

## **Does Human Rights Due Diligence Offer the Key to Prosecuting Ecocide?<sup>1</sup>**

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### **Abstract**

*This paper explores the potential for international human rights law and practice, and particularly the duty of “due diligence”, to inform the interpretation of ecocide. The concept may help clarify the standard of conduct expected of private actors and the requisite level of fault. Incorporating the concept may improve the predictability, legal legitimacy, and acceptability of the proposed new crime, and contribute to corporate accountability for human rights and environmental harms.*

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<sup>1</sup> This paper builds upon Lisa Oldring and Kate Mackintosh, ‘The Crime of Ecocide Through Human Rights: A New Tool for Climate Justice’, International Crimes Database Brief 27, Asser Institute (May 2022), in particular Section V.

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## Introduction

One of the most difficult problems tackled in the Independent Expert Panel's definition of ecocide was how to align the proposed crime with environmental law and principles.<sup>4</sup> Reconciling international criminal law (ICL) with environmental law and principles is one of the most challenging "puzzles" of ecocide, as one of the present authors (Robinson) has discussed elsewhere.<sup>5</sup> The challenge is that environmental law offers very few concrete prohibitions that are readily adaptable into a crime; instead, environmental law draws on various principles and considerations, whereas criminal law requires a certain level of precision and predictability. Another difficult balance is developing a definition that has a chance of adoption by States and yet is broad enough to effectively capture the worst forms of wrongdoing.

To incorporate environmental law and principles, the Panel's definition requires that the conduct be either "*unlawful*" or "*wanton*". "Unlawful" means illegal in national or international environmental law. Because environmental law often does not concretely prohibit specific conduct as such, the Panel also included an alternative, "*wanton*", which aims to capture conduct clearly breaching the underlying *principles* of environmental stewardship. The definition of "*wanton*" involves an environmental assessment "balancing" test.<sup>6</sup>

Like any possible ecocide definition, the Panel approach is susceptible to criticisms from opposing sides. For example, it can be argued that the "balancing" test is too nebulous and difficult for a prosecutor.<sup>7</sup> On the other hand, it can also be argued that the balancing test is too unfair and uncertain for the businessperson, engaged in a lawful high-impact activity to meet essential societal needs, who would have to rely on retrospective judicial balancing to determine whether he or she is an international criminal.

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<sup>4</sup> Independent Expert Panel for the Definition of Ecocide, Commentary and Core Text, 2021, available at <https://ecocidelaw.com/independent-expert-drafting-panel/> (hereafter, "Panel"). Almost every facet of the ecocide definition proposed by the Independent Expert Panel has attracted commentary from multiple directions. This article addresses one small subset of the issues.

<sup>5</sup> Darryl Robinson, "Ecocide – Puzzles and Possibilities", 20 *JICJ* (2022) 313.

<sup>6</sup> Under the Panel proposal, "*wanton*" means "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated". Panel, *supra* note 2.

<sup>7</sup> Kevin Heller, "The Crime of Ecocide in Action", *Opinio Juris* (blog), 28 June 2021.

So, a crucial question is: can the crime of ecocide be further concretized? Ideally, can it be concretized using available legal concepts? The benefits of doing so include improved predictability, legitimacy, and coherence with the legal system, as well as acceptability and likelihood of adoption. Here, we explore whether “human rights due diligence” might be a helpful tool to clarify key elements of ecocide.

In this article, we are in a conversation with pragmatic readers interested in legally-grounded solutions that have a chance of adoption. We are not dissecting here the more strident positions that would reject environmental law outright, or reject any balancing or wrongfulness requirement.<sup>8</sup> The reason against such positions are discussed in more detail elsewhere.<sup>9</sup> In brief, while we fully sympathize with concerns that environmental law is often too permissive, the crime of ecocide is neither an appropriate nor plausible place to radically reform environmental law. This is so for reasons of legality and legitimacy (international criminal law draws on the most well-established norms that attract broad moral consensus), avoiding over-use of criminal law (the sledgehammer of criminal law is far too crude of a tool for many of the needed societal reforms), and acceptability. Thus, we are discussing here a crime that deals with serious violations of existing principles. Because those principles are unfortunately often flouted every day, recognition of such a crime would be very valuable, helping to stigmatize and deter the worst environmental wrongdoing. Furthermore, criminalizing ecocide could also help contribute to the desired and necessary transformations in popular consciousness, toward a culture of stewardship, and thus help foster stronger environmental law.

