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ACCESS TO JUDICIAL REMEDIES AND EXTRATERRITORIAL LITIGATION IN BUSINESS AND HUMAN RIGHTS:

an analysis from the cases of ‘Fundão’ and ‘Córrego do Feijão’ dam collapses

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A Thesis presented to the Pontificia Universidade Católica do Paraná (PUCPR), in the Postgraduate Program in Law (PPGD), Expertise: Socio-environmental Law and Sustainability, and to the Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), to the International Doctoral Program in Business and Human Rights, as part of a cotuttele agreement, as partial requirement for obtaining the title of Phd in Law. This work was conducted with the support of the Coordination for the Improvement of Higher Education Personnel - Brazil (CAPES) - Funding code 001.

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ABSTRACT

The Fundão and Córrego do Feijão dam collapses in Brazil were the result of extractive activities by mining companies and caused numerous human rights violations. Although domestic litigation provided some relief to the victims, it was insufficient to adequately remedy their situation, leading them to seek an alternative: extraterritorial litigation. In both cases, foreign companies were involved through national subsidiaries, and the victims sued the parent company in the country where it was headquartered. In the case of the Fundão dam collapse, the victims filed a lawsuit in the British jurisdiction against BHP Billiton, one of the controlling companies of the Samarco joint venture. In the case of the Córrego do Feijão dam collapse, the victims are seeking reparations in the German jurisdiction by suing the company Tüv Süd, as its Brazilian office had issued a report certifying the safety of the dam that collapsed. This research aims to analyze the feasibility and main challenges victims face in seeking reparations in a foreign jurisdiction through extraterritorial litigation, as well as how these difficulties can be mitigated. The study is based on the Third Pillar of the UN Guiding Principles, which relates to providing effective remedies for victims, opting for judicial means while considering the need to effectively guarantee access to justice. The research seeks to understand extraterritorial litigation in the field of Business and Human Rights in light of International Law. The regulation of International Law addressing state jurisdiction over transnational corporations and human rights is not static within a fixed set of norms but is constantly evolving to reflect ongoing efforts to balance state sovereign interests and the protection of human rights in a globalized economy. Subsequently, the study analyzes litigation in the home jurisdictions of the cases examined—England and Germany—to identify the main obstacles victims face when seeking extraterritorial reparations in each jurisdiction. For the research, the inductive method was initially applied, starting with the analysis of specific cases to identify general problems in each jurisdiction. This was followed by a comparative law study between the two jurisdictions. Subsequently, the hypothetical-deductive method was applied to explore potential solutions to the obstacles identified in each jurisdiction. The research procedure adopted was monographic, with qualitative analysis through bibliographic research. Documentary and jurisprudential research was also conducted, seeking official UN documents and reports, international treaties related to the topic, domestic legislation, and precedents from each jurisdiction studied. This work aims to ensure that the conclusions drawn from the investigation result in applicable and informed recommendations that are relevant and useful for the victims, so that extraterritorial jurisdiction is recognized and access to effective reparations becomes possible. The goal is to improve this mechanism to facilitate victims' access to resources.

Key-words: Business and Human Rights; International Law; Extraterritoriality.

RESUMO

Os rompimentos das barragens de Fundão e do Córrego do Feijão ocorreram no Brasil em decorrência da atividade extrativista de mineradoras e causaram inúmeras violações de direitos humanos. Apesar de os litígios domésticos terem resultando em amparo às vítimas, não foram suficientes para remediá-las de forma adequada, o que as levou a buscar outra alternativa: os litígios extraterritoriais. Em ambos os casos, empresas estrangeiras estavam envolvidas por meio de subsidiárias nacionais, e as vítimas processaram a empresa controladora no país de origem da companhia. No caso do rompimento da barragem de Fundão, as vítimas interpuseram ação judicial na jurisdição britânica contra a BHP Billiton, uma das empresas controladoras da joint venture Samarco. Já no caso do rompimento da barragem do Córrego do Feijão, as vítimas buscam reparação na jurisdição germânica ao processar a empresa Tüv Süd, uma vez que seu escritório brasileiro forneceu um laudo atestando a segurança da barragem que se rompeu. A presente pesquisa busca analisar a viabilidade e os principais desafios que as vítimas encontram na busca por reparação em uma jurisdição estrangeira por meio de litígios extraterritoriais, bem como de que forma essas dificuldades podem ser amenizadas. O trabalho desenvolveu-se a partir do Terceiro Pilar dos Princípios Orientadores da ONU, relacionados ao provimento de remediação efetiva às vítimas, optando-se pelo meio judicial, considerando a necessidade de garantir efetivamente o acesso à justiça. Buscou-se compreender os litígios extraterritoriais no campo de Empresas e Direitos Humanos à luz do Direito Internacional. A regulação do Direito Internacional que aborda a jurisdição estatal sobre empresas transnacionais e os direitos humanos não permanece estática em um conjunto fixo de normas, mas está em constante evolução para refletir esforços contínuos na busca de um equilíbrio entre os interesses soberanos do Estado e a proteção dos direitos humanos em uma economia globalizada. Posteriormente, passou-se a analisar os litígios nas jurisdições base dos casos estudados, Inglaterra e Alemanha, para identificar os principais obstáculos enfrentados pelas vítimas que buscam reparação extraterritorial em cada jurisdição. Para a realização da pesquisa, inicialmente foi aplicado o método indutivo, partindo-se da análise dos casos específicos para identificar os problemas gerais de cada uma das jurisdições. Em seguida, realizou-se o estudo de direito comparado entre as duas jurisdições. Posteriormente, o método hipotético-dedutivo foi aplicado, buscando-se uma possível solução para os obstáculos identificados em cada jurisdição. O procedimento de pesquisa utilizado foi o monográfico, com análise qualitativa por meio de pesquisa bibliográfica. Também foi utilizada pesquisa documental e jurisprudencial, buscando documentos e relatórios oficiais da ONU, tratados internacionais relativos ao tema, legislações domésticas e precedentes de cada jurisdição estudada. Este trabalho busca garantir que as conclusões obtidas na investigação resultem em recomendações aplicáveis e informadas, que sejam relevantes e úteis para as vítimas, de modo que a jurisdição extraterritorial seja admitida e que o acesso a uma reparação eficaz seja possível. O objetivo é aprimorar esse mecanismo para que as vítimas tenham o acesso aos recursos facilitado.

Palavras-chave: Empresas e Direitos Humanos; Direito Internacional; Extraterritorialidade.

ZUSAMMENFASSUNG

Die Brüche der Fundão- und Córrego-do-Feijão-Dämme ereigneten sich in Brasilien als Folge des extraktiven Bergbaus und verursachten zahlreiche Menschenrechtsverletzungen. Obwohl innerstaatliche Gerichtsverfahren den Opfern gewisse Unterstützung brachten, reichten diese nicht aus, um angemessene Abhilfe zu schaffen, was sie dazu veranlasste, eine alternative Lösung zu suchen: extraterritoriale Gerichtsverfahren. In beiden Fällen waren ausländische Unternehmen über nationale Tochtergesellschaften beteiligt, und die Opfer verklagten das Mutterunternehmen im Herkunftsland der Firma. Im Fall des Fundão-Dammbruchs reichten die Opfer eine Klage in der britischen Gerichtsbarkeit gegen BHP Billiton ein, eines der kontrollierenden Unternehmen des Joint Ventures Samarco. Im Fall des Córrego-do-Feijão-Dammbruchs streben die Opfer Entschädigungen in der deutschen Gerichtsbarkeit an, indem sie die Firma TÜV Süd verklagen, da deren brasilianische Niederlassung ein Gutachten ausgestellt hatte, das die Sicherheit des gebrochenen Damms bescheinigte. Die vorliegende Forschung zielt darauf ab, die Machbarkeit und die Hauptherausforderungen zu analysieren, denen Opfer bei der Suche nach Entschädigungen in einer ausländischen Gerichtsbarkeit durch extraterritoriale Gerichtsverfahren begegnen, sowie Möglichkeiten zu untersuchen, wie diese Schwierigkeiten gemildert werden können. Die Arbeit basiert auf der dritten Säule der UN-Leitprinzipien, die sich auf die Bereitstellung wirksamer Abhilfemaßnahmen für Opfer bezieht, wobei der gerichtliche Weg gewählt wurde, um den effektiven Zugang zur Justiz zu gewährleisten. Die Forschung zielt darauf ab, extraterritoriale Gerichtsverfahren im Bereich Unternehmen und Menschenrechte im Lichte des internationalen Rechts zu verstehen. Die Regulierung des internationalen Rechts, die die staatliche Gerichtsbarkeit über transnationale Unternehmen und Menschenrechte behandelt, ist nicht statisch in einem festen Regelwerk verankert, sondern entwickelt sich ständig weiter, um die fortlaufenden Bemühungen widerzuspiegeln, ein Gleichgewicht zwischen den souveränen Interessen des Staates und dem Schutz der Menschenrechte in einer globalisierten Wirtschaft zu finden. Anschließend wurden die Gerichtsverfahren in den Heimatgerichtsbarkeiten der untersuchten Fälle – England und Deutschland – analysiert, um die Haupthemmnisse zu identifizieren, denen Opfer bei der Suche nach extraterritorialen Entschädigungen in jeder Gerichtsbarkeit begegnen. Für die Forschung wurde zunächst die induktive Methode angewendet, indem spezifische Fälle analysiert wurden, um allgemeine Probleme in jeder Gerichtsbarkeit zu identifizieren. Darauf folgte eine rechtsvergleichende Studie zwischen den beiden Gerichtsbarkeiten. Anschließend wurde die hypothetisch-deduktive Methode angewendet, um mögliche Lösungen für die identifizierten Hindernisse in jeder Gerichtsbarkeit zu erarbeiten. Das Forschungsverfahren war monographisch, mit qualitativer Analyse durch bibliografische Recherche. Es wurden auch dokumentarische und rechtswissenschaftliche Recherchen durchgeführt, wobei offizielle UN-Dokumente und Berichte, internationale Verträge zum Thema, nationale Gesetzgebungen und Präzedenzfälle aus jeder untersuchten Gerichtsbarkeit herangezogen wurden. Diese Arbeit zielt darauf ab, sicherzustellen, dass die aus der Untersuchung gezogenen Schlussfolgerungen in anwendbare und fundierte Empfehlungen münden, die für die Opfer relevant und nützlich sind, sodass die extraterritoriale Gerichtsbarkeit anerkannt wird und der Zugang zu wirksamen Entschädigungen ermöglicht wird. Das Ziel ist es, diesen Mechanismus zu verbessern, um den Opfern den Zugang zu Ressourcen zu erleichtern.

Schlüsselwörter: Wirtschaft und Menschenrechte; Internationales Recht; Extraterritorialität.

LIST OF ABBREVIATIONS AND ACRONYMS

ABNT: Associação Brasileira de Normas Técnicas

ACP: Ação Civil Pública

ANA: Agência Nacional das Águas

ANM: Agência Nacional de Mineração

ATS: Alien Tort Statute

AVABRUM: Association of relatives of victims and those affected by the collapse of the Corrégo do Feijão dam

BHR: Business and Human Rights

BREXIT: Name given to the UK's movement to leave the European Union

COPAM: Conselho Estadual de Política Ambiental

DNPM: Departamento Nacional de Produção Mineral

DPMG: Defensoria Pública de Minas Gerais

DPU: Defensoria Pública da União

ECHR: European Commission of Human Rights

ECOSOC: Economic and Social Council

EDH Court: European Court of Human Rights

ESCR: Economic Social and Cultural Rights

EU: Europe Union

HRC: Human Rights Council

IBAMA: Instituto Brasileiro do Meio Ambiente e dos Recurso Naturais Renováveis

IACHR: Inter-American Commission on Human Rights

IED: Investimentos Estrangeiros Diretos

ILO: International Labor Organization

ISO: International Organization for Standardization

KCM: Konkola Copper Mines

LKSG: Lieferkettensorgfaltspflichtengesetz

MG: Minas Gerais

MPF: Ministério Público Federal

MPMG: Ministério Público do Estado de Minas Gearis

MPT: Ministério Público do Trabalho

NAP: National Action Plan

NBR: Norma Brasileira

OC: Opinião Consultiva

OECD: Organization for Economic Cooperation and Development

OHCHR: Office of the High Commissioner Human Rights

OL: Operating License

OMC: Organização Mundial do Comércio

ONGs: Organizações não Governamentais

ONU: Organização das Nações Unidas

PAE: Plano de Ações Emergenciais

SPDC: Shell Petroleum Development Company

TAP: Termo de Ajuste Preliminar

TACF: Termo de Ajustamento de Conduta Final

TJMG: Tribunal de Justiça de Minas Gerais

TNCs: Transnational Corporations

TRT: Tribunal Regional do Trabalho

TTAC: Termo de Transação e Ajustamento de Conduta

TWAIL: Third World Approaches to International Law

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGPs: United Nations Guidinging Principles on Business and Human Rights

UNODC: United Nations Office on Drugs and Crime

UNWG: United Nation Working Group

USA: United States of America

WGBHR: Working Group on Business and Human Rights

SUMMARY

INTRODUCTION

The global reach of transnational corporations[1] has increased significantly over the last decades. The global financial markets impose their laws and precepts on the planet, and States don't have enough resources or freedom to withstand the pressure.[2] The loss of autonomy by some States has occurred concomitantly with its increase by other entities, which are strengthened by alliances, conflicts, or political and economic changes. [3]However, the conditions under which these companies can be held accountable for human rights violations are not in line with this evolution.

Transnational companies operate in several countries through branches or subsidiaries, mainly in countries of the Global South.[4] It is not uncommon that the company's activities in these countries cause serious damage to human rights and the environment. Even if a country is a signatory to international conventions protecting human rights, it May not have strong institutions to guarantee their effective protection.

Some States do not have effective justice systems or an independent judiciary. In addition, governments May be closely linked to companies that have committed or been complicit in human rights violations. In some cases, the government itself May have contributed to facilitating the violation.[5]

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[1] For the UN, the term "transnational corporation" refers to an economic entity operating in more than one country, or an economic group operating in two or more countries, regardless of its legal form, either in its country of origin or in the country in which it operates, either individually or collectively. (UNITED NATIONS. Norms on the responsibilities of transnational corporations and other business enterprises with regardto human rights. 26 August 2003, p. 07. Available at: https://undocs.org/en/E/CN.4/Sub.2/2003/12/Rev.2 Accessed on February 15, 2023

[2] BAUMANN, Zygmunt. **Globalização**: as consequências humanas. Tradução Marcus Penchel. Jorge Zahar Editor. Rio de Janeiro 1999, p. 64. Available at: < http://www.institutoveritas.net/livros-digitalizados.php?baixar=113 > Accessed on October 03, 2023.

