable resource devastation that is evident and open to public view. However, it is not as straightforward and easy to link and legally attribute a specific and well-proven offence to a specific legal or natural person, since this demands scrupulous evidence and expert verified testimony, since, as noted before, the underlying misconduct leading to a criminal abuse of law is often non-physical and well concealed by the offenders.

A remarkable example of massive environmental damage in an African region (namely, Nigeria) and certain other territories due to subsoil use crimes, resulting in an extremely harmful spill of oil and toxic wastes, became a matter of litigation in the courts of the Netherlands, since the jurisdiction of

[19] Bribery Act 2010, The Stationery Office, 8 April 2010, p. 10 <https://www.legislation.gov.uk/ukpga/2010/23> (accessed: 23.03.2020).

[20] Netherlands Penal Code, Article 51 (criminal liability), United Nations Office on Drug and Crime <https://sherloc.unodc.org/cld/en/legislation/nld/penal_code/article_51/article_51.html> (accessed: 23.03.2020).

[21] P Gottschalk and L Gunnesdal, *White-Collar Crime in the Shadow Economy* (Palgrave Pivot 2018) 5.

the country allowed acceptance of nuisance claims to a branch of *Trafigura* incorporated and domiciled in the Netherlands, as well as to another legal person *in Royal Dutch Shell* incorporated and domiciled in the UK, London and The Hague headquarters in the Netherlands. Court hearings are still under way. Choosing the *proper jurisdiction for the processing of claims against environmental crimes* is and was of the highest priority in the above-mentioned and analogous cases, for the reason that it is directly linked to the effectiveness of criminal investigations, court proceedings and remedy mechanisms when massive damage is done to the environment, both domestically and to alien claimants as well. As regards Trafigura and Royal Dutch Shell, both companies were considered by the courts in the Netherlands and the UK as liable for deeply negligent pollution and damage to the safety of the living environment of the host state citizens; this was as well as a breach of security of industrial operations and transportation of oil products with a heavy impact on human health and even lethal cases among the African neighborhoods and communities, after contact with toxic waste, spills and sludge remaining in the soil and water along oil-transportation pipelines and around onshore and offshore oil-processing sites. Trafigura was mostly responsible for the transportation and dumping of slops, thus putting its officers and its legal person under the axe of criminal environmental justice in the Netherlands.

The rational judgment from the headquarters was to thus avoid risks related to physical participation in local subsoil use and the environmental impact of criminal extracting and mining operations. This would leave any trouble from host state jurisdictions to locally incorporated special-purpose vehicles (subsidiaries and affiliates), thus anticipating that the corruption and low competencies of local (host state) public officers, prosecution, courts and enforcement agents would limit or mitigate any potential risk and negative impact of environmental crimes of transnational corporations, with minimum or no material impact on mother companies, allowing them thus, according to Riley, to 'evade the risk of liability'. Operations through host state affiliates and subsidiaries under transnational holding corporate control are used to underpin the *rational choice* of the corporate business decision makers between the *criminal opportunity* and the *risks of criminal liability*[22].

The weakness of host jurisdictions is obvious and notable in the above-mentioned cases. Indeed in Nigeria as well as in Côte d'Ivoire, both Shell and Trafigura effectively limited their liability to host state affiliates (namely, the Shell Petroleum Development Company of Nigeria in the case of Shell), while

[22] C Riley and O Akanmidu, 'Making Parent Companies Pay for the Sins of their Subsidiaries' in Diverse participation and great atmosphere at Dynamics of Inclusive Prosperity Conference, 29-30 November 2018 in Rotterdam <https://www.doipconference.com/Portals/176/Riley.pdf?ver=2018-12-11-161009-173> (accessed: 23.03.2020).