### **Preliminary Remark: Natural Persons, Corporate Context**

Before turning to the developing law of “human rights due diligence”, we must first affirm that rules developed for corporations and businesses will indeed be relevant in the ecocide context. The

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<sup>8</sup> Kevin Heller, “Skeptical Thoughts on the Proposed Crime of ‘Ecocide’ (That Isn’t)”, *Opinio Juris* (blog) 23 June 2021; Clémentine Dècle-Classen, “Ecocide and the End of the Anthropocene: An Ecocentric Critique of the (Failed) Developments of an International Crime of Ecocide”, ICD Brief 28, August 22, available at <https://www.internationalcrimesdatabase.org/upload/documents/20220831T115656-Ecocide%20and%20the%20End%20of%20the%20Anthropocene.pdf>.

<sup>9</sup> Robinson, *supra* note 3, esp at 321-25 and 332-38.

Independent Expert Panel proposed to add ecocide crime to the ICC Statute, and the ICC exercises jurisdiction only over natural persons, not legal persons such as corporations.<sup>10</sup> One understandable concern is that not including direct corporate criminal liability is a missed opportunity.<sup>11</sup> Others have expressed concern that corporate activity might thereby be excluded, which would be problematic, given the expectation that many ecocide cases are likely to involve corporations.

It seems clear, however, that the crime of ecocide will apply to business actors. First, the jurisdictional limitation to natural persons only applies at the ICC; if ecocide is adopted as a crime in national jurisdictions, then they can certainly adopt direct corporate criminal liability. Thus, in addition to punishing persons, national jurisdictions can also sanction the corporation as an entity.

Second, even at the ICC, the focus on natural persons does not mean that business activity is thereby exempt from scrutiny. International criminal law still applies to the actions and decision of the individuals who work within a corporation or business. So, the crime of ecocide would still fully apply to individuals acting within a corporate context. As was noted at Nuremberg, a central point of ICL is that it punishes the human beings, rather than focusing on abstract entities.<sup>12</sup> Whereas other legal mechanisms impose liability on artificial persons, ICL seeks to add an additional incentive by focusing on individuals.

## **Human Rights and Environmental Due Diligence**

In recent years, international human rights law has evolved in groundbreaking ways to respond to corporate activity that threatens to harm people and the environment. This body of law clarifies the responsibilities of business enterprises, and requires accountability and access to effective remedy in cases of business-related abuse. These developments offer substantive and procedural guidance that may help to elucidate elements of an ecocide crime.

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<sup>10</sup> ICC Statute, Art 25(1).

<sup>11</sup> Jelena Aparac, "A Missed Opportunity for Accountability? Corporate Responsibility and the Draft Definition of Ecocide", *Völkerrechtsblog* (blog), 9 July 2021.

<sup>12</sup> *Trial of the Major War Criminals before the International Military Tribunal: Proceedings, November 14, 1945 – October 1, 1946*, Vol I (1947) at 223.

## *Guiding Principles*

The UN Guiding Principles on Business and Human Rights ('UNGP'), which were endorsed by the UN Human Rights Council in 2011, establish a "three pillar" framework. The first pillar is that States must take positive steps to ensure protection against human rights abuses by business enterprises. The second pillar outlines the corporate responsibility to respect human rights. This requires that businesses – regardless of their size, sector, operational context, ownership, and structure - avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. The third pillar focuses on access to effective remedy for individuals and communities whose rights are impacted by business activity. Each of these pillars includes a series of foundational and operational principles, along with a detailed commentary. The UN Working Group established to assist with the promotion and implementation of the UNGP has provided additional guidance and 'good practice' insights, while the UN Human Rights Office is engaged in several major initiatives to help further disseminate and implement the UNGP.<sup>13</sup>

Through the application of this framework, the UNGP have become an authoritative global standard, widely accepted by governments, civil society and business entities.<sup>14</sup> Shortly after their adoption by the UN Human Rights Council in 2011, the European Union endorsed the UNGP, and the Organization for Economic Co-operation and Development (OECD) released updated Guidelines for Multinational Enterprises which adapt the UNGP framework to the activities of multinational enterprises and apply them to areas of responsible business conduct, such as impacts on the environment. A multitude of initiatives have since been undertaken to implement the UNGP through multi-stakeholder processes and national action plans. A ten-year stocktaking exercise recently concluded that the UNGPs have 'helped shift the focus from corporate philanthropy to accountability as an essential feature of responsible business'.<sup>15</sup>