[3] GIDDENS, Anthony. **As consequências da modernidade**. Tradução Raul Fiker. 5ª edição. Editora Unesp. São Paulo, 1991, p. 63. Available at: < http://www.afoiceeomartelo.com.br/posfsa/autores/Giddens,%20Anthony/ANTHONY%20GIDDENS%20-%20As%20Consequencias%20da%20Modernidade.pdf > Accessed on October 03, 2023.

[4] An expression coined at the end of the Cold War to refer to developing countries and societies in the Southern Hemisphere, as well as others located in the Northern Hemisphere, which have average or low development indicators. These countries are mostly young African and Asian nations, but also Latin American states that have been independent for more than two centuries. This is a non-geographical concept, relating to the empowerment of the states of the Global South as historical subjects and important players on the international stage. (STUENKEL, O. India-Brazil-South Africa Dialogue Forum (IBSA): The Rise of the Global South? London: Routledge 2014. 174p.)

[5] SKINNER, Gwynne; MCCORQUODALE, Robert; SHUTTER, Olivier de. The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business. **European Corporate Justice**. December 2013, p.02. Available at: <http://corporatejustice.org/wp-

Subsidiaries benefit from the political boost they receive from the country where the parent company is based, which can facilitate access to international financial institutions. These companies also benefit from corporate structures that prevent or make it difficult for the parent companies to be held accountable. The interaction of different legal regimes has allowed companies to consolidate themselves as subjects of important rights and prerogatives, but without obligations to respect the human rights or the environment of the local communities where they operate.[6] The fact that there are different regulatory standards in the companies' host States[7] is an aggravating factor.

When a human rights violation is committed by a subsidiary, the victims often do not get adequate remedy in the courts of the country where the violations were perpetrated. As a result, victims have recently sought to sue the parent company in the company's home State[8], where its main headquarters are located.

The lack of access to judicial remedies provided by the host State of the company that has committed human rights abuses, particularly those that have occurred extraterritorially, has a considerable impact on the effective exercise of human rights.[9] In the states where the largest transnational companies are domiciled, these are often the main jurisdictions in Europe, with strengthened rule of law, which gives victims hope of achieving remedy in these jurisdictions.

However, these States sometimes fail to ensure that victims of violations perpetrated by companies outside their territory have access to their judicial remedies. By

content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf> Accessed on February 08, 2023

[6] RIVERA, Humberto Cantú. Los desafios de la globalización: reflexiones sobre la responsbailidad empresarial em materia de derechos humanos. In: Instituto Interamericano de Derechos Humanos. **Derechos Humanos y Empresas**: Reflexiones desde América Latina. San José, C.R.: IIDH,2017. ISBN:978-9930-514-12-2. p. 38.

[7] The term 'host State' or host refers to any state other than the home state in which the group operates or invests, or which is a significant source of goods or services for the group or its constituent companies.

[8] The term 'home State' in relation to a multinational group of companies is used to indicate the state in which the parent company is a national company. From a commercial point of view, but not necessarily a legal one, this is the place where the group is headquartered or where relevant decisions are made about actions in the host state.

[9] SKINNER, Gwynne; MCCORQUODALE, Robert; SHUTTER, Olivier de. The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business. **European Corporate Justice**. December 2013, p.02. Available at: <http://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf> Accessed on February 08, 2023

creating or allowing obstacles and barriers to the possibilities for victims to use redress mechanisms, States fail in their duty to protect human rights by not guaranteeing access to effective remedies through the judicial process.[10]

Litigation over the civil liability of parent companies in the jurisdiction of the State where they are based is an important alternative method for establishing and enforcing human rights standards, but it generates controversy in terms of its legitimacy under public international law, especially when considering the principles of sovereignty and non-intervention.[11] In addition, the impacts on victims' access to effective remedies can be many, such as the delay resulting from the discussion about the legitimacy of the court to judge, the distance of victims from the place of judgment and the financial costs of litigation.

This research seeks to analyze the viability and main challenges that victims face when seeking remedies in a foreign jurisdiction, and how these difficulties can be mitigated. The research will be based on the study of two specific cases that occurred in Brazil, and which had a major impact on human rights and the environment in the country. These are the cases of the Fundão dam collapse in the city of Mariana/MG in 2015[12] and the Córrego do Feijão dam collapse in the city of Brumadinho/MG in 2019[13], which were the result of extractive activities.

In each of the cases, the victims were unable to obtain effective remedy at home, even though more than eight and four years had passed respectively, which led them to file lawsuits in the jurisdictions of the home States where the parent companies are located. In the case of the Fundão dam collapse, the victims brought legal claims in British

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[10] SKINNER, Gwynne; MCCORQUODALE, Robert; SHUTTER, Olivier de. The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business. **European Corporate Justice**. December 2013, p.02. Available at: <http://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf> Accessed on February 08, 2023

[11] CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions (PhD thesis). **University of Essex**. School of Law. April 2018, p.11.

[12] Principais informações sobre o caso ver em: BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de abril de 2017, p. 7. Available at: http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html . Accessed on February 10, 2023.

[13]For more information on the case: BRASIL. Ministério Público Federal. **Relatório final**: Análise computacional da ruptura da Barragem I na Mina do Córrego do Feijão, em Brumadinho. Agosto de 2012. Available at < https://www.mpf.mp.br/mg/sala-de-imprensa/docs/2021/relatorio-final-cinme-upc-traducao-do-sumario-executivo-final.pdf>. Accessed on March 24, 2023.

courts against BHP Billington, one of the parent companies of the Samarco *Joint Venture*. In the case of the Córrego do Feijão dam collapse, the victims are seeking remedy in German court by suing Tüv Süd, since its Brazilian office provided a report attesting to the safety of the dam that broke. Each of the jurisdictions will be analyzed specifically.

The analysis aims to answer the following questions: What are the difficulties faced by victims in extraterritorial litigation in each of the jurisdictions (England and Germany)? How can victims access effective legal remedies?

The objective of this study, based on an analysis of the two cases mentioned, is to analyze the viability of extraterritorial litigation under the rules of international law, and to identify the main obstacles faced by victims in seeking remedies through such litigation. It seeks to understand how home States can better fulfill their duty to reduce these barriers to victims' access to judicial remedies for human rights violations by transnational corporations, specifically when the violation occurs extraterritorially.

A comparative study will be carried out based on these two cases, analyzing the two foreign jurisdictions, studying the background to the case, identifying the applicable legislation, and studying the legal institutes of the countries in the situation. In the end, the aim is to provide answers to reduce the obstacles for victims seeking remedy in a foreign jurisdiction in the field of business and human rights.

Pierre Bourdieu's[14] idea of the field is used as a system of structural relations that shape actions and institutions, and the visible actions of these actors that structure relations. For the author, fields are social microcosms with specific values (capital, assets), objects and interests, in other words, they are "structured spaces of positions" at a given time. The intellectual field, like the magnetic field, is a system of lines of force: the agents and institutions are in a relationship of forces that oppose each other and aggregate in their specific structure, in each place and moment in time. In this way, in the field of business and human rights, there are two ideas that oppose each other and come together to seek an evolution in society.

The first chapter of the thesis will look at the cases that took place in Brazil, describing the facts and the domestic proceedings, based on a legal analysis, and

[14] BOURDIEU, Pierre. **Razões práticas**: sobre a teoria da ação. São Paulo: Papirus, 1996.

identifying why they were not sufficient to remedy the victims, causing them to seek compensation in foreign jurisdictions. The second chapter will seek to understand the possibility and viability of extraterritorial litigation in the field of business and human rights, in the light of the rules and principles established by international law.

The third chapter will analyze the extraterritorial claims involving the cases: Marina Vs. BHP Billiton and Brumadinho Vs. Tüv Süd. Based on these cases, a comparative law study will be carried out between the jurisdiction of England and Germany, identifying the applicable legislation and the procedure adopted in each of them based on the analysis of precedent cases. The fourth and final chapter will seek to identify the main failings of each of the legal systems in providing victims the access to adequate remedy. Finally, the aim is to present a recommendation for reducing the obstacles identified and to facilitate the victim's path to remediation.

The paper used the nomenclature "extraterritorial" to refer to the jurisdiction and the litigation that was studied. Some authors[15] consider the term "transnational" more accurate, as the activities of transnational companies, their subsidiaries and global business partners usually cross many national borders, so that these actions are neither purely national nor entirely extraterritorial, but rather transnational. However, legal analysis usually refers to the "extraterritorial" jurisdiction of a state over global business activity, it is a term applicable to the cases being studied, and it is the one most used by the doctrine. This was the term used as a keyword for the research, and it is the nomenclature that most of the research sources in this work use, so an attempt was made to maintain standardization in the writing of the thesis.

To carry out the research, the inductive method was initially applied, starting from the analysis of two specific cases to identify the general problems in each of the jurisdictions. Subsequently, comparative law was studied between the two jurisdictions, considering that they are two different systems (common law and civil law). Subsequently, the hypothetical-deductive method was applied, seeking a possible solution to the problems identified in each jurisdiction, to test them deductively.

[15] CASSEL, Doug. Chapter 10: State jurisdiction over transnational business activity affecting human rights. IN: DEVA, Surya. BIRCHALL, David. **Research Handbook on Human Rights and Business**. 08 July, 2023. ISBN: 9781786436399, pp. 198–222, p.200.

The research procedure used was monographic and qualitative analysis. It was carried out by bibliographical research of authors who address the subject of international law and human rights, especially those related to violations carried out by transnational corporations and which deal with the subject of extraterritoriality. Documentary research was also used, looking for official UN documents and reports, international treaties on the subject, such as the Maastricht Principles and the Draft Binding International Treaty on Business and Human Rights, as well as domestic legislation that allows for the prosecution of violations occurring outside national territory.

Regarding the specific cases (Mariana and Brumadinho) under study, the research was based on official documents reporting the events and their consequences. Jurisprudential research was also carried out, analyzing court decisions involving the two specific cases that are the focus of the research, as well as other cases considered to be precedents, in which the established understanding was applied in these lawsuits.

This research seeks to ensure that the conclusions reached in the investigation result in applicable and informed recommendations that are relevant and useful to victims, so that extraterritorial jurisdiction is accepted. Thus, the reality of access to effective redress will be made possible, with the aim of improving it so that victims have easier access to remedies.

Victims face obstacles that can sometimes completely block their access to effective remedy. Such obstacles exist in all jurisdictions, despite differences in legislation, court approaches, national human rights protections, and legal traditions, which will be analyzed in this research.

States must take consistent decisions to reaffirm that the human rights of victims are more important than the economic interests of companies. Victims of human rights violations by companies, wherever the violations occur, have the right to full and effective access to judicial remedies. To this end, each State should examine the barriers in its jurisdiction and consider the range of actions it can take to mitigate them.

1. THE FUNDÃO AND CÓRREGO DO FEIJÃO DAM COLLAPSES CASES AND THE LEGAL CLAIMS IN DOMESTIC SPHERE

This chapter will look at the cases of the Fundão and Córrego do Feijão dam collapses, describing the facts and the legal proceedings, showing that the resolution of the cases in the Brazilian courts was not enough to compensate the victims, who decided to seek reparation in a foreign jurisdiction.

1.1 THE FUNDÃO DAM COLLAPSE CASE (MARIANA/MG)

The Fundão dam was created in the city of Mariana in Minas Gerais (Brazil) to receive tailings from the iron ore extraction process by the Samarco S/A mining company.[16]. Preliminary studies indicate that this dam contained approximately 50 million m³ of waste, classified according to NBR 10.004[17] as solid, non-hazardous and non-inert, such as iron and manganese, i.e. its composition was basically made up of sand and metals.[18]

On November 5, 2015, the dam burst, releasing more than 32 million m³ of mud containing toxic substances harmful to human and animal life in the region, including iron oxide and silica. This incident is recognized as Brazil's worst socio-environmental disaster and the world's largest tailings accident in the last 100 years.[19]

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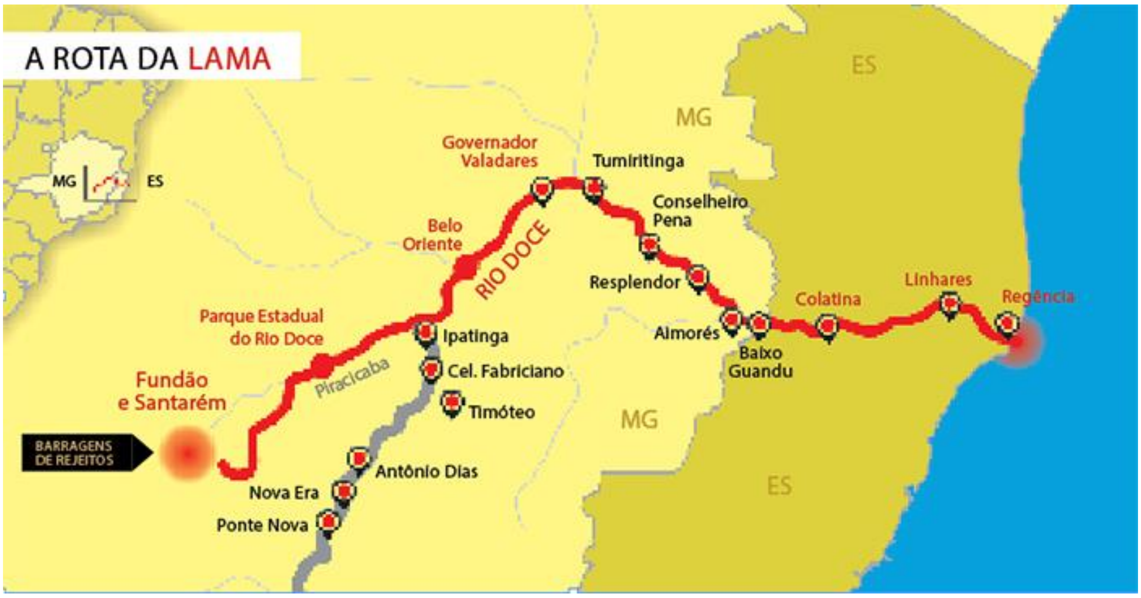
[16] Law No. 12.334, of September 20, 2010 (establishes the National Policy for the Safety of Dams intended for the accumulation of water for any use, the final or temporary disposal of tailings and the accumulation of industrial waste, creates the National Information System on Dam Safety and establishes other provisions), provides the definition of dam in Article 2, item I: "For the purposes of this Law, the following definitions are established: I - dam: any structure on a permanent or temporary watercourse for the purpose of containing or accumulating liquid substances or mixtures of liquids and solids, comprising the dam and associated structures; [...]". Law No. 12.305, of August 2, 2010 (Institutes the National Solid Waste Policy; amends Law No. 9.605, of February 12, 1998; and makes other provisions) conceptualizes tailings in article 3, item XV: "Art. 3 For the purposes of this Law, it is understood that: [...] XV - tailings: solid waste which, after all possibilities of treatment and recovery by available and economically viable technological processes have been exhausted, has no other possibility than environmentally appropriate final disposal.