host court rulings established moderate financial compensatory payments for environmental damage and remedies to affected local communities after a long-lasting judicial routine with minimal impact on polluting subsoil users. As a matter of fact, one of the most active lawyers representing endangered local communities, Martyn Day of Leigh Day, once said: 'For decades claims have swirled around in the Nigerian courts getting nowhere'[23]. It is also due to the proactive position of the non-governmental organizations and unions of host state victims of environmental crimes that transnational corporations were made accountable for extractive industry crimes by collective lawsuits through extraterritorial jurisdiction and hearings in courts (namely, Friends of the Earth, Stichting Union des Victimes des Déchets Toxiques d'Abidjan et Banlieues (UVDTAB, 110,937 victims) and Stichting Victimes des Déchets Toxiques Côte d'Ivoire, uniting 110,865 victims (VDTCI))[24].

In its turn, Trafigura, its Amsterdam- and London-based headquarters (Trafigura Beehr BV and Trafigura Ltd) and host state representative Puma Energy CI in Côte d'Ivoire were taken to court by the government of Côte d'Ivoire, prosecuted and charged for 16 lethal cases and over 100,000 claims of health problems as a result of harm caused by toxic pollution. In order to bring the story to a close and release its executives detained in a local prison in expectation of host state court rulings on criminal charges, Trafigura concluded a settlement deal, totalling 100b local francs, with host state government and local victims to pay 95b francs to civil victims and 5b francs to the Côte d'Ivoire state budget in reparation and compensatory payments, at that time an equivalent to approximately USD198m[25]; it also released its two top managers from the local jail after the deal was properly enacted on 12 February 2007 and countersigned by the government of Côte d'Ivoire[26]. Also, in order to avoid proactive collective lawsuits from the extraterritorial legal attempts of 1,000 victims from the Abidjan community brought overseas to the London courts, Trafigura paid GBP32m in an out-of-court settlement[27].

Another much more essential breakthrough in applying extraterritorial jurisdiction to alien torts and transnational environmental corporate crimes was further progress by Amsterdam prosecutors with its criminal charges

[23] 'Shell oil spills in the Niger delta: Nowhere and no one has escaped' The Guardian (3 Aug 2011) <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> (accessed: 23.03.2020).

[24] 'The Probo Koala Case in 12 Questions' (Trafigura) <https://www.trafigura.com/resource-centre/probo-koala> (accessed: 23.03.2020).

[25] Toxic wastes: How 100 billion is shared out, Communique No004 of 21 June 2007 Related to compensation of toxic waste victims. 2007 <https://www.trafigura.com/media/3902/communiqu%C3%A9_rci_21_06_2007_en.pdf> (accessed: 23.03.2020).

[26] P Murphy, 'Trafigura execs released after Ivory Coast deal' Reuters (14 Feb 2007) <https://www.reuters.com/article/us-ivorycoast-toxic-release/trafigura-execs-released-after-ivory-coast-deal-idUSL1461558720070214> (accessed: 23.03.2020).

[27] 'Oil company that "poisoned 100,000 with toxic waste" is fined £830,000' Daily Mail (24 July 2010) <https://www.dailymail.co.uk/news/article-1297186/Dutch-oil-company-fined-1m-Euros-toxic-waste-killed-16-people-100-000-ill.html> (accessed: 23.03.2020).