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<sup>13</sup> See <https://www.ohchr.org/en/special-procedures/wg-business> and <https://www.ohchr.org/en/business-and-human-rights>

<sup>14</sup> UN Human Rights Council resolution 17/4, 'Human rights and transnational corporations and other business enterprises', 6 July 2011, A/HRC/RES/17/4, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf>

<sup>15</sup> UN Human Rights Council, 'Guiding Principles On Business And Human Rights At 10: Taking Stock of the First Decade', Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/47/39, June 2021

While the UNGP do not refer explicitly to the environment, the Guiding Principles have a direct bearing on corporate behaviour that risks causing harm to the environment. After all, the corporate responsibility to protect human rights elaborated under the UNGP applies to all internationally-recognised human rights, and it is widely acknowledged that corporate entities are responsible for human rights abuses related to climate, biodiversity, and environmental damage. Moreover, activities such as rampant deforestation, chemical and plastic production, fossil fuel exploitation, and other large-scale extractive activities directly jeopardize the human right to a clean, healthy and sustainable environment.<sup>16</sup> In its ten-year assessment report, the UN Working Group highlighted the 'existential climate crisis' among the most pressing global challenges. Looking ahead, it underscored the UNGPs as both an authoritative framework and a key opportunity for States and businesses to 'forge a better normal that prioritizes respect for people and the environment'.<sup>17</sup>

Pillar 2 of the Guiding Principles sets out a blueprint for the corporate responsibility to respect. The responsibility requires an explicit policy commitment to respect human rights, which is approved by senior management, embedded into the corporate culture, and which covers all business operations. Pillar 2 outlines how business enterprises should identify, prevent, mitigate, and account for how they address their adverse human rights impacts through the exercise of human rights due diligence.<sup>18</sup> This is a four-step management tool, developed through a process of meaningful stakeholder engagement, which involves: assessing actual and potential human rights impacts; integrating and acting upon the findings; tracking the effectiveness of responses; and communicating on how impacts are addressed.<sup>19</sup> Undertaking social and environmental impact assessments are an integral part of this process.<sup>20</sup>

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<sup>16</sup> UN General Assembly resolution 76/300, 'The human right to a clean, healthy and sustainable environment', 1 August 2022, A/RES/76/300; David R Boyd and Stephanie Keene, 'Policy Brief No. 3: Essential elements of effective and equitable human rights and environmental due diligence legislation', UN OHCHR, June 2022.

<sup>17</sup> UN Human Rights Council, 'Guiding Principles On Business And Human Rights At 10: Taking Stock of the First Decade', Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/47/39, June 2021, page 3. See also UN OHCHR, 'Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change' (2021), p 36, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>18</sup> As the UN Working Group has emphasized, human rights due diligence focuses on risks to people, whereas traditional corporate due diligence (typically transactional due diligence or compliance monitoring) addresses risks that are a concern for business. See UN General Assembly, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/73/163, 16 July 2018.

<sup>19</sup> Guiding Principles 17 to 21. See also <https://shiftproject.org/resources/ungps101/pillar-2-of-ungp-respect/engage/>

<sup>20</sup> UN OHCHR, *Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change* (2021), p 36, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

Accordingly, a business enterprise must obtain the information it needs in order to understand the specific risk - at a given point in time and in any operating context - and identify and implement the actions needed to prevent harm, mitigate risks and address any adverse impacts, such as those caused through the direct or indirect emission of greenhouse gases and toxic waste.<sup>21</sup> As the nature of human rights risks associated with a business operation may evolve over time, the due diligence obligation is to be implemented through a continuous process. In other words, the concept of due diligence reflected in the UNGP refers both to an ongoing practice and a standard of care expected of companies to meet their responsibility to respect throughout their full value chain.<sup>22</sup>

The framework elaborated under the UNGP is credited with helping to 'shore up the legitimacy of both market integration and human rights ... by re-orienting human rights norms, if not international laws, to address contemporary threats to individuals, societies and the environment deriving from business activities'.<sup>23</sup> As for their impact, the expectation that businesses exercise human rights due diligence is considered a normative innovation and may be the 'most influential contribution of the UNGPs'.<sup>24</sup>

Still, the UNGP are binding only when translated into law at the national level. Discussions towards an international legally binding instrument on 'transnational corporations and other business enterprises with respect to human rights', which began in 2014, are ongoing.<sup>25</sup>