[17] It is a Brazilian standard that classifies solid waste according to its potential risks to the environment and public health, so that it can be managed properly.

[18] BRASIL. Laudo Técnico Preliminar: Impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais. In: Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA. Minas Gerais, 2015. Available at: http://www.ibama.gov.br/phocadownload/noticias_ambientais/laudo_tecnico_preliminar.pdf. Accessed on February 10th, 2023.

[19]BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em**

The sub-district of Bento Rodrigues, located in the city of Mariana, was affected by the mud that hit urban buildings and affected the functioning of the city. According to the Congress' Human Rights and Minorities Commission report, the tailings were initially spilled in the valley of the Santarém stream and traveled more than 600 km, reaching the mouth of the Rio Doce in the state of Espírito Santo and finally reaching the Atlantic Ocean, as shown in the image below:



Source: Envolverde. Available at: https://envolverde.com.br/credito-para-empreendedores-nas-cidades-atingidas-pela-lama-da-samarco/

The environmental damage was mainly due to the silting up of some rivers, especially the "Rio Doce" river, which was badly affected. There was devastation of vegetation in the region near these rivers, impacts on permanent preservation areas and damage to water quality. The catastrophe also led to the death of countless animals that had their natural habitat there, as well as the extinction of species.[20]

Mariana. April 3, 2017, p. 7. Available at: <http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html> Accessed on February 10th, 2023.

[20] IBAMA. Laudo Técnico Preliminar. Impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais. Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – Ibama. November 2015. Available at: < https://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo_tecnico_preliminar_Ibama.pdf >. Accessed on February 16, 2023.

In addition to the countless environmental damages, the disaster caused the death of 19 people, including workers from the mining company and residents of the affected community. There was damage to all residents, especially traditional communities, with the loss of property, jobs, and livelihoods. There was irreversible damage to the town's economy. Different economic activities, which generated jobs and brought wealth to the population, were affected, such as agriculture, livestock, commerce, and industry.[21]

In addition to the material conditions of survival, the social, psychological and health damage has been immeasurable: depression, panic disorder, alcoholism, other illnesses such as worsening respiratory diseases, conjunctivitis, itching, allergies and burns from contact with the tailings. There has been a loss of quality of life and family sustainability, as well as the destruction of places to socialize, such as soccer fields, community centers, churches, farms, and ranches.[22]

Among the rights violated by the disaster and the lack of effective responses from the state and companies are the right to life, the right to water, the right to housing, the right to work, the right to health and the right to live in a healthy environment (life and physical integrity, adequate housing, information and effective legal recourse). In addition, the human dignity of 3.2 million people was put at risk, which is the estimated number of inhabitants of the Rio Doce basin, the main area affected by the socio-environmental disaster.

In terms of intensity, the incident under analysis is classified as a Level IV disaster, i.e. a "very large disaster", the highest level, according to the Brazilian Civil Defense classification. Disasters of this level are characterized when the damage caused is very significant and the losses extremely large and considerable. Under these

[21] BRASIL. Relatório diligência destinada a apurar violações de direitos humanos decorrentes do rompimento da barragem de fundão, em mariana/mg (req. Nº 09/2016). Câmara dos Deputados. Comissão de direitos humanos e minorias. Novembro de 2016, p.12. Available at: < http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm/documentos/relatorios-de-atividades/diligencia-destinada-a-apurar-violacoes-de-direitos-humanos-decorrentes-do-rompimento-da-barragem-de-fundao-em-mariana-mg-req-no-09-2016/view >. Accessed on February 16, 2023.

[22] HOMA. Centro de Direitos Humanos e Empresas. Relatório reunião com o grupo de trabalho da ONU sobre direitos humanos, empresas transnacionais e outras empresas em mariana, minas gerais. December de 2015. Available at: < https://homacdhe.com/wp-content/uploads/2015/12/Relato%CC%81rio-Final-Visita-a%CC%80-Mariana-e-reunia%CC%83o-com-GP.pdf?fbclid=IwAR3Smn5CTn-yVZGjOKrJ0MnaRtphG73Pn_4lbb91FiaUYzCN0RpEoBB5sl0>. Accessed on February 10th, 2023.

conditions, these disasters are not surmountable or bearable by communities, even when they are well-informed, prepared, and participative.[23]

The dam complex operated using the conventional hydraulic embankment method, which is widely used around the world. In this process, the waste from the mining process was directed into the tailing's ponds by gravity, while the water was filtered through sand located in front of the ponds. However, there are now more modern techniques that allow mining waste to be drained more safely through filters. This new technology increases production costs by up to six times, which leads mining companies to prefer assuming the risks associated with more traditional and less expensive methods.[24]

In 2013, the Fundão Dam underwent an assessment to renew its Operating License (Licença de Operação - LO). According to a study commissioned by the Public Prosecutor's Office of the State of Minas Gerais and carried out by the Prístino Institute, there was a risk of the dam breaking due to the combined impacts of the Fundão Dam and the União Waste Pile at Vale's Fábrica Nova Mine. Despite this, the Minas Gerais State Environmental Policy Council (Conselho Estadual de Política Ambiental - COPAM) granted the license. This indicates that both the company and the state of Minas Gerais were aware of the possibility of a dam rupture and therefore it would be justifiable to implement an effective prevention plan, including training for communities and a warning system in the event of a rupture[25], reducing the impact on human rights..

By ignoring the risks of failure pointed out in the contracted institution's report, the process of revalidating the Fundão dam's operating license demonstrates the state's lack of care with administrative procedures for preventing environmental risks. Environmental licensing is an essential measure to mitigate the effects, minimize the risks and control the damage that the project presents to the population and the environment.

[23] IBAMA. Laudo Técnico Preliminar. Impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais. Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – Ibama. November 2015. Available at: < https://www.ibama.gov.br/phocadownload/barragemdefundao/laudos/laudo_tecnico_preliminar_Ibama.pdf >. Accessed on February 16, 2023.

[24] LOPES, Luciano M. N. O rompimentoda barragem de Marianaeseus impactos socioambientais. Revista Sinapse Múltipla, 5 (1), jun 1-14, 2016. Available at: http://periodicos.pucminas.br/index.php/sinapsemultipla/article/view/11377/9677. Accessed on February 20, 2023.

[25] http://www.meioambiente.mg.gov.br/images/stories/URCS_SupramCentral/RioVelhas/69/9.1-laudo-tecnico.pdf

However, by viewing licensing procedures as bureaucratic obstacles that prevent "progress", the state favors economic interests over the public interest and neglects its responsibility to protect the common good.[26]

1.1.1 Samarco company description

The company responsible for mining the dam, Samarco Mineração S/A, is a joint venture[27] and its controlling shareholders are the Brazilian company Vale S/A and the Anglo-Australian company BHP Billiton, each with 50% of the shares. BHP Brazil is a subsidiary of the BHP group. Vale and BHP are two of the largest mining companies in the world. BHP England and BHP Australia are at the head of the BHP group. At all relevant times, they have operated together as a single economic entity, with boards of directors made up of the same individuals, a unified executive management structure, and joint objectives.[28]

The company's main focus is the production and sale of iron ore pellets. These pellets are produced by transforming low-grade minerals into a high value-added product and are destined for the global steel industry. The company is essentially an exporter and in 2014 was ranked 10th in the world exporters.[29]

At the time, Samarco Mineração S/A had approximately 3,000 direct employees and 3,500 outsourced workers. The company operates an integrated system in Minas Gerais and Espírito Santo, consisting of two mines, three processing plants, three pipelines, four pelletizing plants and a harbor. Samarco is recognized as one of the leading Brazilian companies to implement corporate social responsibility policies. The company

[26] JUSTIÇA GLOBAL. Vale de Lama – relatório de inspeção em Mariana após o rompimento da barragem de rejeitos do Fundão. Rio de Janeiro: 2016. Available at: < http://www.global.org.br/wp-content/uploads/2016/03/Vale-de-Lama-Justi--a-Global.pdf> Accessed on February 20, 2023.

[27] It is a system of cooperation between two or more companies to carry out an economic activity, with the possibility of a division of obligations, responsibilities and profits. (GAMBARO, Carlos Maria. O contrato internacional de joint venture. Revista de Informação Legislativa, Brasília, ano 37, n. 146, abr./jun. 2000. Available at: < https://www2.senado.leg.br/bdsf/bitstream/handle/id/580/r146-05.pdf?sequence=4&isAllowed=y >. Accessed on February 16, 2023.

[28] Information available in the report "ntes fosse mais leve a carga: uma avaliação dos aspectos econômicos e sociais do desastre da Vale/BHP/Samarco em Mariana (MG)", produced by the Grupo Política, Economia, Mineração, Ambiente e Sociedade – PoEMAS. Available at: < http://www.ufjf.br/poemas/files/2014/07/PoEMAS-2015-Antes-fosse--mais-leve-a-carga-versão-final.pdf >. Accessed on: February 18, 2023.

[29] JUSTIÇA GLOBAL. Vale de Lama – relatório de inspeção em Mariana após o rompimento da barragem de rejeitos do Fundão. Rio de Janeiro: 2016. Available at: < http://www.global.org.br/wp-content/uploads/2016/03/Vale-de-Lama-Justi--a-Global.pdf> Accessed on February 20, 2023.

was a pioneer in the mining sector when it obtained ISO 14001 certification, which covers all stages of production and environmental management[30]. In addition, Samarco has committed to following other corporate social responsibility initiatives, including the UN Global Compact.

The Mariana Complex includes Vale's three mines and four main processing plants, as well as two other mines, three other processing plants, three pipelines, four pelletizing plants and Samarco's harbor. During the extraction and beneficiation process, two types of waste are generated: waste rock piles, which are dry waste, and tailings dams, which are wet waste. Although some of the mines in the complex have their own dams, as is the case with the "Alegria da Vale" mine, all the mines and the Samarco plant in this region partially or totally divert their wet tailings to the three large dams in the complex: Germano, Santarém and Fundão. All three are classified as Class III by the State Environment Foundation, indicating a high potential for environmental damage.[31]

In 2009, Samarco contracted to draw up a 24-hour monitoring plan for its dams, along with an emergency response system. However, due to the economic crisis, these measures were not put into practice. Instead, a contingency plan that did not comply with environmental standards, and which eliminated the monitoring of the dams and the emergency alert system, was submitted to the regulatory authorities and approved. Samarco did not have audible alarm systems, as required by law, and did not have personnel trained to assist the population in the event of an emergency.[32]

Samarco's Emergency Action Plan (Plano de Ações Emergenciais - PAE) also included carrying out emergency simulations with the communities located below the dams, but these activities were not carried out. In addition, the plan transferred responsibility for alerting and evacuating nearby populations, in the event of an emergency, to the government, when in fact this task is company's responsibility.[33]

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[30] SAMARCO. Relatório Anual de Sustentabilidade 2014. Available at: http://www.samarco.com/wp-content/uploads/2015/11/Relatorio-Anual-de-Sustentabilidade-2014.pdf . Accessed on: February 25, 2023.

[31] Information available in the report “ntes fosse mais leve a carga: uma avaliação dos aspectos econômicos e sociais do desastre da Vale/BHP/Samarco em Mariana (MG)”, produced by the Grupo Política, Economia, Mineração,
Ambiente e Sociedade – PoEMAS. Available at: < http://www.ufjf.br/poemas/files/2014/07/PoEMAS-2015-Antes-fosse--mais-leve-a-carga-versão-final.pdf >. Accessed on: February 25, 2023.

[32] JUSTIÇA GLOBAL. Vale de Lama – relatório de inspeção em Mariana após o rompimento da barragem de rejeitos do Fundão. Rio de Janeiro: 2016. Available at: < http://www.global.org.br/wp-content/uploads/2016/03/Vale-de-Lama-Justi--a-Global.pdf> Accessed on February 22, 2023.

[33] JUSTIÇA GLOBAL. Vale de Lama – relatório de inspeção em Mariana após o rompimento da barragem de rejeitos do Fundão. Rio de Janeiro: 2016. Available at: < http://www.global.org.br/wp-

1.1.2 Visit of the UN Working Group on Business and Human Rights

The Working Group on Business and Human Rights (WGBHR) was created in June 2011 by the UN Human Rights Council in resolution 17/04. The WGBHR is part of a larger body called the Special Procedures, whose main characteristic is its independence from any government or organization. It is made up of volunteer experts who aim to inform and advise on human rights issues, and is responsible for promoting, disseminating and implementing the Guiding Principles on Human Rights and Business. It also has the mandate to exchange and promote good practices and lessons learned in the implementation of the Guiding Principles, as well as to evaluate and make recommendations in this regard.[34]

The WGBHR carried out a 10-day visit to Brazil (from December 7 to December 16, 2015), with the self-declared objective of providing support to the efforts of the government, transnational companies and stakeholders in preventing and increasing protection against human rights violations by companies. This was the first time the WGBHR had been to Latin America and the Caribbean region. The visit to the country had already been scheduled before the environmental disaster.

The Working Group met with Samarco executives and Vale officials to discuss the actions taken. There were also meetings with victims of the disaster in Mariana, Minas Gerais, and in the state of Espírito Santo, as well as with state and federal prosecutors involved in seeking justice and compensation for the victims. From the testimonies and contributions made to the Working Group, one of the main concerns of the affected communities was uncertainty about the long-term support they would receive to rebuild their lives and worries about the health risks posed by the contaminated river and sea. Trust in the company among the local community was seriously damaged. There was therefore a need to provide information that was credible in the eyes of the affected communities. People were also concerned about the collapse of more dams. There are 753 tailings dams in Minas Gerais alone, 40 of which have been deemed unsafe. The

content/uploads/2016/03/Vale-de-Lama-Justi--a-Global.pdf> Accessed on February 22, 2023.

[34] Working Group on the issue of human rights and transnational corporations and other business enterprises. Available at: https://www.ohchr.org/en/special-procedures/wg-business . Accessed on February 10th, 2023.