and actions. This is a remarkable example of *extraterritorial jurisdiction and a globalizing trend in prevention of transnational environmental and subsoil use corporate crimes,* that demonstrates enhancing pre-emptive environmental justice going global and depressing the motivation of corporate polluters and white-collar criminals, by bringing the stakes and risks of punishment way up against still-existing lures, high payoffs and material opportunities nested within environmental crimes, illegal mining and extractive operations. In the case of Trafigura, despite a 100b francs settlement in Côte d'Ivoire, victims from the Abidjan community, whose settlement funds were improperly allocated and misappropriated in the host state, initiated in Abidjan on 24 December 2010 the new civil case number 359[28], which caused the government of Côte d'Ivoire to resign, and brought litigations against Trafigura to the Amsterdam court with the support of the Dutch Public Prosecutor's Office for Financial, Economic and Environmental Offences. A notable feature of this case is embodied in the criminal charges and prosecution against both legal and physical persons, the corporation and its officers, white-collar executives, including a top manager, its President-Director, characterizing the possibility of both joint and separate liabilities for alien environmental crimes to be applied to the phenomenon of extraterritorial justice. Both Trafigura itself and its officers were prosecuted and sentenced, but after an appeal, the President-Director was allowed to pay a EURO67,000 settlement, along with a EURO25,000 settlement for another sentenced employee to avoid a suspended prison sentence[29]. The captain of a vessel rented by Trafigura for the transportation of hazardous waste and spills was also found guilty and sentenced to five months of suspended custody[30]. Settlements were paid upon agreement with the Dutch Public Prosecutor, thus allowing an executive and their subordinates involved in planning and sharing benefits from environmental crime to go free. Even though the corporation itself did not entirely avoid criminal liability, such an easy finale for white-collar offenders allows this case to be named, according to Rebecca Bratspies, as an implicit form of environmental corruption, due to the active efforts of interested parties to exclude a transnational corporation from criminal liability[31].

Pursuing a strategy probably similar to that of the aforementioned Trafigura, of avoiding the risks of extraterritorial justice for environmental crimes and alien nuisance, Shell was deeply involved in the other Nigerian

[28] The Court of Appeal of Abidjan (CAA) (2010) First Civil and Commercial Division at the Palais de Justice. Extract from Court Records, Official Notification. Reference No. 359 of 24/12/2010 <https://www.trafigura.com/media/3910/court_of_appeal_abidjan_yameogo_hado_and_others_24_12-2010_en.pdf> (accessed: 23.03.2020).

[29] Openbaar Ministerie Netherlands Public Prosecution Service, 16 November 2012 – Functioneel Parket, press release <https://www.om.nl/vaste-onderdelen/zoeken/@31000/trafigura-punishment> (accessed: 23.03.2020).

[30] R Bratspies, 'Corrupt at its Core: How Law Failed the Victims of Waste Dumping in Côte d'Ivoire' [2018] 43 (2) Columbia Journal of Environmental Law 417–73.

[31] Ibid 421.

case, initiated by Nigerian citizens harmed by industrial pollution from oil extraction and transportation along rivers, lands and farms of Friday Alfrad Akpan from Ikot Ada Udo, Eric Dooh from Goi and Alali Efanga en Fidelis Oguru from the Oruma and Bodo community. Oil spills severely damaged the biosphere and living environment of Nigerian victims. Shell rationally chose to limit its potential losses from legal action by host states, in order to avoid any nuisance in the country of its domicile, the Netherlands. Specifically, in the UK, under the statutory jurisdictional rules of England and Wales in respect to claims linked to extraterritorial environmental torts, the right of claim itself is contested by the British presumption system, and the claim may be left to the discretion of the court in favor of a defendant domiciled in the UK[32].

Despite extensive efforts by Shell and its defendants to contest numerous claims arising from environmental pollution and damage to local inhabitants of Nigeria, extraterritorial justice effectively put the British–Dutch incorporated Shell under judiciary fire in the Court of The Hague on 30 December 2009[33]. The key to the success of this extraterritorial application of justice in the UK and also continental Europe, in particular the Netherlands, is substantially carved in the rulings of the courts, on the grounds of Brussels Regulation 44/2001 for actions commenced before 2015 against defendants domiciled in the Brussels Regulation Member States[34], and then basing on Brussels Regulation 1215/2012, since 10 January 2015[35]. Although the District Court of The Hague (Rechtbank Den Haag) in its final decision on 30 January 2013 rejected Dutch jurisdiction over three claims of Nigerian victims and passed them over to Nigerian courts, one Nigerian claim for compensation to Akpan was accepted[36]. Moreover, on 18 December 2015, the Dutch Court of Appeal in the Shell Nigeria case supported claims basing on Article 60 of Brussels Regulation 44/2001 effective on the date of initiation of this litigation, since the defendant was domiciled in the Brussels Regulation Member State[37]. The Dutch Court of Appeal dismissed the decision of the Court of The Hague, combined the separate claims of the Nigerian victims into one ruling and returned them to the court of the original claim for further action. Furthermore, in its ruling, the Dutch Court

[32] Blanco and Pontin (n 5).