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<sup>21</sup> OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide* (2012), p. 31; and OHCHR, *Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change* (2021), p 37, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>22</sup> Although different legal systems may use different terminology to refer to due diligence in relation to human rights and environmental matters – the concept of 'vigilance' under French civil law differs slightly, for example, from the common law 'duty of care' - the concept of human rights due diligence reflected in the UNGP has gained a wide acceptance at international level, as it resonates with standards in both civil and common law systems. See, for example, European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H., et al., *Study on due diligence requirements through the supply chain : final report*, Publications Office, 2020, page 157. <https://data.europa.eu/doi/10.2838/39830>

<sup>23</sup> Claire Methven O'Brien and Giulia Botta, "The Corporate Responsibility to Respect Human Rights: An Updated Status Review (2022)", in *Corporate Social Responsibility and Social and Environmental Governance: Greenwashing and Human Rights*, (Rio de Janeiro, Lumen Iuris, forthcoming 2022), p3.

<sup>24</sup> UN Human Rights Council, "Guiding Principles On Business And Human Rights At 10: Taking Stock of the First Decade", Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/47/39, Executive Summary page II.

<sup>25</sup> UN Human Rights Council resolution 26/9, 14 July 2014, A/HRC/RES/26/9, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>. A third revised draft of the 'legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises', published on 17 August 2021, was discussed at 7th session of the intergovernmental working group on 25 – 29 October 2021. See

<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

Assessments conducted ten years after the introduction of the UNGP suggest that, despite the promising vision reflected in the UNGP, *voluntary* due diligence measures have proven inadequate to prevent, mitigate and redress serious harm to human rights and the environment.<sup>26</sup> Globally, only a small number of corporations have adopted human rights and environmental standards, and 'few companies view existing regulations as a compelling or sufficient incentive for their businesses to respect human rights and environmental imperatives'.<sup>27</sup> Well-documented barriers to securing corporate accountability and access to remedy for victims of business-related human rights abuses persist.<sup>28</sup>

### ***Mandatory Due Diligence Legislation***

Some States have therefore initiated mandatory due diligence regimes with a view to preventing human rights and environmental harm, and enhancing corporate accountability.<sup>29</sup> Businesses that have recognised the value of due diligence policies also have called upon States to enact national legislation that would oblige corporate actors to do so in their global business operations, in order both to level the playing field and to establish greater legal certainty around the standards expected of companies.<sup>30</sup> The demand for mandatory due diligence stems at least in part from the acknowledgement by some corporate actors and investors of the business imperatives of the

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<sup>26</sup> UN Human Rights Council, "Guiding Principles On Business And Human Rights At 10: Taking Stock of the First Decade", Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/47/39; June 2021; European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H., et al., *Study on due diligence requirements through the supply chain : final report*, Publications Office, 2020, <https://data.europa.eu/doi/10.2838/39830>; and Boyd and Keene, *supra* note 15.

<sup>27</sup> Boyd and Keene, *supra* note 15 at page 4.

<sup>28</sup> One global initiative to address these barriers and strengthen implementation of UNGP Pillar 3 is the OHCHR *Accountability and Remedy Project*, launched in response to a request by the UN Human Rights Council in its resolution 26/22, at: <https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project>

<sup>29</sup> Rachel Chambers and Jena Martin argue that even mandatory due diligence is insufficient and that 'by having corporate accountability solely be determined by corporate *actions* rather than corporate *outcomes*, this framework also runs the risk of becoming ineffective'. They suggest a framework that combines a mandatory human rights due diligence framework with a 'prohibitive framework—one that focuses on outcomes and, in some instances, acts as an outright ban on the most egregious corporate conduct within the area of human rights'. See *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence* (New York University Journal of Law & Business, Vol. 18, no. 3, Summer 2022), page 780.