Working Group considered it urgent for the competent authorities and the companies responsible to take immediate steps to strengthen safety measures.[35]

According to the report presented by the Working Group on the visit, Samarco did not provide information to the communities about the health risks related to the mud. There was also clearly a flaw in the company's contingency plan. People from the affected areas said they were not warned about the disaster by the company or the civil defense. This occurred despite a gap of around 10 hours between the dam bursting and the flooding of Bento Rodriguez, the first village to be inundated. The advance warning would have allowed people to save some belongings and could have saved lives. On November 11, 2015, the Public Prosecutor's Office of Minas Gerais sought an agreement with Samarco to guarantee an amount of R$300 million (approximately 77 million dollars) to compensate the victims. Despite several attempts to reach an agreement, Samarco did not agree, leading to the filing of the Public Civil Action, which will be discussed in the next section of this chapter.[36]

Given the scale of the disaster, the Working Group considered that the federal and state authorities should have played a more active role in responding to the disaster. Although there was a relief effort, it is necessary for the government to provide clear information to the population and guidance on the resettlement process and the compensation determination. While Samarco is responsible for repairing the damage caused, the state remains primarily responsible for defending the affected communities' human rights.[37]

The working group understood that Brazil has a well-developed legal framework and regulations and mechanisms to protect human rights against business-related harm.

[35] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil. A/HRC/32/45/Add.1. May 16, 2016, paragraph 29. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement . Accessed on February 10th, 2023.

[36] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil. A/HRC/32/45/Add.1. May 16, 2016, paragraph 30. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement . Accessed on February 10th, 2023.

[37] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil. A/HRC/32/45/Add.1. May 16, 2016, paragraph 30. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement . Accessed on February 10th, 2023.

However, regulatory agencies such as the Brazilian Institute of Environment and Renewable Natural Resources and the National Indian Foundation should be strengthened to ensure their ability to act unhindered and independently against adverse impacts on human rights in the context of large-scale development projects. Those who May be affected by development projects should receive sufficient support to enable them to be in a balanced negotiating position vis-à-vis a company. Effective stakeholder engagement, allowing for the voice of the most vulnerable, is particularly important. The Working Group noted that in some cases, without the support of civil society and the Public Prosecutor's Office, affected communities would be virtually powerless.[38]

The WGBHR recommended that Brazil develop a comprehensive national action plan on business and human rights based on the framework of the Guiding Principles on Business and Human Rights through inclusive and transparent processes. It identified the need to strengthen the support provided to rights holders to enable them to be in a balanced position towards companies. The working group recommended the creation of platforms to strengthen mechanisms for dialogue between government, business, and civil society on business and human rights issues.

Specific recommendations were made in relation to the disaster, such as strengthening the dam inspection activities carried out by the National Council of the Department of Minerals Research (Conselho Nacional de Departamento de Pesquisa de Minerais), with the aim of improving government supervision and preventing further collapses. In addition, the state must ensure that, in the event of disasters such as the collapse of the Fundão tailings dam, adequate compensation is provided to all those affected. In addition, it must ensure that the parties are properly consulted, and that adequate environmental mitigation and remediation measures are carried out.[39]

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[38] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil. A/HRC/32/45/Add.1. May 16, 2016, paragraph 30. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement . Accessed on February 10th, 2023.

[39] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil. A/HRC/32/45/Add.1. May 16, 2016, pag. 21. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement . Accessed on March 10, 2023.

1.1.3 Judicial claims in Brazil

Among the various mechanisms to guarantee access to justice for victims of business-related human rights abuses, the Working Group[40] was particularly impressed by the work of the public prosecutors from the Federal Public Prosecutor's Office (Ministério Público Federal - MPF) and 27 State Public Prosecutors' Offices. [41]

Following the disaster, the State and Federal Public Prosecutors' Offices, together with the Federal Government, the Public Defender's Office, and non-profit associations, filed several public civil actions at the State (Minas Gerais and Espírito Santo) and Federal levels.[42]. Public Civil Action (Ação Civil Pública - ACP) No. 0069758-61.2015.4.01.3400, filed by the states of Minas Gerais and Espírito Santo, the Federal Government and their municipalities, aimed to resolve emergency issues in order to minimize the damage caused by the tragedy. [43]

The report drawn up by the Congress[44] shows that the lawsuits pending in the State Courts and in Subsections of the Federal Courts were referred to the 12th Federal Court in Belo Horizonte, seeking greater uniformity in the judgment. Some of the lawsuits that had emergency plans for repairing damage were approved, including one that required the company to provide around R$2 billion (approximately 407 million US

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[40] UNITED NATIONS. Statement at the end of visit to Brazil by the United Nations Working Group on Business and Human Rights. December 16, 2015. Available at. https://www.ohchr.org/en/statements/2015/12/statement-end-visit-brazil-united-nations-working-group-business-and-human . Accessed on March 10, 2023.

[41] Established by the 1988 Constitution in the context of 21 years of military dictatorship (1964-1985), the Public Prosecutor's Office operates independently of the three branches of government and has the mandate to "defend the judicial order, the democratic regime and inalienable social rights" and individual interests" (Art. 127). A total of approximately 1,000 federal public prosecutors and more than 12,000 state public prosecutors are empowered to investigate and initiate legal proceedings against state authorities and companies on behalf of individuals or communities.

[42]BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 12. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

[43] BRASIL. Justiça Federal de Minas Gerais. Tribunal Regional Federal da 1ª Região. Processo n. 0069758-61.2015.4.01.3400. Available at: https://processual.trf1.jus.br/consultaProcessual/processo.php?proc=697586120154013400&secao=MG&pg=1&enviar=Pesquisar. Accessed on: March 10, 2023.

[44] BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 13. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

dollars) to guarantee the supply of water to communities whose river sources were affected by the mud disaster.

In early 2016, the Federal Public Prosecutor's Office filed a public civil action against Samarco, Vale, BHP, the states of Minas Gerais, Espírito Santo and the Federal Government, as well as municipalities, for compensation for environmental damage, moral damage and loss of profits, totaling an initial deposit of approximately R$7.75 billion (approximately 1.508 billion US dollars), just for emergency repair programs. In addition, the Federal Public Prosecutor's Office requested[45]:

> (…) vedação de novas operações de crédito e financiamento da Samarco e suas controladoras em entidades públicas ou das quais o poder público possua controle acionário; suspensão do recebimento de subvenção, benefício ou incentivo, fiscal ou creditício do poder público; formular e executar plano de captação e distribuição de fontes alternativas de abastecimento de água nos municípios afetados, de modo a atender à integralidade do abastecimento da população, entre outros. À causa deu-se o valor de R$ 155 bilhões. [46]

The Brazilian Federal Constitution, in art. 225, § 3, allows individuals or legal entities to be held liable in criminal proceedings. Thus, the companies responsible for the tragedy are also facing criminal charges, which, however, will not be dealt with in this research. The study will be restricted to the analysis of Public Civil Actions, a procedural instrument provided in the Federal Constitution, designed to protect diffuse or collective interests, holding accountable those who commit damages against the rights protected. It can be filed by the Public Prosecutor's Office or other legal entities, public or private, to protect public and social assets, the environment, the consumer, as well as to obtain compensation for damages.[47]

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[45] BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 14. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

[46] Translation: (...) prohibition of new credit and financing operations by Samarco and its parent companies with public entities or entities in which the government has a controlling stake; suspension of the receipt of subsidies, benefits or tax or credit incentives from the government; formulation and implementation of a plan for the collection and distribution of alternative sources of water supply in the affected municipalities, in order to supply the entire population, among others. The case is worth R$ 155 billion (approximately 31.603 billion US dollars).

[47] MINISTÉRIO PÚBLICO. Ação civil pública. Conselho Nacional do Ministério Público. Available at:

1.1.3.1 Transaction and Conduct Adjustment Agreement (Termo de Transação e Ajustamento de Conduta -TTAC)

Shortly after the lawsuits were filed, in 2016, a Transaction and Conduct Adjustment Agreement (Termo de Transação e Ajustamento de Conduta - TTAC)[48] was signed in the Public Civil Action proceedings (case no. 0069758-61.2015.4.01.3400). The purpose of this agreement was to define how the environmental, social, and economic damage resulting from the collapse of the Fundão dam in Mariana (MG) should be repaired. The document also agreed on the institutional arrangement for deliberating, implementing, and controlling the programs and projects set up for this purpose, creating the Fundação Renova (Renova Foundation)[49], the Inter-Federative Committees[50] and the Technical Chambers[51]. The agreement also determined the suspension of the Public Civil

https://www.cnmp.mp.br/portal/institucional/476-glossario/8242-acao-civil-publica . Accessed on February 23, 2023.

[48] The TTAC is an extrajudicial mechanism offered by a public entity to companies responsible for damages, with the aim of resolving disputes related to the violation of collective rights. This agreement must include a list of obligations and responsibilities to be fulfilled by the offender, such as: reparation for the damage caused, compliance with applicable laws and regulations, and compensation and indemnification for damage that cannot be repaired. (MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA. **PoEMAS/UFJF**. April, 2016. p. 1-2. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.)

[49] The Renova Foundation is the entity responsible for mobilizing to repair the damage caused by the collapse of the Fundão dam in Mariana (MG). It is a non-profit organization, the result of a legal commitment called the Transaction and Conduct Adjustment Agreement (Termo de Transação e Ajustamento de Conduta - TTAC). It defines the scope of the Renova Foundation's activities, which are the 42 programs that unfold in the many projects being implemented in the 670 kilometers of impacted area along the Rio Doce river and its tributaries. The actions underway are long-term.

[50] Consisting exclusively of state and federal government representatives, its purpose is to accompany, monitor and supervise the results of the Foundation's activities.

[51] These are advisory bodies designed to assist the federal inter-federative committee. The following technical chambers have been set up: a. Tailings Management and Environmental Safety, coordinated by Ibama (Superintendence of Minas Gerais); b. Forest Restoration and Water Production, coordinated by Ibama (Directorate for the Sustainable Use of Biodiversity and Forests); c. Conservation and Biodiversity, coordinated by the Chico Mendes Institute for Biodiversity Conservation (ICMBio); d. Water Security and Water Quality, coordinated by the National Water Agency (ANA); e. Social Organization and Emergency Aid, coordinated by the National Water Agency (ANA). Social Organization and Emergency Aid, coordinated by the Civil House of the Presidency of the Republic; f. Reconstruction and Recovery of Infrastructure, coordinated by the state of Minas Gerais; g. Health, Education, Culture, Leisure and Information, coordinated by the state of Espírito Santo; 20 h. Communication, Participation, Dialogue and Social Control, coordinated by the Secretariat of Government of the Presidency of the Republic; i. Economy and Innovation, coordinated by the state of Minas Gerais; j. Indigenous and Traditional Peoples and Communities, coordinated by the National Indian Foundation (FUNAI) and the Palmares Cultural Foundation.

Action in progress at the 12th Civil Court of Belo Horizonte until the agreed obligations were concluded.[52]

In the case under study, given the environmental tragedy involved, the justification used to carry out a TTAC would be the urgency required to take action. The delay in legal proceedings could lead to worsening environmental damage and its consequences, making reparation much more difficult.

The creation of the Fundação Renova (Renova Foundation) on July 5, 2016 can be considered the most significant aspect of the TTAC agreement. This special legal entity was established exclusively to implement 41 socio-environmental and socio-economic reparation programs aimed at compensating for the damage caused by the tragedy. The total estimated cost of these programs is R$26 billion (approximately 5.3 billion US dollars).[53]

However, the agreement reveals weaknesses, since there was no involvement of the groups directly affected by the tragedy, nor consideration of the victims' point of view and their needs. As a result, the development of reparations programs was hampered, indicating that the agreement's proposal is not legitimate.[54]

An important aspect to highlight is the fact that the agreement was not signed by the State and Federal Public Prosecutor's Offices, as they did not agree with the terms proposed by the state. According to these institutions, the treaty favors the companies' assets over the protection of the affected communities and the environment. As a result, there was an attempt to contest the agreement in the courts. The absence of the Public

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[52] BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 14. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

[53] BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 17. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

[54] MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA. **PoEMAS/UF JF**. April, 2016. p. 5. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.

Prosecutor's Office in the agreement has made it considerably more difficult to monitor the activities carried out by the foundation, which is responsible for issues of public interest. It is worth noting that it is not uncommon for the Public Prosecutor's Office not to participate in TTACs, either because it disagrees with the proposal or simply because it was not consulted.[55]

In addition, institutions with expertise and specialized practices in the issues addressed in the reparation programs were not involved in drawing up the reparation programs. Thus, the region's riverside communities and artisanal fishermen, as well as the ministries responsible for social and environmental issues, were not consulted.

Thus, the foundation's management is made up of members appointed by the companies and the state and federal governments, and supervised by an inter-federative committee composed of executive branch members.[56] The monitoring and inspection system has procedures that present structural elements with conflicts of interest. The fact that the auditing companies are selected and paid by the Foundation reproduces a monitoring model which, in various situations, has proved incapable of guaranteeing truly independent supervision. [57] This raises further questions from society about the true intentions of this agreement and whether the proposals will actually be fulfilled.

In addition, there are some inconsistencies in the definition of targets and deadlines in the TTAC. In general, there is a discrepancy in the level of detail between the socio-economic programs, which are more generic and vaguer, and the socio-environmental programs, which are more specific and thoroughly described.

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[55] MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA. **PoEMAS/UF JF**. April, 2016. p. 5. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.

[56]BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 17-19. Available at: < http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html > Accessed on February 23, 2023.

[57] BRASIL. Ministério Público Federal, Ministério Público do Estado de Minas Gerais, Ministério Público do Estado do Espírito Santo, Defensoria Pública da União, Defensoria Pública do Estado de Minas Gerais, Defensoria Pública do Estado do Espírito Santo, Fundação Renova. (2018). Termo de Ajustamento de Conduta. Belo Horizonte. Available at: http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/tac-governanca . Accessed on: March 5, 2023.

The socio-economic programs lack specific targets, either qualitative or quantitative. Although the agreement provides for the implementation of programs, it does not establish concrete results or evaluation criteria. Because of this approach, in many cases the mere creation of the program by the Renova Foundation will be enough to fulfill the conditions of the agreement, regardless of their effectiveness and the actual solution of the dam failure's problems. On the other hand, in the socio-environmental programs, the goals are well specified and defined, mainly in quantitative terms, with the aim of trying to repair as much damage as possible.[58]

In general, socio-economic programs have deadlines for the start of activities, but these deadlines are often inconsistent. Some programs start after the agreement has been signed, others after the Foundation's budget have been approved and still others after the public bodies have delivered a term of reference. This variety of deadlines makes following up on the programs more complex and makes it difficult for society to monitor them. In addition, many of these programs have a duration determined by the agreement itself, without a clear link to concrete results. In this way, programs can be terminated even if the impacts are not solved.[59]

Socio-environmental programs, on the other hand, have more detailed and precise deadlines. In some cases, deadlines are set for specific dates, which makes it easier to arbitrate deadlines and monitor performance. However, this rule does not apply to all socio-environmental programs, and there are cases of program closures without clear links to specific results.[60]

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[58] MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA**. PoEMAS/UFJF**. April, 2016. p. 9. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.