[33] Court of the Hague, Civil law section. Judgment in motion contesting jurisdiction of 30 December 2009, Case number 330891/HA ZA 09-579 <https://www.elaw.org/system/files/P091230.judgment%20in%20jurisdiction%20motion%20Oruma.pdf> (accessed: 23.03.2020).

[34] European Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF> (accessed: 23.03.2020).

[35] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> (accessed: 23.03.2020).

[36] C van Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' <http://www.ceesvandam.info/default.asp?fileid=643> (accessed: 23.03.2020).

[37] European Council Regulation (EC) 44/2001 (n 34).

of Appeal, in Articles 6.10 and 6.11, satisfied the demands of the claimants to force the defendant to disclose and provide to the court for review a set of internal documentation from Shell, including minutes, reports, business plans and assurance letters, which remained concealed by the company and might unleash the true facts about the circumstances of a parent company's liability for violation of a due business practice and proper duty of care. Also, any reference by Shell to acts of sabotage by three unidentified parties on its industrial sites and along oil transportation pipelines was also turned down in the Court of Appeal, thus keeping Shell responsible for the damage[38].

Another alien nuisance initiated by the Bodo community of Nigeria against Shell on a similar occasion is under scrutiny. Litigations of the Bodo community against Shell for damages caused by oil spills of the host state affiliate (Shell Petroleum Development Company of Nigeria Ltd) have been brought to the English courts, basing on the domicile of Shell headquarters in the UK[39], in compliance with Article 4 of the new edition of Brussels Regulation 1215/2012, since Royal Dutch Shell resides under the authority of a Brussels Regulation Member State[40].

For the period of an out-of-court settlement, Royal Dutch Shell is required to compensate costs for damages to 30,000 residents of the Bodo community to the amount of GBP55m and to clean up the polluted territories, according to a London High Court ruling[41]. If the clean-up is not properly done by Shell, both participants of the litigation remain alert to continue hearings in the English courts[42], according to Leigh Day, attorneys for the Bodo victims, whilst the case remains periodically stayed, with the option for Bodo lawyers to reactivate it at any time of violation of liabilities by Shell[43].

As regards Ukraine, which is on its converging and harmonizing its domestic legislation towards legislative requirements of the European Union, it shall be admitted that Brussels Regulation 1215/2012 regretfully has not been integrated into the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (hereinafter European

[38] Gerechtshof den Haag (GDH), Afdeling civiel recht, Judgment of 18 December 2015 in the cases of 1. Eric Barizaa DOOH, of Goi, Rivers State, Federal Republic of Nigeria, 2. Vereniging Milieudefensie: 41, pp. 38–39 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:3586> (accessed: 23.03.2020).

[39] The High Court of England and Wales, The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd. EWHC 1973 (TCC). 2014, p. 1. <http://www.bailii.org/ew/cases/EWHC/TCC/2014/958.html> (accessed: 23.03.2020).

[40] Regulation (EU) No 1215/2012 (n 35).

[41] J Payne and S Falush, 'Shell to pay out $83 million to settle Nigeria oil spill claims' Reuters (7 January 2015) <https://www.reuters.com/article/us-shell-nigeria-spill/shell-to-pay-out-83-million-to-settle-nigeria-oil-spill-claims-idUSKBN0KG00920150107> (accessed: 23.03.2020).