<sup>30</sup> Oldring and Mackintosh, *supra* note 1. According to the Business and Human Rights Resource Centre, to date, more than 70 large (e.g. those with over 1 billion Euro turnover) businesses, associations and investors have made statements in support of mandatory due diligence regulation. Business and Human Rights Resource Centre, 'List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation', 6 June 2019, at <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/>; and 'UK businesses call for a new human rights and environmental due diligence law', 21 October 2021, at <https://www.business-humanrights.org/en/latest-news/uk-businesses-call-for-a-new-human-rights-and-environmental-due-diligence-law/>



climate crisis, as well as the importance of human rights protection as a buffer against the impacts of severe environmental harm.<sup>31</sup> A range of initiatives, particularly in Europe and, more recently, in Latin America, have begun to integrate corporate human rights and environmental due diligence requirements into law, at a rate and scope which suggests there exists 'considerable appetite for reform'.<sup>32</sup> Reflecting on these developments, some commentators have noted a perceptible shift from the 'soft law' approach to corporate responsibility reflected in the UNGPs towards the establishment of legal duties.<sup>33</sup>

France is often cited as the most far-reaching and comprehensive example: legislation adopted in 2017 imposes a 'duty of vigilance' on some French companies (ie. those with more than 5,000 employees, including employees of their French subsidiaries, or 10,000 or more employees worldwide) in order to 'identify risks and forestall serious infringements of or harm to human rights and fundamental freedoms, personal health and safety and the environment' that may be caused by the company, their subsidiaries and other business relationships.<sup>34</sup> The law requires companies to design and implement measures to identify, prevent and address risks and impacts in their global operations, and provides for access to remedy for harm resulting from a lack of 'vigilance' that can be invoked before a French court.

In Germany, new legislation that is set to enter into force in 2023 will require large German companies, and foreign companies with administrative main offices in Germany, to identify human

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<sup>31</sup> 'The Investor Case for Mandatory Human Rights Due Diligence', available at [https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL\\_3.pdf](https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_3.pdf); P Jurewicz and R DeWinter-Schmitt, 'Mandatory Human Rights and Environmental Due Diligence is Good for Investors and Business', 15 March 2022, Proxy Preview, <https://www.proxypreview.org/2022/contributor-articles-blog/mandatory-human-rights-and-environmental-due-diligence-is-good-for-investors-and-business>; Business and Human Rights Resource Centre, 'More than 100 companies and investors call for effective EU corporate accountability legislation', 8 February 2022, <https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence-2022/>

<sup>32</sup> UN OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies', June 2020, available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR\\_Due\\_Diligence\\_Issues\\_Paper.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf). See also Clara Pacce P Serva and Luiz Carlos S Faria Jr, 'Mandatory human rights due diligence in Brazil', *International Bar Association (blog)*, 17 June 2022, <https://www.ibanet.org/Mandatory-human-rights-due-diligence-Brazil>

<sup>33</sup> Chiara Macchi and Claire Bright, 'Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in M. Buscemi, N. Lazzarini and L. Magi (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill, 2020); Barnali Choudury, 'Balancing soft and hard law for business and human rights' (2018) 67 *International and Comparative Law Quarterly* 961, 968-969.

<sup>34</sup> Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre [Law 2017-399 of March 27, 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 28, 2017. [https://www.legifrance.gouv.fr/download/pdf?id=9aawcYcwvktYs2UUCMWL4iX\\_erjixoTD\\_Jy3AVXRfk=&](https://www.legifrance.gouv.fr/download/pdf?id=9aawcYcwvktYs2UUCMWL4iX_erjixoTD_Jy3AVXRfk=&) [https://www.diplomatie.gouv.fr/IMG/pdf/law\\_on\\_the\\_duty\\_of\\_vigilance\\_cle8b1211.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/law_on_the_duty_of_vigilance_cle8b1211.pdf)

rights and environmental risks, and establish an effective risk management system in order to prevent or minimize human rights and environmental violations.<sup>35</sup> The due diligence requirements apply to the company's own business operations and to that of their direct suppliers, as well as operations of 'indirect' suppliers where there is 'substantiated knowledge' of a potential human rights violation.

At the regional level, acting on a resolution of the European Parliament, the European Commission recently released its long-awaited proposed directive on corporate sustainability due diligence. This directive aims to anchor human rights and environmental considerations in companies' operations and corporate governance.<sup>36</sup> The directive would require EU member States to introduce rules to compel companies to conduct human rights and environmental due diligence, in order to ensure businesses address adverse impacts of their actions in their value chains both inside and outside Europe. The directive also introduces duties for corporate directors, which include setting up and overseeing the implementation of the due diligence processes and integrating due diligence into corporate strategy. The proposed directive has been criticized as unduly restrictive in scope and insufficiently aligned with both the UNGPs and the OECD Guidelines, and undoubtedly will evolve further as the legislative process moves forward.<sup>37</sup>

### ***Judicial Developments***

In parallel with these mandatory due diligence developments, courts also have begun to interpret the human rights responsibilities of corporations for climate and environmental harms, drawing on

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<sup>35</sup> Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021. BGBl I at 2959 (Ger.). Official English translation at [https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3). See also Business and Human Rights Resource Centre, 'German parliament passes mandatory human rights due diligence law', available at: <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>.