[59] MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA**. PoEMAS/UFJF**. April, 2016. p. 9. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.

[60] MILANEZ, Bruno; PINTO, Raquel Giffoni. Considerações sobre o Termo de Transação e de Ajustamento de Conduta firmado entre Governo Federal, Governo do Estado de Minas Gerais, Governo do Estado do Espírito Santo, Samarco Mineração S.A., Vale S. A. e BHP Billiton Brasil LTDA**. PoEMAS/UFJF**. April, 2016. p. 9. Available at; < http://www.epsjv.fiocruz.br/sites/default/files/documentos/noticias/documentos_-_poemas_2016_-

The TTAC stipulates a financial ceiling of R$20 billion (approximately 4 billion US dollars), but the Federal Public Prosecutor's Office questions whether this amount is sufficient, as it could restrict the rights of the victims of the disaster, since compliance with the agreement would lead to the total settlement of the obligations assumed, including the damages resulting from the disaster. As there has not yet been a precise diagnosis of the environmental damage, it seems illogical to set a spending limit for repair and compensation activities. A limit of R$3.6 billion (approximately 733 million US dollars) was set for compensation for socio-environmental and socio-economic damage, which will be paid in fixed installments of R$240 million (approximately 49 million US dollars) over 15 years. However, the question arises as to why this limit was set without knowing the full extent of the damage. Even if there were a justification for the limit, the unnecessary prolongation of the reparation actions can be questioned.[61]

Another important issue in the agreement is the attribution of subsidiary liability to Vale and BHP. Clauses 226, 233 and 237 establish the subsidiary liability of Samarco's parent companies, whereas, according to current legislation, liability for environmental damage is joint and several between direct and indirect polluters, according to Brazilian Law No. 6.938, of August 31, 1981, art. 3, IV.[62]

In addition to all the problems already mentioned, the main one lies in the fact that the Foundation has the power to establish the criteria for determining who will be considered affected, as well as to reject requests for indemnity and compensation. This scenario shows that a disproportionate amount of power has been granted to the Foundation and, consequently, to the companies responsible for the dam collapse.

_comentarios_acordo_samarco.pdf > Accessed on February 23, 2023.

[61] BRASIL. Câmara dos Deputados. **Relatório aponta violações de direitos humanos após desastre em Mariana.** 03 de April de 2017, p. 21. Available at: <http://www2.camara.leg.br/camaranoticias/noticias/DIREITOS-HUMANOS/528406-RELATORIO-APONTA-VIOLACOES-DE-DIREITOS-HUMANOS-APOS-DESASTRE-EM-MARIANA.html> Accessed on February 23, 2023.

[62] In Brazilian law, it is crucial to distinguish between joint and several and subsidiary liability. In joint liability, creditors have the option of demanding that any of the debtors pay the debt in full. The debtor who fulfills the obligation can subsequently seek compensation from the other co-debtors in the proportion that corresponds to them. This approach facilitates the fulfillment of the obligation and protects the creditor. In subsidiary liability, on the other hand, certain debtors can only be sued after attempts to collect from the principal debtor have been exhausted - an order of preference is established. In the case of environmental damage caused by third parties, the law states that indirect polluters are jointly liable. This means that Vale's shareholders are liable together with the company in relation to creditors, without benefit of order. However, this type of liability can be modified by means of a negotiating instrument. (free translation)

Faced with so many flaws pointed out by the Federal Public Prosecutor's Office, as well as the filing of a new public civil action, a new conduct adjustment agreement was signed on January 18, 2017. Called the Preliminary Adjustment Term (Termo de Ajuste Preliminar - TAP), this agreement was signed between the Federal Public Prosecutor's Office and the companies that caused the damage. In this new agreement, the ministerial body agreed to appoint organizations as experts, advisors or technical assistants. The addendum also brought in the figure of experts responsible for facilitating dialogue with those affected and carrying out a diagnosis of the socio-economic damage that affected these populations.[63]

The purpose of these organizations' activities was to help the Federal Public Prosecutor's Office draw up the Final Conduct Adjustment Agreement (Termo de Ajustamento de Conduta Final - TACF), with clauses more suited to the reparation needs of the communities involved. A new Conduct Adjustment Agreement was then signed, called the "TAC-Governança". This new agreement was signed on June 25, 2018, between the Federal Public Prosecutor's Office (MPF), the public prosecutors' offices of the states of Minas Gerais and Espírito Santo, the public defenders' offices of the states involved and the Federal Government, and nine other public bodies, as well as the companies Samarco Mineração, Vale and BHP Billiton Brasil. This agreement has enabled changes in the Renova Foundation's governance.[64]

The change in the Renova Foundation's governance was required to allow a more significant participation of those affected during the process of repairing the damage caused. With the aim of improving the system of previous agreements and adjustments, the “TAC-Governança” established the creation of 39 local commissions, six regional chambers and an Fórum dos Observadores (Observers' Forum). The first two are composed of those affected, and the last by representatives of civil society, academic groups, affected people and traditional peoples and communities. These structures are

[63] BRASIL. Ministério Público Federal, Ministério Público do Estado de Minas Gerais, Samarco Mineracão S.A., Vale S.A., & BHP Billiton Brasil Ltda. (2017). Termo Aditivo ao Termo de Ajustamento Preliminar (TAP). Belo Horizonte. Available at: http://www.mpf.mp.br/mg/sala-de-imprensa/docs/aditivoTAP.pdf. Accessed on: March 5, 2023.
[64] BRASIL. Ministério Público Federal, Ministério Público do Estado de Minas Gerais, Ministério Público do Estado do Espírito Santo, Defensoria Pública da União, Defensoria Pública do Estado de Minas Gerais, Defensoria Pública do Estado do Espírito Santo, Fundação Renova. (2018). Termo de Ajustamento de Conduta. Belo Horizonte.Available at: http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/tac-governanca. Accessed on: March 5, 2023.

under the supervision of the Public Prosecutor's Office and the Public Defender's Office and are funded by the mining companies responsible for the disaster.[65]

Thus, the proposed "governance structure" consisted of a negotiated institutional arrangement that tried to create rules of interaction between state bodies (executive and judiciary), companies and affected communities. This structure included government, private and public perspectives in very unequal power relations. [66]

Initially, the TAP signed in 2017 provided the hiring of technical advisors to help those affected in the management and social control of the recovery actions, as well as helping with the public hearings provided in the TTAC. However, when the draft "TAC-Governança" was drawn up, the promised technical advisory services had not yet been implemented, meaning that the affected communities did not have the promised technical support. This shows that this TAC was not as inclusive as expected, as the draft agreement was drawn up without the help of the technical advice promised to those affected, which had not yet actually been implemented.

> É imprescindível destacar que o Acordo se destina a três grandes tarefas: alterar o processo de governança previsto no TTAC; aprimorar os mecanismos de participação das pessoas atingidas na implementação do TTAC e do TAC-Governança; e estabelecer um processo de negociação visando à eventual repactuação dos programas de reparação. Dessa redação se infere que nenhum dos objetos do TAC-Governança poderá ser alcançado legitimamente sem que antes se tenha garantido a Assessoria Técnica às pessoas atingidas, pois esta é condição sine qua non tanto para a reparação integral, quanto para a participação das pessoas atingidas e qualquer negociação no âmbito do desastre de Fundão.[67]

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[65] BRASIL. Ministério Público Federal, Ministério Público do Estado de Minas Gerais, Ministério Público do Estado do Espírito Santo, Defensoria Pública da União, Defensoria Pública do Estado de Minas Gerais, Defensoria Pública do Estado do Espírito Santo, Fundação Renova. (2018). Termo de Ajustamento de Conduta. Belo Horizonte.Available at: http://www.mpf.mp.br/grandes-casos/caso-samarco/documentos/tac-governanca. Accessed on: March 5, 2023.

[66] LOSEKANN, Cristiana; MILANEZ, Bruno. A emenda e o soneto: notas sobre os sentidos da participação no TAC de Governança. **Versos**, v. 2, n. 1, p. 26-45, 2018, p.30. Available at: http://www.ufjf.br/poemas/files/2017/04/RPRD-2018-Dossi%C3%AA-TAC-Governan%C3%A7a-versos.pdf. Accessed on: March 7, 2023.

[67] It is essential to point out that the Agreement is intended to accomplish three major tasks: to change the governance process provided for in the TTAC; to improve the mechanisms for the participation of the affected people in the implementation of the TTAC and the TAC-Governance; and to establish a negotiation process aimed at the eventual renegotiation of the reparation programs. It follows from this writing that none of the objectives of the TAC-Governance can be legitimately achieved without first guaranteeing technical advice to the people affected, as this is a sine qua non condition both for full reparation and for the participation of the people affected in any negotiation in the context of the Fundão disaster.(free translation) SOUZA, Tatiana Ribeiro de; CARNEIRO, Karine Gonçalves. O papel das assessorias técnicas

The “TAC-Governança” has planning problems. The implementation of the agreement has neither a timetable nor a method. The absence of these elements can significantly compromise the results to be achieved. These flaws further increase the challenges of implementing such a complex structure.[68]

This shows that the mechanisms established by the "TAC-Governança" cannot be realized in practice. Therefore, what was guaranteed to those affected has not been realized. Thus, a process of negotiating agreements upon agreements was created, generating misrepresentations throughout the process which, in many ways, distanced the final results from those initially sought.[69]

In addition, the terms signed in the agreement have not been carried out in practice as expected by the victims. In March 2023, the Federal Court ordered Vale and BHP to deposit R$10.3 billion (approximately 2.1 billion US dollars) in court to ensure that all the programs, projects and actions being carried out by the Renova Foundation include more affected municipalities, in order to repair the damage caused by the collapse of the Samarco dam in Mariana. Resolution CIF 58 recognized new communities impacted by the collapse of the Fundão dam, but the Renova Foundation has never considered them in its actions.[70]

1.1.3.2 UN statement on the agreement

More than two and a half years after the disaster, there was still no complete assessment of the socio-environmental and socio-economic damage suffered by the affected communities, as well as the health impacts. Some communities and individuals

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no TAC governança. **Versos**, v. 2, n. 1, p. 46-63, 2018. Available at: http://www.ufjf.br/poemas/files/2017/04/RPRD-2018-Dossi%C3%AA-TAC-Governan%C3%A7a-versos.pdf. Accessed on: 7 março 2023.

[68] LOSEKANN, Cristiana; MILANEZ, Bruno. A emenda e o soneto: notas sobre os sentidos da participação no TAC de Governança**. Versos**, v. 2, n. 1, p. 26-45, 2018. Available at: http://www.ufjf.br/poemas/files/2017/04/RPRD-2018-Dossi%C3%AA-TAC-Governan%C3%A7a-versos.pdf. Accessed on: March 7, 2023.

[69] LOSEKANN, Cristiana; MILANEZ, Bruno. A emenda e o soneto: notas sobre os sentidos da participação no TAC de Governança**. Versos**, v. 2, n. 1, p. 26-45, 2018. Available at: http://www.ufjf.br/poemas/files/2017/04/RPRD-2018-Dossi%C3%AA-TAC-Governan%C3%A7a-versos.pdf. Accessed on: March 7, 2023.

[70] MANSUR, Rafaela. Tragédia de Mariana: Justiça determina depósito judicial de R$ 10,3 bilhões de Vale e BHP. Available at: https://g1.globo.com/mg/minas-gerais/noticia/2023/03/30/justica-determina-que-vale-e-bhp-paguem-r-103-bilhoes-por-tragedia-de-mariana.ghtml . Accessed on: March 7, 2023.

were still struggling to be recognized as affected by the disaster and had not received any kind of reparation.

In this context, on September 5, 2018, the UN[71] sent a letter to the Brazilian government. It criticized the measures adopted by the Brazilian government authorities and the companies involved in the Fundão dam collapse, including the lack of transparency in the damage assessment process and the reduced participation of civil society in the bodies set up to deal with the crisis.[72]

The letter mentions the agreement reached between the Brazilian public authorities and the three companies involved, negotiated without consulting the affected communities, civil society organizations and social movements. Although the agreement contains dispositions related to transparency and the involvement of communities in its implementation, the mechanisms for its proper application were not clearly defined. The agreement did not regulate the process of appointing representatives of the affected communities to the Renova Foundation and the Inter-Federative Committee. Thus, the community representatives had no decision-making power in the two entities.[73]

The document also highlights the fact that the agreement did not provide meaningful participation mechanisms for the affected communities, which seriously undermined the remedies provided by the companies. It was up to the Renova Foundation to determine the damage that could be remedied, the type of remediation and the amount of monetary compensation. In the reparation programs, the Renova Foundation mainly offers monetary compensation to the affected communities, failing to effectively address the victims' concerns and return their lives to the *status quo ante*.[74]

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[71] Mandates of the Special Rapporteur on the implications for human rights of environmental protection; proper management and disposal of hazardous substances and wastes; the Special Rapporteur on the human rights to safe drinking water and sanitation; the Special Rapporteur on the issue of humanity's rights obligations regarding the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the rights of indigenous peoples; and the Working Group on the issue of human rights and transnational corporations and other business enterprises.

[72] UNITED NATIONS. Procedimentos Especiais da Organização das Nações Unidas. Documento AL BRA 11/2018. 05.09.2018, p.03. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24044. Accessed on March 18, 2023.

[73] UNITED NATIONS. Procedimentos Especiais da Organização das Nações Unidas. Documento AL BRA 11/2018. 05.09.2018, p.03. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24044. Accessed on March 18, 2023.

[74] UNITED NATIONS. Procedimentos Especiais da Organização das Nações Unidas. Documento AL BRA 11/2018. 05.09.2018, p.03. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24044.

The Renova Foundation had only recognized a limited number of intangible losses as eligible for reparation. Unfortunately, indigenous, fishing and other traditional communities that depended on the Rio Doce for cultural, religious and leisure activities, among others, were not granted the right to reparation for certain types of losses. As a result, the people affected by the disaster did not receive effective resources and had to choose between participating in the Mediated Compensation Program or seeking legal solutions. Within the mediation program, the amounts offered to those affected were much lower than expected and there was no room for negotiation, since the criteria for establishing the amounts were unclear. In addition, individuals were forced to renounce any rights to future claims.[75]

The UN points out that the new agreement (TAC-Governance) is intended to increase the participation of affected communities in compensation processes. However, the new participatory mechanism would have been designed from the top down. In this way, the representatives of the affected communities would not be sufficiently represented on the Renova Foundation's decision-making board. Of the nine members of the decision-making body, only two represent the affected communities, while six members are appointed by the three companies. In an excerpt from the letter, the rapporteurs state: [76]

> We wish to express our general concern regarding the lack of notable progress in remedying the situation of communities affected by the disaster, which is the result, to some extent, of the lack of a robust assessment of the socio-environmental and socioeconomic damages, including health consequences. We are concerned at the alleged continued violations of the human rights of communities affected by the Doce River basin.