[42] 'Shell fails in High Court bid to halt Nigerian community's legal fight over clean-up' (*Leigh Day*, 29.05.2018) <https://www.leighday.co.uk/News/News-2018/May-2018/Shell-fails-in-High-Court-bid-to-halt-Nigerian-Com> (accessed: 23.03.2020).

[43] E Shirbon, 'Nigeria's Bodo community claims win over Shell after latest UK court ruling' (*Reuters*, 24.05.2018) <https://www.reuters.com/article/us-shell-nigeria-spill/nigerias-bodo-community-claims-win-over-shell-after-latest-uk-court-ruling-idUSKCN1IP2SP> (accessed: 23.03.2020).

Union – Ukraine Association Agreement). Ukrainian criminal justice yet has not recognized the categories of the corporate crime and the corporate criminal responsibility. This fact to the great extent undermines effective efforts to deter and counteract to the subsoil use crimes as whole and extractive industry crimes in particular. Only administrative responsibility and administrative fine is generally applicable[44]. There are only limited and contracted references to corporate criminal responsibility in a General Section, Part XIV[1] of the Criminal Code of Ukraine as regards penal legal actions towards legal persons for drug trafficking, crimes against peace and, which is more promising, also for certain crimes (bribes) committed in a course of executive and business activities.

In the Law of Ukraine "On ratification of the European Union – Ukraine Association Agreement" of September 14th 2014, №1678-VII, and in Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of March 21st 2014 itself in Part 2, Article 1, point e) it is determined that in order to reach the aims of Association in it required to 'to enhance cooperation in the field of Justice, Freedom and Security with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms'[45]. Furthermore, Article 387 at point c) regarding corporate governance is linked to Annex XXXVI of the Agreement, where it is declared that Ukraine shall cooperate with the European Union for bringing its 'corporate governance policy in line with international standards, as well as gradual approximation to the EU rules and recommendations in this area, as listed in Annex XXXVI to this Agreement', that is in line with the abovementioned Organization for Economic Co-operation and Development Principles on Corporate Governance, which opens that path to making amendments within domestic legislations of Ukraine and its Criminal Code for applying criminal justice for corporate crimes, including environmental crimes. Nevertheless, these clauses in the European Union – Ukraine Association agreement carry rather recommendation input into legislative reforms and European harmonization of the legislation of Ukraine. It has to be noted however that Ukrainian policies and strategies of deterring and counteracting subsoil use crimes shall be contributed with legally binding add-ins into the European Union – Ukraine Association Agreement for Ukraine to amend its Criminal Code of Ukraine and other laws in order to introduce corporate

[44] Jennifer Zerk, 'Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies' A report prepared for the Office of the UN High Commissioner for Human Rights <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> (accessed: 23.03.2020).

[45] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of 21 March 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&from=EN> (accessed: 23.03.2020).

criminal responsibility and binding principles of corporate governance in public and private legal persons in line with the principles of Brussels Regulation 1215/2012. This will allow deterring and effective counteracting to the subsoil use crimes and shall facilitate guaranteeing protection of fundamental rights and freedoms of the people of Ukraine to have access to secure and safe healthy environment, and to have the right to remedy for damages caused by violation of the aforementioned rights and freedoms.

Conclusion. World Bank experts revealed a manifestation of poverty that overwhelmed roughly 4 billion people from 56 key mining and resource extracting regions of mainly developing and transitional nations, thus keeping per capita income at the lowest daily USD2 in over a third of such regions, while they accounted for 90 % of the global resources generated from mining and extracting operations. Such an unfair correlation of natural wealth and poverty in major mining and resource extracting economies is the direct sign of deficit and the inefficiency of subsoil crime prevention in these countries, thus leading to deficiencies of the protection of fundamental human rights and freedoms under harmful environmental and other impacts of subsoil use.