<sup>36</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM (2022) 71 final (Feb. 23, 2022) [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1145](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145) At regional level, the Inter-American Commission on Human Rights also recommended in 2019 that its member States adopt mandatory due diligence. [www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf](http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf)

<sup>37</sup> See [https://shiftproject.org/wp-content/uploads/2022/03/Shift\\_Analysis\\_EU\\_CSDDProposal\\_vMarch01.pdf](https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf); [https://media.business-humanrights.org/media/documents/EU\\_Business\\_Statement\\_February2022.pdf](https://media.business-humanrights.org/media/documents/EU_Business_Statement_February2022.pdf); [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback\\_en?p\\_id=29288521](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback_en?p_id=29288521); European Coalition for Corporate Justice, 'Comprehensive analysis of EU Commission's proposal for a directive on due diligence', 5 April 2022, <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

the framework of the UNGP. The case brought by Friends of the Earth Netherlands (Milieudefensie) and co-plaintiffs against Royal Dutch Shell (RDS) - following on the heels of the Netherlands Supreme Court landmark decision in the *Urgenda* case, which found the Dutch government's inadequate action on climate change to have violated a duty of care to its citizens – is particularly noteworthy in this regard.<sup>38</sup>

The plaintiffs in this case claimed that RDS's business operations violated its duty of care and that the company should reduce its emissions in accordance with the goals of the Paris Agreement. In its extraordinary judgment, the District Court in the Hague emphasized the company's responsibility to respect human rights as formulated in the UN Guiding Principles; that this responsibility was distinct from a State's human rights responsibilities and exists 'over and above compliance with national laws and regulations protecting human rights'; and that it included meeting climate commitments.<sup>39</sup> The Court interpreted an unwritten standard of care under Dutch tort law with reference to the rights to life and to respect for private and family life of Dutch residents and inhabitants of the region (as reflected in the ECHR and ICCPR), as well as the UNGP. The Court also took note of RDS's public policy, in which the company commits to respecting human rights and, further, states that its human rights policy 'is informed by the UN Guiding Principles on Business and Human Rights and applies to all our employees and contractors'. The Court found the UNGP to be 'suitable as a guideline in the interpretation of the unwritten standard of care' and suggested that '(d)ue to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP'.<sup>40</sup> The Court concluded that RDS had breached its duty of care and ordered the corporation to reduce its emissions by 45% by 2030 relative to 2019 across all its activities (including end-users emissions).<sup>41</sup> Of course, this decision is not without controversy: the Court's analysis has been criticized and an appeal by RDS is pending.<sup>42</sup> The decision is nonetheless remarkable in its

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<sup>38</sup> The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell PLC*, Judgment of 26 May 2021, case number C/09/571932 / HA ZA 19-379, at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:R BDHA:2021:5339>

<sup>39</sup> Ibid.

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Benoit Mayer, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?', EJIL Talk! (Blog), 3 June 2021. <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>

reference to the UNGP as an authoritative source of guidance in its interpretation of the duty of care.

## **Implications for Ecocide**

In the light of these developments, the duty of due diligence as reflected in the UNGP offers intriguing possibilities for the crime of ecocide.

First, such a duty helps address what we might call “the problem of the addressee”. International human rights law and international environmental law in general speak to *States*. This makes it challenging to draw on those bodies of law to provide more concrete content for the crime of ecocide. The crime of ecocide needs to speak not only the state actors but to individual and private actors, since international criminal law establishes individual criminal responsibility. The duty of due diligence, applicable to private actors in relation to human rights and the environment, bridges that gap. It specifies a level of obligation which is appropriate for private actors, and yet which makes reference to international human rights law and environmental obligations.

Second, the duty of due diligence as reflected in the UNGPs provides a single, internationally-accepted guiding benchmark which is nonetheless adaptable to different circumstances. For example, while it applies to all actors – eg. big or small operations – the duty of due diligence takes into account the size of the business operation in assessing the burden that is fair to impose, while also considering the dangerousness of the activity or directness of the link to harm.