In the letter, the UN also highlighted the quality of the water, which according to the Renova Foundation, complies with the standards of the National Water Agency (ANA). This information, however, conflicts with the assessment of independent studies on the subject. Another point raised is the resettlement of the community, which is far

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Accessed on March 18, 2023.

[75] UNITED NATIONS. Procedimentos Especiais da Organização das Nações Unidas. Documento AL BRA 11/2018. 05.09.2018, p.05. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24044. Accessed on March 18, 2023.

[76] Idem.

from being completed. According to the Renova Foundation's estimate, new neighborhoods would be completed by March 2019, but construction only began in the second half of 2018.[77]

At the end of the letter, the UN called for all necessary interim measures to be taken to stop the alleged violations and prevent their repetition. It also stated that, if the investigations support or suggest that the allegations are correct, the accountability of those responsible for the violations should be guaranteed. It also recalled the relevant international human rights obligations that the Brazilian government has assumed.

On November 16, 2018, the Brazilian government issued a response to the correspondence indicating that the TAC-Governance is consistent with the international protection of human rights. As regards water quality, the state acknowledged that the samples collected by the Evandro Chagas Institute showed levels of metals that exceeded the maximum permitted values. However, the government stated that this does not affect the potability of the water. In addition, the state provided information on the resettlement of the districts of Bento Rodrigues, Paracatu de Baixo and Gesteira, which were scheduled to be completed by mid-2020, among other topics.[78]

Thus, it is possible to understand that the agreement initially signed in this case was insufficient to repair the damage and remedy the victims, especially since the victims were not consulted and the Public Prosecutor's Office did not even take part in the negotiations for the first TAC. Subsequently, the "TAC-Governança" sought to correct some errors. However, despite establishing the participation of those affected (almost two years late), the mechanisms for this were flawed, again preventing the real participation of the victims.

In addition, the Renova Foundation, which was the entity created to develop and carry out the reparation and remediation projects and actions, has its decisions made by members appointed by the violating company, which can be unfavorable to the victims.

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[77] UNITED NATIONS. Procedimentos Especiais da Organização das Nações Unidas. Documento AL BRA 11/2018. 05.09.2018, p.07. Available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24044. Accessed on March 18, 2023.

[78] Missão Permanente do Brasil junto à Organização das Nações Unidas e outros organismos internacionais em Genebra. Letter sent on 11/16/2018. Available at< https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34415> . Accessed on March 23, 2023.

Many of the affected communities have not been recognized by the Renova Foundation, and there is no remediation measure applicable to them. In this way, the agreement signed, despite establishing methods and programs for reparation and remediation, has not been effectively applied in practice, leaving the victims without sufficient reparation for the damage suffered.

1.2 CÓRREGO DO FEIJÃO DAM COLLAPSE CASE (BRUMADINHO/MG)

On January 25, 2019, in the Brumadinho city (state of Minas Gerais), Vale's ore dam located on the Ferro-Carvão stream (Córrego do Feijão), a tributary of the Paraopeba river, broke, releasing 13 million cubic meters of toxic mud, causing a new major socio-environmental disaster in Brazil. The dam collapse is one of the biggest environmental crimes and work-related accidents in Brazil, since most of the 270 victims were workers who were employed by the company. This new disaster has also been classified in terms of intensity as level IV, i.e. a "very large disaster". Disasters of this higher level are characterized when the damage caused is very significant and the losses very large and considerable. [79]

In addition to the mud spreading through the site, the iron ore tailings spread through the neighborhood and reached the Paraopeba River, a tributary of the São Francisco River, which is responsible for supplying drinking water to 43% of the city's population. The first studies carried out on the Paraopeba River identified contamination not only of the water, but also of the riverbed, due to the presence of chemical products (lead, mercury, zinc, cadmium) and metals.[80]

The tailings dam at the Córrego do Feijão mine, belonging to mining company Vale S.A., broke in Brumadinho, a company also involved in the Fundão dam collapse in Mariana. It is important to note that this dam used the upstream raising method, the same one adopted at the Fundão dam. In this system, whenever the tailings reach the dam's maximum capacity, it undergoes a procedure to raise its level by using steps built on its

[79] BRASIL. Ministério Público Federal. Relatório final: Análise computacional da ruptura da Barragem I na Mina do Córrego do Feijão, em Brumadinho. Agosto de 2012. Available at < https://www.mpf.mp.br/mg/sala-de-imprensa/docs/2021/relatorio-final-cinme-upc-traducao-do-sumario-executivo-final.pdf>. Accessed on March 24, 2023.
[80] Idem

upstream side. This model was chosen due to its low construction cost and faster completion time. Its disadvantage, however, lies in its lower safety coefficient, which results in a greater risk of failure due to various factors linked to the materials used.[81]

The company's negligence in terms of prevention is not due to a lack of standards. Brazil has a whole legal framework for the safety of mining activities, including tailings dams. These include conventions 174 and 176 of the International Labor Organization, ratified by Brazil, law 12.334/2010, which establishes the National Dam Safety Policy, and NR-22 of the then Ministry of Labor.[82]

Then, in the same context, another disaster occurred three years later, and again Vale S.A. was involved in both cases. This suggests that the punishment applied in the Mariana case was not enough to have an educational impact on the company, encouraging it to take preventative measures to avoid future similar disasters.

After the disaster, the Ministry of Economy's Welfare and Labor Secretary drew up a technical report to determine the cause of the dam collapse. It concluded that the event was the result of a combination of factors accumulated over time, aggravating its consequences. Its origin can be explained by technical and organizational decisions made throughout the history of the system. Among the technical causes were the susceptibility of the stored tailings, the liquefaction, the undrained situation of the dam, such as the high phreatic line.[83]

Among other factors that have increased the risk of a dam collapse in Brumadinho are the lack of inspection and problems with environmental licensing. The National Mining Agency (Agência Nacional de Mineração - ANM), the successor to the National

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[81] BRASIL. Ministério Público Federal. Relatório final: Análise computacional da ruptura da Barragem I na Mina do Córrego do Feijão, em Brumadinho. Agosto de 2012. Available at < https://www.mpf.mp.br/mg/sala-de-imprensa/docs/2021/relatorio-final-cinme-upc-traducao-do-sumario-executivo-final.pdf>. Accessed on March 24, 2023.

[82] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale S.A. Revista Balanço da atuação caso Vale Brumadinho. Edition published in July 2020 and updated on January 25, 2023. Available at: < https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on March 25, 2023.

[83] BRASIL. Ministério da Economia. Relatório de Análise de Acidente de Trabalho Rompimento da barragem B I da Vale S.A. em Brumadinho/MG em 25/01/2019. Brasília, setembro de 2019, p.230. Available at: https://www.gov.br/trabalho-e-previdencia/pt-br/composicao/orgaos-especificos/secretaria-de-trabalho/inspecao/seguranca-e-saude-no-trabalho/acidentes-de-trabalho-informacoes-1/relatorio_analise_acidentes_brumadinho.pdf. Accessed on March 25, 2023.

Department of Mineral Production (Departamento Nacional de Produção Mineral - DNPM), is responsible for overseeing mining activities and ensuring their safety. However, the insufficient number of technicians trained to carry out inspections throughout the country has led to the outsourcing of inspection and surveillance activities to the mining companies themselves, which hire companies to draw up reports. This policy of transferring inspection responsibility exposes the ANM to inspections commissioned and paid by the mining companies themselves. This situation facilitates the occurrence of irregularities, whether due to the incapacity of the contracted companies or the corrupt behavior of their technicians with company connivance.[84]

1.2.1 Description of Vale and Tüv Süd companies

Vale S.A. is a Brazilian multinational mining company that operates as a private, publicly traded company. It is one of the largest mining companies in the world, and leads the production of iron ore, pellets and nickel. Vale S.A.'s administrative structure is made up of a Board of Directors, which includes five advisory committees, including the Governance, Compliance and Risk Committee and the Audit Committee. It is therefore essential that the Board of Directors has full knowledge of risk issues and cannot claim ignorance of them.[85]

Furthermore, it is clear that the failures at the Córrego do Feijão tailings dam were related to the price and volume of iron ore exports. From 2010 onwards, there was a drop in the price of iron ore, accompanied by an increase in production, which resulted in the increasing accumulation of tailings in the dam, as well as an escalation in the risks involved. These risks should have been properly assessed, along with the ongoing maintenance of the dam structure.[86]

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[84] FARIA, Edimur Ferreira; SOUZA, Renta Martins. Da responsabilidade civil do Estado por omissão fiscalizatória: acidentalidade provocada pelo rompimento da barragem de Brumadinho. A&C – **Revista de Direito Administrativo e Constitucional.** Belo Horizonte, ano 19, n. 78, p. 221-248, out./dez. 2019, p. 224. Available at: < http://www.revistaaec.com/index.php/revistaaec/article/view/1160/835 >. Accessed on March 22, 2023

[85] BRASILIANO, Antonio Celso Ribeiro. Brumadinho: miopia na gestão de riscos por parte da administração. Inteligência em Riscos (Interisk). 2019. Available at:< https://d335luupugsy2.cloudfront.net/cms/files/40195/1552997643INTERISK-Brumadinho-paper-06.pdf>. Accessed on: March 21, 2023.

[86] SILVA, Alexandre Antonio Bruno; GO, Augustin; MOREIRA, Roberta Pessoa. O desastre ambiental de Brumadinho: por uma nova composição de forças para a defesa ambienta. **Revista Brasileira de Estudos**

During the period between 2014 and 2017, data revealed that Vale S.A. took advantage of the growth in the iron ore market to maximize returns to its shareholders. As a result, it significantly reduced investments in operational maintenance (falling by about half of what it was in 2014, from approximately 4 billion dollars to 2 billion dollars in 2017), decreased spending on the maintenance of tailings dams and piles (from approximately 474 million dollars to two hundred and two million dollars) and on health and safety (from approximately 359 million dollars to 207 million dollars).[87]

Because tailings dams are just one aspect of industrial activity, they often don't receive enough attention in terms of maintenance. The argument used to justify this neglect is that it would be an investment with no financial return. As a result, large dams are built with a high storage capacity, whose construction in itself poses environmental risks. These constructions promote inadequate waste management, which often is a source of pollution and can cause major damage.[88]

The company also failed to activate the sirens installed in the communities near the dam in Brumadinho, as reported by survivors. In addition, there was no guidance for residents on evacuation routes in the event of a disaster. This is the company's responsibility, according to an ordinance issued by the National Department of Mineral Production (Departamento Nacional de Produção Mineiral - DNPM). This rule establishes the company's duty to warn and guarantee routes for the population in the region below the dams, since there would be no time for the authorities to intervene. This lack of a contingency and evacuation plan proved even more problematic due to the malfunctioning sirens.[89]

Políticos. Belo Horizonte, n. 123, pp. 49-83, jul./dez. 2021. DOI: 10.9732/2021.V123.925. Available at: http://ibdh.org.br/responsabilidad-civil-de-las-empresas-por-violacion-de-la-costumbre-internacional-corte-suprema-de-canada-nevsun-contra-araya/>. Accessed on March 23, 2023.

[87] ALMEIDA, Ildeberto Muniz de; JACKSON FILHO, José Marçal; VILELA, Rodolfo Andrade de Gouveia. Razões para investigar a dimensão organizacional nas origens da catástrofe industrial da Vale em Brumadinho, Minas Gerais, Brasil. **Cadernos de Saúde Pública**, v. 35, p. e00027319, 2019. Available at: https://www.scielosp.org/article/ csp/2019.v35n4/e00027319/. Accessed on March 25, 2023.

[88] SILVA, Alexandre Antonio Bruno; GO, Augustin; MOREIRA, Roberta Pessoa. O desastre ambiental de Brumadinho: por uma nova composição de forças para a defesa ambienta. **Revista Brasileira de Estudos Políticos**. Belo Horizonte, n. 123, pp. 49-83, jul./dez. 2021. DOI: 10.9732/2021.V123.925. Available at: http://ibdh.org.br/responsabilidad-civil-de-las-empresas-por-violacion-de-la-costumbre-internacional-corte-suprema-de-canada-nevsun-contra-araya/>. Accessed on March 23, 2023.

[89] FARIA, Edimur Ferreira; SOUZA, Renta Martins. Da responsabilidade civil do Estado por omissão fiscalizatória: acidentalidade provocada pelo rompimento da barragem de Brumadinho. A&C – **Revista de Direito Administrativo e Constitucional.** Belo Horizonte, ano 19, n. 78, p. 221-248, out./dez. 2019, p. 228. Available at: < http://www.revistaaec.com/index.php/revistaaec/article/view/1160/835 >. Accessed on

After the disaster, the then president of Vale, Fábio Schvartsman, claimed that an audit carried out on January 10, 2019 had attested to the safety of the dam[90]. The dam's stability study had been approved in September 2018 by German company Tüv Süd.

Tüv Süd AG is an internationally active German service company with its head office in Munich. It is an unlisted public limited company. The organization provides technical testing through a wide range of services with focus on testing and certification. In 2021, it achieved an annual turnover of 2.7 billion euros with 25,500 employees. Of the company's shares, 74.9% belong to the registered association Tüv Süd, which has around 13,500 members; the remaining 25.1% belong to the Tüv Süd Foundation. The share rights in Tüv Süd AG have been transferred to the independent Tüv Süd Gesellschafterausschuss GbR, based in Munich.[91]

Tüv Süd has a thousand regional offices around the world, and in Brazil there are two offices, both located in the state of São Paulo. In July 2018, the Brazilian subsidiary was hired by Vale to draw up a report confirming the stability of the dam. Although the document identified some issues in the drainage system and made observations about the stability of the raising, which would be at the limit of safety according to Brazilian standards, the safety certificate was provided by the company.[92]

In September, seven Vale employees and six from TÜV SÜD were indicted by the Federal Police for misrepresentation. The police investigation concluded that the companies worked with falsified documents attesting the dam's stability. According to the Minas Gerais Public Prosecutor's Office (Ministério Público de Minas Gerais - MPMG), Tüv Süd had a strong interest in signing off on the dam's safety in order to obtain more contracts with Vale. This happened after another inspection company, which refused to certify the safety of the structure, was dismissed by Vale. According to Lanchotti, this highlights a conflict of interest between Tüv Süd and Vale, since the

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90 APF. Barragem que rompeu em Brumadinho tinha sido inspecionada recentemente. Isto É, Tecnologia & Meio Ambiente, 23 Jan. 2019. Available at:<https://istoe.com.br/barragem-que-rompeu-em-brumadinhotinha-sido-inspecionada-recentemente/>. Accessed on March 22, 2023.