Recent efforts to apply extraterritorial justice through international, supranational and regional legislation into domestic courts and legal enforcement procedures more rigorously counteract and prevent subsoil use crime in various parts of the globe and deliver such cases of crime to domestic courts and legal enforcement procedures. Consequently, extraterritorial norms of justice become available for application to alien torts within the domestic jurisdictions of the European continent and the UK, including extraterritorial subsoil use crimes that physical and legal bodies, particularly transnational corporations headquartered in Europe and the UK, commit outside the formal domicile. In this respect, a key motion to the process of extraterritorial environmental litigations is brought about by the introduction of Brussels Regulations.

There are instances of both civil law and common law nations, namely the UK and the Netherlands, where corporate crimes are scrupulously defined in the corresponding penal codes and, thus, are prosecuted regardless of whether such crimes are linked directly to individual physical executive body and/or just the legal body as an offender. Of even more remarkable note is that penal codes of the UK and the Netherlands determine corporate criminal offence almost identically. The natural person, a corporate officer, ordering someone to carry out actions leading to a crime and the legal person committing a crime are closely interconnected in the essence of corporate crime, and both may be prosecuted and sentenced.

In addition, since in Italy, Germany and Ukraine along with some other European countries corporate criminal responsibility is not formally recognized,

it is suggested that their national ecological justice systems should be amended with corporate crime offences. Positive experience in such a stance may be derived from recent developments in Portugal and Poland, where criminal norms as regards such offences were complemented with specific corporate crimes.

Since transnational mining and extracting companies do not experience a deep sense of the inevitability of punishment for environmental crimes and alien torts committed in the host states, it is essential to substantially increment the pressure of perceptual deterrence as the pivotal preventive brake on the road to the obstruction of criminal deviant actions and felonies. Therefore, *choosing proper jurisdiction for the processing of claims against environmental crimes* as one of the tolls in this respect will remain of the highest priority in the cases of environmental torts and crimes. And this is exactly due to the fact that it has a major effect on the outcome of criminal investigations, court proceedings and remedy mechanisms to indemnify for harmful effects and especially large-scale damages caused to domestic or alien claimants.

It is envisaged that transnational corporations tend to eliminate the risks arising from physical participation in the exploration and production of mineral resources in host states and the environmental harm from such criminal extracting and mining operations, solving any trouble from host state jurisdictions at the expense of special purpose vehicles incorporated locally and directly and actually involved in those problems. Accordingly, they rely on the rational assumption that the corruption and low professional skills of the host state public administration, prosecution, courts and law enforcement officers would constitute an acceptable constraint or mitigate potential risks and negative impacts of their environmental crimes, with minimum or no material impact on controlling companies or top executive management. The *rational choice* of the corporate stakeholders with executive authority between *criminal opportunity* and the *risks of criminal liability* is incentivized by greed and lure, which are lubricated by the temptation to escape from criminal responsibility in the host state jurisdictions, where operations are physically carried out by the local subsidiaries and their subordinates under transnational corporate control.

To conclude, it shall be noted that, by exercising extraterritorial jurisdiction over transnational subsoil use crimes, regardless of the geographical location of the offender and physical running of the operations in any part of the globe where the crime is committed and environmental harm is caused, it is possible to globally strengthen the preventive measures for the purpose of fighting criminal mining and counteracting devastating resource extraction, thus

adding more value and efficiency to pre-emptive measures of environmental justice against criminal corporate subsoil use and transnational environmental crimes. The mechanism of the extraterritorial application of justice to alien torts and transnational corporate environmental crimes committed by subsoil users shall extensively increase risking punishment for a crime, and a corresponding sense of the inevitability of justice against environmental crime. As a consequence, rational behavior shall hold physical and legal persons back from choosing criminal opportunities and shall bring down the rate of associated subsoil use crimes, even presuming that criminal behavior promises potential benefits arising from transnational mining and extractive operations which damage lives and the environment.