The duty could be statutorily created by new legislation on ecocide, if such a duty does not already clearly exist at the time of adoption. Ideally, the duty would be already established, through other laws such as comprehensive mandatory due diligence legislation, case law, or widely-recognized developments in human rights law. If the duty of due diligence comes to be well-established through other initiatives, then it will provide a tested and accepted legal concept upon which to build.

Building on a duty of due diligence could give helpful clarifications both in the fault element, as well as the “wrongfulness” element in the crime of ecocide.

### ***Due Diligence and Culpable Ignorance***

The definition of ecocide proposed by the Panel requires “knowledge that there is a *substantial likelihood* of severe and either widespread or long-term damage to the environment”.<sup>43</sup> Our focus here is not on the “impact threshold” (eg how severe the anticipated damage must be), but rather on the requisite level of foresight or fault. As with any possible formulation in ecocide, this text has attracted commentary that pulls in many different directions.<sup>44</sup>

Fundamental principles of justice require some level of *fault* (mens rea) in relation to the prohibited impact. An understandable reflex, by those seeking to give the crime maximum breadth and ensure that no one “escapes justice”, would be to exclude mens rea. Thus, there have been proposals to remove any fault requirement (ie. absolute liability) or, alternatively, to require simple negligence.<sup>45</sup> While such proposals have laudable aims of facilitating prosecution and maximizing deterrence, they are problematic. For a crime with a severe stigma, some “fault” – ie some degree of foresight or other culpable state of mind – is needed. Of course, there can be lesser environmental offences with lower states of mens rea, especially in environmental regulatory offences. But if ecocide is to have the stigma of a most serious international or transnational crime, then it requires a commensurate level of fault, to satisfy the culpability principle.

The Panel approach is preferrable to many other approaches. For example, requiring “*intent*” to harm the environment is implausible, because people rarely act with such intent. A “knowledge” test, without any further caveat, would generally require knowledge of a “*substantial certainty*” of the prohibited degree of harm. This would also be problematic, because environmental impacts often cannot be predicted with substantial certainty; they are a matter of risks and probabilities.

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<sup>43</sup> Panel, *supra* note 2.

<sup>44</sup> While some scholars assert that “knowledge of a substantial likelihood” is an impermissible contradiction in terms, it is actually a common term, used in national and international jurisprudence, and is often how recklessness is defined or described. See Robinson, *supra* note 3, at 330-31.

<sup>45</sup> Polly Higgins, *Eradicating Ecocide*, 2nd Ed (Shepherd Walwyn 2010) at 68.

The Panel's test – knowledge of likelihood – is akin to common law “recklessness”.<sup>46</sup> This standard strikes an appropriate balance: it includes those who willingly run dangerous risks, and yet it is also still a highly culpable subjective standard.

Nonetheless, a “foresight of likelihood” test is still vulnerable to a sound criticism: it would exonerate a person who remains ignorant of the danger only because they completely neglected their responsibilities of environmental stewardship to investigate potential impacts.<sup>47</sup> This scenario is akin to the common law concept of “willful blindness”. Perhaps wilful blindness could be incorporated into the definition, but wilful blindness is a subtle and easily mis-applied concept that is not familiar in other traditions.<sup>48</sup>

This is one way that a duty of due diligence along the lines reflected in the UNGP could prove helpful: in developing a test for “culpable ignorance” that is acceptable across legal traditions. The duty of due diligence includes a *positive duty* to inquire about human rights and environmental impacts. A person who fails to know about the impact of their project, because of an egregious breach of their duty of inquire, exhibits a culpable state of mind in relation to that impact. By choosing to proceed blindly, they have demonstrated their disdain for the impacts and the harms that they cause, which is a culpable attitude.<sup>49</sup> This is called “the fault of not knowing”.<sup>50</sup> It is the underpinning for “command responsibility”, in which the commander cannot plead ignorance where the ignorance was produced by an egregious breach of the duty to stay informed.<sup>51</sup>

There are subtly different ways in which the “fault of not knowing” could be crafted. Importantly, the standard would not include every lapse in due diligence, as that would amount to a ‘simple negligence’ standard, inappropriate for a serious crime. The standard would have to focus on the most culpable breaches of the duty of due diligence. For example, it could be a subjective standard, requiring something like a demonstration of “reckless disregard” for the duties and harms.

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<sup>46</sup> Panel, *supra* note 2, at 11.

<sup>47</sup> Heller, *supra* note 5.