91 Available at: https://www.tuvsud.com/en

92 FARIA, Edimur Ferreira; SOUZA, Renta Martins. Da responsabilidade civil do Estado por omissão fiscalizatória: acidentalidade provocada pelo rompimento da barragem de Brumadinho. A&C – **Revista de Direito Administrativo e Constitucional.** Belo Horizonte, ano 19, n. 78, p. 221-248, out./dez. 2019, p. 228. Available at: < http://www.revistaaec.com/index.php/revistaaec/article/view/1160/835 >. Accessed on March 22, 2023

former had important contracts with the latter for other activities, such as decommissioning dams and projects. This situation exposed the flaws in the inspection system.[93]

1.2.2. Judicial claims in Brazil

The disaster in Brumadinho has generated several lawsuits in the criminal, labor, environmental and civil spheres. Most of the victims of the disaster were Vale workers, and it is considered the biggest work accident[94] ever recorded in Brazil[95]. The Labor Public Prosecutor's Office filed a Public Civil Action in the Labor Courts, and the state and federal Public Prosecutor's Offices filed a Public Civil Action in the civil sphere. This study will focus on the civil and labor lawsuits, since the objective is to analyze the reparations offered to the victims.

1.2.2.1 Labor claims

On January 27, the Labor Prosecutor's Office (Ministério Público do Trabalho - MPT) took the first judicial step by requesting the blocking of funds to cover the costs of the reparations, which were valued at R$1.6 billion (approximately 328 million US dollars) by the MPT. The request was granted by the Regional Labor Court. The Labor Prosecutor's Office also requested and obtained approval to maintain the payment of salaries for its own and outsourced workers, cover funeral and body transportation expenses, and provide severance pay for employment contracts.[96]

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[93] BRASIL. Ministério da Economia. Relatório de Análise de Acidente de Trabalho Rompimento da barragem B I da Vale S.A. em Brumadinho/MG em 25/01/2019. Brasília, setembro de 2019, p.176. Available at: https://www.gov.br/trabalho-e-previdencia/pt-br/composicao/orgaos-especificos/secretaria-de-trabalho/inspecao/seguranca-e-saude-no-trabalho/acidentes-de-trabalho-informacoes-1/relatorio_analise_acidentes_brumadinho.pdf. Accessed on March 25, 2023.

[94] According to Law 8,213/91 “Any occurrence that causes bodily injury or functional disturbance that causes death or the loss or reduction, permanent or temporary, of the ability to work” is legally called a work accident.

[95] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale S.A. Revista Balanço da atuação caso Vale Brumadinho. Edição publicada em julho de 2020 e atualizada em 25 de janeiro de 2023. Available at: < https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on 25 March, 2023.

[96] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale S.A. Revista Balanço da atuação caso Vale Brumadinho. Edition published in July 2020 and updated on January 25, 2023, p.15. Available at: < https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on March 25,

In defense of the rights of the workers and their families who were victims of the Brumadinho disaster, the Labor Prosecutor's Office filed Public Civil Action No. 0010080.15.5.03.0142 against Vale S.A. on March 25, 2019. On July 15, 2019, an agreement for moral and material reparations for the family groups of the 270 dead and missing workers was signed between the Minas Gerais Labor Prosecutor's Office (Ministério Público do Trabalho - MPT) and Vale S.A.[97]

According to the agreement, workers and their families will receive around R$1.7 billion (approximately 348 million US dollars) in reparations. This amount includes two forms of reparation: material damage and moral damage. The material damage is aimed at restoring the family's financial situation, including the full payment of the salaries of its own employees and outsourced workers, as requested by the Labor Prosecutor's Office in the public civil action. To repair the material damage and restore the monthly income of the families of the deceased workers, the dependents will receive a monthly pension for life until the age of 75, which is the average life expectancy of Brazilians, according to data from the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística - IBGE). The agreement provides a minimum compensation of R$800,000 (approximately 164 thousand US dollars) in total per deceased family member.[98]

Regarding moral damages, which aim to alleviate the pain suffered by the family as a result of the loss of a loved one, the agreement established that the spouse or partner, child, mother and father will individually receive R$700,000 (approximately 143 thousand US dollars), of which R$500,000 (approximately 100 thousand US dollars) will be used to compensate moral damages and R$200,000 (approximately 40 thousand US dollars) as additional insurance for work accidents. Siblings of deceased workers will individually receive R$150,000 (approximately 30 thousand US dollars) for moral damages. There will also be the payment of aid, medical and psychological assistance.[99]

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[97] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale S.A. Revista Balanço da atuação caso Vale Brumadinho. Edition published in July 2020 and updated on January 25, 2023, p.15. Available at: < https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on March 25, 2023.

[98] Ibidem, p.05

[99] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale

However, Vale S.A.'s own documents indicate that the company has fixed the cost of human life, in the event of a tragedy, as occurred in Brumadinho. The amount set is R$5 million (approximately 1 million US dollars) per family group, plus an additional R$1 million (approximately 200 thousand US dollars) per dependent in the case of families with more than 5 people. These amounts are higher than those agreed in court.[100]

To reach this agreement, an unprecedented model of investigation was inaugurated within the Public Labor Ministry, characterized by direct and permanent listening to those affected. The families affected received guidance, information on the work of the Labor Prosecutor's Office, legal information and were also asked to give their opinion on the amounts that would represent decent reparations for the damage suffered. The members of the Labor Prosecutor's Office maintained direct dialogue with the families affected through six meetings to negotiate the agreement.[101] This demonstrates great progress in protecting the victims, compared to the Mariana case, guaranteeing their participation in the settlement negotiations, which is essential for more effective remediation.

In addition, the company paid R$400 million (approximately 80 million US dollars) in compensation for collective moral damage. This amount has been allocated primarily to initiatives aimed at preserving life in the areas of health and food safety. The funds are managed by an inter-institutional committee made up of the Labor Prosecutor's Office (Ministério Público do Trabalho - MPT), the Regional Labor Court (Tribunal Regional do Trabalho - TRT), the Federal Public Defender's Office (Defensoria Pública da União - DPU) and the Association of Families of Victims and Affected People (Associação dos Familiares de Vítimas e Atingidos - AVABRUM). Of this amount, around R$54 million (approximately 11 million US dollars) was directed towards structuring health institutions in the 48 municipalities that make up the Paraopeba River basin, while approximately R$22.5 million (approximately 4.6 million US dollars) was used to enable actions to combat hunger in various municipalities in Minas Gerais. Another R$40 million (approximately 8 million US dollars) was intended for projects

S.A. Revista Balanço da atuação caso Vale Brumadinho. Edition published in July 2020 and updated on January 25, 2023, p.05. Available at: <https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on March 25, 2023.

[100] Ibidem, p.25

[101] Ibidem p. 12

aimed towards training workers and generating employment and income, as well as protecting indigenous people, the elderly, and children, in addition to promoting education and preserving memory, to prevent the work accident that caused the death of 274 people from being forgotten. Part of the funds went to the municipalities affected in the Vale do Rio Doce region.[102]

1.2.2.2 Civil claims

On January 26, 2019, the Public Prosecutor's Office of Minas Gerais filed a urgent injunction against Vale S.A. in case no. 5000053-16.2019.8.13.0090, with the aim of blocking the amount of R$5 billion (approximately 1 billion US dollars) to guarantee full reparation for the socio-economic and human damage suffered by those affected by the dam collapse. In this process, other urgent requests were made, such as liability for the reception and sheltering of people whose housing conditions were compromised, provision of transportation, full assistance to those affected by the dam by a multidisciplinary team, provision of adequate information, provision of food, transportation, drinking water, burial expenses, and logistical and financial support for the families. All the requests were granted.[103]

On April 29, 2019, the Public Prosecutor's Office of the State of Minas Gerais filed a Public Civil Action against Vale S.A., requesting the recognition of Vale S/A's civil liability and its consequent condemnation for full reparation for the social, moral, and economic damages caused to the people, communities, and other collectivities, even if undetermined, affected by the Vale disaster. The aim of this action was to obtain judicial relief capable of repairing, restoring and/or compensating the diffuse, collective, and individual homogeneous socio-economic damage caused to the people, families, communities, localities/districts, and municipalities affected.[104]

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[102] BRASIL. Ministério Público do Trabalho. Minas Gerais. Do desastre ao acordo entre o MPT e a Vale S.A. Revista Balanço da atuação caso Vale Brumadinho. Edition published in July 2020 and updated on January 25, 2023, p.42. Available at: < https://drive.google.com/file/d/1f4jL1ut36Sf3iCyTB2lIudItSFUYHaOO/view>. Accessed on March 25, 2023

[103] BRASIL. Ministério Público do Estado de Minas Gerais. Ação Civil Pública nº 5000053-16.2019.8.13.0090. Available at: < https://www.mpmg.mp.br/data/files/21/F4/E1/51/2D44A7109CEB34A7760849A8/Brumadinho%20-%20ACP%20Principal%20-%20_rea%20socioec_nomica%20.pdf>. Accessed on March 26, 2023.

[104]BRASIL. Ministério Público do Estado de Minas Gerais. Ação Civil Pública nº 5000053-

On February 4, 2021, the Government of Minas Gerais, the Public Prosecutor's Office of Minas Gerais (Ministério Público de Minas Gerais - MPMG), the Federal Public Prosecutor's Office (Ministério Público Federal - MPF) and the Public Defender's Office of Minas Gerais (Defensoria Pública de Minas Gerais - DPMG) signed the Judicial Reparations Agreement with Vale S.A., under the mediation of the Court of Justice of Minas Gerais (Tribunal de Justiça de Minas Gerais - TJMG). The document guaranteed that the company would be held immediately responsible for the damage caused to the affected regions and to Minas Gerais society by the collapse of the Córrego do Feijão Mine dams in Brumadinho. The agreement established the amount of R$37.6 billion (approximately 7.7 billion US dollars) to repair the damage. It should be noted that environmental recovery has no spending ceiling, with Vale being responsible for repairing the damage already known and any that May be identified. [105]

The agreement put an end to four lawsuits, the Anticipated Injunction and the Public Civil Action arising from it, the Public Civil Action for environmental damage and the Public Civil Action for economic damage. Vale's responsibility for full reparation of all the damage resulting from the collapse was recognized in a court ruling handed down on July 9, 2019. The purpose of the agreement was to define Vale's obligations to do and to pay, to fully repair the damages, negative impacts and socio-environmental and socio-economic losses caused because of the breach, and their consequences, according to the solution and technical adequacy defined for each situation.[106]

Regarding measures for comprehensive socio-environmental reparation of the impacts and damage resulting from the disaster, these correspond to actions, projects and works that can be measured using indicators and will not be subject to a monetary limit, except for the environmental compensation defined in the agreement. Thus, the amounts

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16.2019.8.13.0090. Available at: < https://www.mpmg.mp.br/data/files/21/F4/E1/51/2D44A7109CEB34A7760849A8/Brumadinho%20-%20ACP%20Principal%20-%20_rea%20socioec_nomica%20.pdf>. Accessed on March 26, 2023.

[105] BRASIL. Ministério Público do Estado de Minas Gerais. Acordo judicial para reparação integral relativa ao rompimento das barragens B-I,B-IV e B-IVA / córrego do feijão. Processo de mediação sei n. 0122201-59.2020.8.13.0000 tjmg / cejusc 2º grau. Available at: <https://www.mg.gov.br/sites/default/files/paginas/Minuta%20versao%20final.pdf.pdf >. Accessed on March 26, 2023.

[106] BRASIL. Ministério Público do Estado de Minas Gerais. Acordo judicial para reparação integral relativa ao rompimento das barragens B-I,B-IV e B-IVA / córrego do feijão. Processo de mediação sei n. 0122201-59.2020.8.13.0000 tjmg / cejusc 2º grau. Available at: <https://www.mg.gov.br/sites/default/files/paginas/Minuta%20versao%20final.pdf.pdf >. Accessed on March 26, 2023.

spent on comprehensive socio-environmental reparation and related projects, except for environmental compensation, were not considered for the purposes of calculating the established ceiling.[107]

In addition, Vale committed to pay or carry out projects and actions aimed to repair all the diffuse and collective socio-economic damage resulting from the collapse. However, supervening damages, individual damages and homogeneous individual damages of a divisible nature were excluded, in accordance with the requests of the lawsuits not extinguished by this agreement, which are the subject of the judicial investigations that will continue. The agreement states that the people affected will be guaranteed informed participation in the conception, formulation, execution, monitoring and evaluation of plans, programs, projects, and actions.[108]

Of the R$37.6 billion (approximately 7.7 billion US dollars) established in the agreement, R$5 billion (approximately 1 billion US dollars) is for the implementation of the Paraopeba River Basin Socio-Environmental Reparation Plan. The amount of approximately R$26.4 billion (approximately 5.4 billion US dollars) corresponds to the Ceiling of the Agreement and represents the maximum limit to be invested, funded or spent by Vale in fulfilling the obligations of socioeconomic reparation and compensation and compensation for socio-environmental damage and indemnity resources. The remaining amount corresponds to values indicated by Vale as expenses already incurred in the socio-environmental and socio-economic reparation actions and as advance compensation for collective and diffuse damages.[109]

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[107] BRASIL. Ministério Público do Estado de Minas Gerais. Acordo judicial para reparação integral relativa ao rompimento das barragens B-I,B-IV e B-IVA / córrego do feijão. Processo de mediação sei n. 0122201-59.2020.8.13.0000 tjmg / cejusc 2º grau. Available at: < https://www.mg.gov.br/sites/default/files/paginas/Minuta%20versao%20final.pdf.pdf >. Accessed on March 26, 2023.

[108] BRASIL. Ministério Público do Estado de Minas Gerais. Acordo judicial para reparação integral relativa ao rompimento das barragens B-I,B-IV e B-IVA / córrego do feijão. Processo de mediação sei n. 0122201-59.2020.8.13.0000 tjmg / cejusc 2º grau, p.07. Available at: < https://www.mg.gov.br/sites/default/files/paginas/Minuta%20versao%20final.pdf.pdf >. Accessed on March 26, 2023.

[109] BRASIL. Ministério Público do Estado de Minas Gerais. Acordo judicial para reparação integral relativa ao rompimento das barragens B-I,B-IV e B-IVA / córrego do feijão. Processo de mediação sei n. 0122201-59.2020.8.13.0000 tjmg / cejusc 2º grau, p.09. Available at: < https://www.mg.gov.br/sites/default/files/paginas/Minuta%20versao%20final.pdf.pdf >. Accessed on March 26, 2023.