Brussels Regulation 1215/2012 regretfully has not been integrated into the European Union – Ukraine Association Agreement. Only administrative responsibility and administrative fine is generally applicable thus making the Ukrainian environmental criminal justice barely affective and legally constrained. In order to add value and power to the Ukrainian environmental criminal justice and fundamentally improve domestic policies and strategies of deterring and counteracting subsoil use crimes, the Criminal Code of Ukraine and its other laws shall be amended with legal instruments of introducing corporate criminal responsibility and binding principles of corporate governance in public and private legal persons in line with the principles of Brussels Regulation 1215/2012. Alternatively the European Union – Ukraine Association Agreement for Ukraine may also be amended with legally binding obligations of Ukraine to act in this direction by harmonizing its legislation with the legislation of the European Union.

REFERENCES

Bibliography

Authored books

1. Blackburn D, *Removing Barriers to Justice. How a Treaty on Business and Human Rights could Improve Access to Remedy for Victims* (SOMO 2017) (in English).
2. Brantingham P J and Brantingham P L, *Environmental Criminology* (Waveland 1991) (in English).
3. Gottschalk P and Gunnesdal L, *White-Collar Crime in the Shadow Economy* (Palgrave Pivot 2018) (in English).
4. Siegel L, *Criminology: Theories, Patterns, and Typologies* (12th ed, Cengage Learning 2014) (in English).
5. Sutherland E, *White-Collar Crime: The Uncut Version* (Yale University Press 1983) (in English).
6. White R, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (Routledge 2011) (in English).

Journal articles

7. Apel R and Pogarsky R and Bates L, 'The Sanctions-Perceptions Link in a Model of School-based Deterrence' (2009) 25 Journal of Quantitative Criminology 203 (in English).
8. Blanco E and Pontin B, 'Litigating Extraterritorial Nuisances under English Common Law and UK Statute' [2017] 6 (2) Transnational Environmental Law 285–308 (in English).
9. Bratspies R, 'Corrupt at its Core: How Law Failed the Victims of Waste Dumping in Côte d'Ivoire' [2018] 43 (2) Columbia Journal of Environmental Law 417–73 (in English).
10. Croall H, 'Who Is the White-Collar Criminal?' [1989] 29 (2) The British Journal of Criminology 157–74 (in English).
11. Dhami M, 'White-Collar Prisoners' Perceptions of Audience Reaction' (2007) 28 Deviant Behavior 57–77 (in English).
12. Enneking L, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' [2014] 10 (1) Utrecht Law Review 44 (in English).
13. Ericsson M and Löf O, 'Mining's Contribution to Low- and Middle-income Economies' (2017) 148 WIDER Working Paper 6 (in English).
14. Lynch M and Stretesky P and Long M, 'Environmental Justice: A Criminological Perspective' (2015) 10 Environmental Research Letters 1–6 (in English).
15. Price M and Norris D, 'White-Collar Crime: Corporate and Securities and Commodities Fraud' [2009] 37 (4) Journal of the American Academy of Psychiatry and the Law 538–44 (in English).
16. White R, 'The Four Ways of EcoGlobal Criminology' [2016] 6 (1) International Journal for Crime, Justice and Social Democracy 8–22 (in English).

Newspaper articles

17. Murphy P, 'Trafigura execs released after Ivory Coast deal' Reuters (14 Feb 2007) <https://www.reuters.com/article/us-ivorycoast-toxic-release/trafigura-execs-released-after-ivory-coast-deal-idUSL1461558720070214> (accessed: 23.03.2020) (in English).
18. 'Oil company that "poisoned 100,000 with toxic waste" is fined £830,000' Daily Mail (24 July 2010) <https://www.dailymail.co.uk/news/article-1297186/Dutch-oil-company-fined-1m-Euros-toxic-waste-killed-16-people-100-000-ill.html> (accessed: 23.03.2020) (in English).
19. Payne J and Falush S, 'Shell to pay out $83 million to settle Nigeria oil spill claims' Reuters (7 January 2015) <https://www.reuters.com/article/us-shell-nigeria-spill/shell-to-pay-out-83-million-to-settle-nigeria-oil-spill-claims-idUSKBN0KG00920150107> (accessed: 23.03.2020) (in English).
20. 'Shell oil spills in the Niger delta: Nowhere and no one has escaped' The Guardian (3 Aug 2011) <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> (accessed: 23.03.2020) (in English).
21. Shirbon E, 'Nigeria's Bodo community claims win over Shell after latest UK court ruling' Reuters (24 May 2018) <https://www.reuters.com/article/us-shell-nigeria-spill/nigerias-bodo-community-claims-win-over-shell-after-latest-uk-court-ruling-idUSKCN1IP2SP> (accessed: 23.03.2020) (in English).