<sup>48</sup> Glanville Williams, *Criminal Law: The General Part* (2d ed. 1961) at 157–60, noting that wilful blindness is strictly limited and must be almost tantamount to actual knowledge.

<sup>49</sup> Kenneth Simons, “Culpability and Retributive Theory: The Problem of Criminal Negligence” (1994) 5 J Contemp Legal Issues 365 at 365; Antony Duff, *Intention, Agency and Criminal Liability* (Blackwell 1990) at 162–163.

<sup>50</sup> See eg George P Fletcher, “The Fault of Not Knowing” (2002) 3 Theoretical Inq L 265; HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2d ed, OUP 2008) at 150-57.

<sup>51</sup> Darryl Robinson, “A Justification of Command Responsibility”, 28 Criminal Law Forum 633 (2017).

Alternatively, it could arguably even be an objective standard, if that standard is set high enough to warrant criminal culpability.<sup>52</sup>

### ***Due Diligence and Other Elements***

The duty of due diligence can also help clarify other elements of ecocide. For example, a criticism of the “wanton” test proposed by the Panel is that it leaves too much room for “balancing”, thereby creating uncertainty both for prosecutors and for citizens. The duty of due diligence might help concretize the analysis, by shifting focus to specific breaches of due diligence. It would also help guide commercial actors, who have a right to know what they must do in order to comply with the law. The answer would be due diligence.

The UNGP due diligence standard may also be useful in relation to the “*unlawful*” test. Under general principles of criminal law, where illegality in another body of law (eg environmental law) is an essential material element transforming conduct into a crime, there is also a need for some degree of “fault” in relation to that illegality. This is reflected, for example, in Article 32 of the Rome Statute, which distinguishes (i) the general principle that ignorance of the criminal prohibition is no excuse, from (ii) the more specific rule requiring fault where “unlawfulness” is a material element of the offence. Depending on circumstances, it might not be fair to expect domestic private actors to know all of the technicalities of international environmental law, which is addressed primarily to States. Again, a duty of due diligence to ascertain the applicable law may provide an appropriate intermediate position (between no mens rea and full subjective mens rea), serving both the effectiveness of the crime and principles of justice.

Again, an understandable reflex may be to oppose any kind of assurances or guidance for commercial operators. Some proponents may regard a climate of fear and uncertainty as *desirable* for maximizing deterrent impact. However, that punitive instinct is not how criminal law is meant to work. The people who provide energy, food, transportation, and waste disposal – with the technology that we currently have and the infrastructure that we currently have – are entitled to know what they need to do to provide essential services without going to prison. Due diligence

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<sup>52</sup> Ibid at 647-51 and 660-62.

also helps prosecutors, by giving concrete provable indicators, ie they can point to specific lapses to show the breach.

If human rights due diligence is used as a tool, the next question to be resolved is: what *degree of departure* from the UNGP due diligence standard is required in ecocide? *Civil* responsibility may be triggered by any lapse in due diligence. For criminal law, and especially international stigmatization at the highest level, a more serious departure is needed. The exact formulation remains to be discovered. Perhaps inspiration already exists somewhere in due diligence jurisprudence or in national environmental law jurisprudence (especially in lists of aggravating factors). Typically, in international criminal law, the standard will be *subjective*: for example, a reckless disregard for the responsibilities and harms. It is also at least conceivable that some objective standards might be included, as long as they are set high enough to be criminally culpable.<sup>53</sup>

## Conclusion

This article offered a preliminary sketch of how international human rights law, in particular the responsibility of business enterprises to exercise due diligence, may help clarify certain elements of ecocide crime. The UN Guiding Principles and related instruments elucidate how corporate actors should identify, prevent, and mitigate their adverse human rights and environmental impacts. The trend towards the adoption of UNGP-inspired due diligence legislation across jurisdictions suggests both a 'hardening' of these standards and an affirmation of their relevance in addressing contemporary threats to people and the planet. The standards may prove useful in clarifying what is expected of private actors and delineating when conduct may become criminally wrongful. Incorporating such standards may help resolve some gaps in the understanding of ecocide, and also align the crime with broader efforts to incentivize mindful and ethical business practices.

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<sup>53</sup> For example, one possible standard, drawn from Canadian criminal negligence law, requires (1) a serious departure that (2) demonstrates a "wanton and reckless disregard for the lives and safety of others". Such a standard arguably uses objective and subjective elements, and would have to be modified to include disregard for the environment and non-human animals.