Conference papers

22. Riley C and Akanmidu O, 'Making Parent Companies Pay for the Sins of their Subsidiaries' in Diverse participation and great atmosphere at Dynamics of Inclusive Prosperity Conference, 29–30 November 2018 in Rotterdam <https://www.doipconference.com/Portals/176/Riley.pdf?ver=2018-12-11-161009-173> (accessed: 23.03.2020) (in English).

Websites

23. Zerk Jennifer, 'Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies' *(A report prepared for the Office of the UN High Commissioner for Human Rights)* <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> (accessed: 23.03.2020) (in English).
24. 'Treasure or Trouble? Mining in Developing Countries' *(The World Bank Group Department)* <http://www.worldbank.org/ogmc/files/treasureortrouble.pdf> (accessed: 23.03.2020) (in English).
25. 'Shell fails in High Court bid to halt Nigerian community's legal fight over clean-up' (*Leigh Day*, 29.05.2018) <https://www.leighday.co.uk/News/News-2018/May-2018/Shell-fails-in-High-Court-bid-to-halt-Nigerian-Com> (accessed: 23.03.2020) (in English).

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ГЛОБАЛЬНІ НАСЛІДКИ ЗДІЙСНЕННЯ ЕКСТЕРИТОРІАЛЬНОЇ ЮРИСДИКЦІЇ ЩОДО ТРАНСНАЦІОНАЛЬНИХ КОРПОРАТИВНИХ ЕКОЛОГІЧНИХ ЗЛОЧИНІВ У ВИДОБУВНИХ ГАЛУЗЯХ ПРОМИСЛОВОСТІ

Анотація. Стаття порушує актуальну тему і присвячена злочинам надрокористування, досліджуючи їх як підтип екологічних злочинів, учинених транснаціональними корпораціями, з обговоренням важливості вибору належної юрисдикції; у статті також розглядаються злочини у сфері надрокористування як особливий компонент екологічних злочинів, вчинених транснаціональними корпораціями, які займаються розробленням та видобуванням корисних копалин по всьому світу. Шкода, якої вони завдають навколишньому середовищу, поглиблення бідності та неналежне використання ресурсів обумовлені їхньою жадібністю і бажанням наживи та вже давно значною мірою захищені механізмами правового юрисдикційного прикриття, на які нині спрямована пильна увага у зв'язку з глобальним розвитком тенденції до здійснення екстериторіальної юрисдикції щодо деяких правопорушень, учинених операторами видобувної промисловості.

У статті автор розглядає та аналізує відповідні кримінологічні теорії та дослідження загальної та екологічної кримінології, а також екологічної юстиції. Висвітлює несправедливість співвідношення природних багатств і бідності, наводить визначення поняття "злочину" за Брантінгемом, після чого звертається до концепції Сазерленда про злочини, вчинені "білими комірцями". У статті також представлений змістовний аналіз та аналіз прецедентних справ із сучасних судових процесів, зокрема, справа *Trafigura i Royal Dutch Shell.*

У заключній частині автор висловлює пропозиції щодо майбутнього екологічної юстиції та попередження екологічних злочинів у галузях розроблення та видобування корисних копалин.

Ключові слова: екологічна злочинність; надрокористування; видобувна промисловість; екстериторіальна юрисдикція; іноземне правопорушення.