The agreement establishes programs and actions to be funded by the company, such as credit and microcredit projects for the people affected, an income transfer program for the affected population, universal basic sanitation, emergency aid, a mobility and allocation program, water safety projects, audits of human health risk and ecological risk studies, water monitoring, among other economic and socio-environmental actions**.**[110]

Although the agreement includes the informed participation of the victims, this will only be in relation to "the design, formulation, execution, monitoring and evaluation of plans, programs, projects and actions". In this way, those affected did not participate in the agreement itself, since they were not consulted about its terms. Thus, a process of Popular Consultation was carried out in all the municipalities affected to indicate the priority thematic areas to receive investments. More than 10,000 residents from the 26 municipalities affected took part in the process.

In February 2022, within Vale's obligations, according to the schedule set out in the Judicial Settlement, R$18.2 billion (approximately 3.7 billion US dollars) was paid, destined for different applications and forms of execution[111]. Many of the projects and actions provided for in the court settlement were underway a year later, guaranteeing the services and remediation to the victims that had been agreed in court.

Thus, in this case we can see that there has been progress, compared to the Mariana case, regarding the post-disaster actions. In the labor sphere, the victims were widely involved before the agreement was reached and compensation was paid as established. In the civil sphere, however, the victims were not consulted about the terms of the agreement, but they were heard afterwards for the development and implementation of social, economic, and environmental projects and actions.

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[110] BRASIL. Estado de Minas Gerais. Comitê Gestor Pró-Brumadinho. Acordo judicial de reparação. Resumo das atividades realizadas no 1º ano de execução 2021/2022. Available at: https://www.mg.gov.br/sites/default/files/paginas/imagens/probrumadinho/Execucao%20do%20acordo%20de%20brumadinho%20-%20resumo%20de%20atividades%202021-2022%20ed1.pdf . Accessed on March 28, 2023.

[111] BRASIL. Estado de Minas Gerais. Comitê Gestor Pró-Brumadinho. Acordo judicial de reparação. Resumo das atividades realizadas no 1º ano de execução 2021/2022. Available at: https://www.mg.gov.br/sites/default/files/paginas/imagens/probrumadinho/Execucao%20do%20acordo%20de%20brumadinho%20-%20resumo%20de%20atividades%202021-2022%20ed1.pdf . Accessed on March 28, 2023.

Brazil has a good judicial system, with efficient methods of access to justice for victims, even if they are vulnerable. The Public Prosecutor's Office plays the role of representing victims of collective damage. The biggest problem lies in the execution of these agreements, to guarantee that the victims receive an adequate remedy.

As a result, many of the victims of these two disasters sought to obtain a remedy through litigation in foreign courts. The Mariana victims filed a lawsuit against BHP Billington in England and the Brumadinho victims against Tüv Süd in Germany. Extraterritorial claims are not common and are only accepted in exceptional situations under international law. However, recently some extraterritorial claims involving human rights violations by transnational companies have emerged, causing discussions as to their applicability and legality in the field of Business and Human Rights, as will be discussed in the second chapter.

2. ACCESS TO JUDICIAL REMEDIES THROUGH EXTRATERRITORIAL LITIGATION

This study is based on an analysis of Pillar III of the UN Guiding Principles on Business and Human Rights, which deals with remedy access for victims. The specific focus is on Principles 25 and 26. Principle 25 establishes that it is the duty of the State to take appropriate measures to ensure that, in the event of human rights abuses, the victim has access to an effective remedy. Regarding principle 26, states should take appropriate measures to ensure the effectiveness of domestic judicial mechanisms when dealing with business-related human rights abuses, including reducing practical legal abuses and other barriers that can lead to denial of remedy.[112]

According to the commentary on principle 26, for effective state judicial mechanisms, there must be impartiality, integrity, and the ability to grant due process of law. States must ensure that there is no barrier to prevent cases being brought before the courts and must ensure that the delivery of justice is not impeded by corruption of the judicial process. In addition, courts need to be independent of economic or political pressures from other state agents and business actors. It must be guaranteed that the legitimate and peaceful activities of human rights defenders are not obstructed.[113]

The legal barriers that can obstruct legitimate legal cases are mentioned in the commentary to principle 26 in examples. The first is related to the way in which legal responsibility is allocated between members of a corporate group under domestic criminal and civil law, which can make it easier for them not to be held properly accountable. The second barrier would be the difficulty for claimants to access the courts in their home state when justice is denied by the host state, regardless of the merits of the case. Finally, the third barrier occurs when certain groups, such as indigenous peoples and migrants,

[112] UNITED NATIONS. Guiding Principles on Business and Human Rights. Implementing the United Nations '"Protect, Respect and Remedy" Framework. New York and Geneva, 2011. Available at: < https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf > Accessed on February 5, 2023
[113] Idem.

are excluded from the same level of legal human rights protection applicable to general population.[114]

There is also mention of practical and procedural barriers to accessing legal remedies. Examples are the costs of legal action that go beyond an adequate bar or that cannot be reduced to reasonable levels through government support. Similarly, when claimants have difficulty obtaining legal representation, due to a lack of resources or a lack of incentives for lawyers to advise claimants in this area. Furthermore, when there are no adequate options for aggregating claims or enabling representative proceedings, and this prevents effective recourse for claimants. When state prosecutors lack adequate resources, experience, or support to fulfill the state's obligations to investigate individuals and companies involved in human rights-related crimes.[115]

Many of these barriers are the result of or aggravated by the frequent imbalance between the parties in human rights claims related to business activity, due to financial resources, access to information and expertise. Furthermore, whether through active discrimination or as an unintended result, the way in which judicial mechanisms are designed and operate often results in individuals from groups or populations at greater risk of vulnerability or marginalization face additional cultural, social, physical, and financial difficulties in accessing, using and benefiting from these mechanisms. Special attention should be paid to the specific rights and needs of such groups or populations at each stage of the reparation process: access, procedures, and outcomes.[116]

Although the Guiding Principles present ideas of access to remediation and indicate the need to exclude its possible access barriers, the concept of "effective remedy" was still abstract and a better explanation of its meaning in practice was needed. In 2017, the UN Working Group on Business and Human Rights (WGBHR) presented its report to the UN General Assembly (A/71/162), in which it clarifies the concept of access to

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[114] UNITED NATIONS. Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework. New York and Geneva, 2011. Available at: < https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf > Accessed on February 5, 2023.

[115] Idem

[116] UNITED NATIONS. Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework. New York and Geneva, 2011. Available at: < https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf > Accessed on February 5, 2023.

effective remedies within the framework of the principles. The report clarifies the interrelationship between the right to effective remedy, access to effective remedy, access to justice and corporate responsibility.[117]

According to the report, affected rights holders should be able to claim what can be called a "bouquet of remedies" without fear of victimization. It outlines what can be called an "all remedies" approach, which implies that access to effective remedies is taken as a lens to guide all measures taken by states and companies, and that such remedies are in a variety of contexts.

The right (or access) to an effective remedy is closely related to the notion of corporate responsibility. If remedies for human rights abuses are interpreted holistically, to address "individual and social objectives", effective remedies must result in some form of corporate responsibility. On the other hand, corporate responsibility must contribute to some form of remedy, which May or May not be effective. The starting point must therefore be to provide effective remedies for victims of human rights abuses by companies, which in turn must inevitably result in corporate responsibility.[118]

According to the working group, access to remediation tools play a key role in preventing future abuses, and they must be able to discourage not only a particular actor, but also others, from committing similar abuses in the future. Effective remediation must therefore combine preventive, restorative and dissuasive elements. There is a vital interrelationship between these elements. If effective preventive remedies are available, there will be little need to seek remedial remedies. Similarly, dissuasive remedies will reduce the need to seek preventive and remedial remedies. Consequently, if any one of these elements is missing, the overall effectiveness of the remedies will be undermined. State-based judicial mechanisms must be able to provide all three elements to be employed.[119]

The WGBHR considers that remedies, to be effective, must be accessible, affordable, adequate and timely. It is vital to interpret these elements from the perspective

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[117] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/71/162). 18 July,2017, paragraph 4. Available at: < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf> Accessed on February 5, 2023.

[118] Ibidem, paragraph 17

[119] Ibidem, paragraph 40

of affected rights-holders seeking remedies. For example, rights-holders would consider a remedy accessible only if they knew of its existence and could access it without too much expense, inconvenience, or the help of technical experts. Similarly, what May be considered an accessible remedy from a purely objective perspective May not be considered accessible by the communities affected.[120]

States have an obligation, in accordance with national law and international human rights law, to ensure that people and communities affected by business-related human rights abuses have access to effective remedies. This obligation is both individual and joint for two reasons. The first is normative: the realization of human rights is a goal shared and agreed upon by the international community, so states have committed to working together collaboratively to achieve it. The second is practical: considering the current nature of globally interconnected business operations, including through supply chains, it would be difficult to provide effective remedies only within strict territorial compartments.[121]

In addition to removing barriers to effective remedies at the national level, states have a duty to cooperate and collaborate with their peers to fill gaps in victims' quests to seek effective remedies against companies, including state-owned enterprises. However, as the Working Group noted in its recent report, to date there has been little progress in cross-border cooperation that has led to successful enforcement actions in cases focused on business-related human rights abuses.[122]

States must therefore do more to develop an institutionalized approach of cooperation and collaboration to deal with all business-related human rights abuses with a transnational dimension. Such an approach can take various forms, such as the development of a regional or international framework or the negotiation of bilateral

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[120] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/71/162). 18 July,2017, paragraph 32. Available at: < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf>. Accessed on February 8, 2023.

[121] Ibidem, paragraph 61.

[122] UNITED NATIONS. Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights: Study of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/35/33). 25 de abril de 2017, paragraph. 4. Available at:< https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/100/07/PDF/G1710007.pdf?OpenElement >. Accessed on February 10, 2023.

mutual assistance agreements. Coordination between states will not only fill redress gaps in the case of corporate human rights abuses, but also avoid a multiplicity of processes.[123]

As part of their extraterritorial obligation to respect, protect and fulfill human rights, states must provide access to effective remedies even for foreign victims in appropriate cases. Doing so will be consistent with states signaling to companies domiciled in their territory and/or jurisdiction to respect human rights in all their operations. States' obligations to protect human rights extend beyond their territorial borders. States act extraterritorially in many areas within the parameters of international law and there are no solid reasons why they should hesitate to do so in the field of business and human rights.[124]

The right to an effective remedy is a human right with procedural and substantive elements. It imposes a duty on states to respect, protect and fulfill this right. It also implies responsibility for non-state actors, including companies[125]. This research focuses on the procedural elements of the right to an effective remedy, in relation to extraterritorial civil litigation.

There is a difficulty in enforcing human rights standards on corporate misconduct in host states where, for various reasons, these standards are not applied at the local level. Litigation in a jurisdiction other than the one where the harm occurred, or regulation of companies' actions in other jurisdictions by their home state, are important alternative methods for enforcing and protecting human rights. But they also generate controversy in terms of their legality under public international law due to dilemmas associated with their use beyond technical legality, reaching into academic areas such as: international relations; the universality of human rights; access to justice and economic development.[126]

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[123] UNITED NATIONS. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/71/162). 18 July,2017, paragraph 18. Available at: < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf>. Accessed on February 8, 2023.
[124] Ibidem, paragraph 19.
[125] Ibidem, paragraph 14.
[126] CHAMBERS, Rachel, An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct. Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques (June 15, 2018). **Utrecht Law Review**, Vol. 14, No. 2, p. 22-39, 2018, Available at SSRN: https://ssrn.com/abstract=3204452 https://www.researchgate.net/publication/326081849_An_Evaluation_of_Two_Key_Extraterritorial_Tec

In the last fifteen to twenty years, victims of human rights violations by transnational corporations have filed human rights claims in the courts of the states of origin of multinational companies, obtaining different responses from the courts. Usually, the claims were based on civil liability laws. The claimants argued that parent companies or leading companies in global supply chains caused violations through the activities of their subsidiaries or suppliers in other countries. The parent companies' liability was based on their contributions to the events that gave rise to the respective infringements.[127]

Given that the operations of transnational corporate groups spread across several jurisdictions, two or more states May be interested in regulating them. The first point of contact, as mentioned earlier, is usually the host state. In this scenario, however, two problems emerge. Firstly, the current legal and regulatory framework is predominantly territorial, while transnational business transcends territorial borders. Secondly, host states are not always willing or able to judge and/or regulate locally incorporated affiliates.[128]

To better understand this phenomenon, firstly extraterritorial jurisdiction in international law, which is only applied in exceptional cases, will be analyzed. This will be followed by an analysis of how it is applied in situations involving human rights violations by transnational companies, especially in recent years.

2.1 EXTRATERRITORIALITY IN INTERNATIONAL LAW

International law has several rules that protect the sovereignty of states and their territorial integrity, limiting their legal competence to apply and enforce rules of conduct extraterritorially. Scholars agree that the Peace of Westphalia in 1648 stipulated that a nation's power ends at its territorial borders, giving rise to the modern notion of sovereignty and territoriality, understood as the defining pillar of international law.[129]

hniques_to_Bring_Human_Rights_Standards_to_Bear_on_Corporate_Misconduct_Jurisdictional_dilemma_raisedcreated_by_the_use_of_the_extraterritorial_techniques . Accessed on June 22, 2023

[127] KRAJEWSKI, Markus. The state duty to protect against human rights violations through transnational business activities. **Deakin law review**. Volume 23, 2018. p. 13-39, p. 33.

[128] CHAMBERS, Rachel E (2019) Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, University of Essex. p. 15. Available at: https://repository.essex.ac.uk/24919/ . Accessed on June 29, 2023

[129] GROSS, Leo; The Peace of Westphalia, 1648-1948. American Journal of International Law, p. 28-29

During the colonial period, the colonizing states exercised almost complete extraterritorial jurisdiction over the colonized territories, through treaties of capitulation or territorial control. The Western powers imposed a system of extraterritoriality by which they claimed exclusive jurisdiction over the citizens of the colonies[130]. After the Second World War, the main wave of decolonization took place, at a time when the rights of colonial peoples to self-determination and the economic development of the newly independent states were being asserted. In this context, the role of foreign companies exploiting the natural resources of the former colonies was highlighted. [131]

Since then, transnational companies have become major world powers. Their activities often cause human rights abuses and damage the environment. Their transnational operations in different countries, especially when subsidiaries are set up in countries in the global south, have led to extraterritorial conflicts arising. To understand the application of extraterritoriality in this context, it is first necessary to analyze the idea of jurisdiction in international law.

2.1.1 Jurisdiction in Public International Law

The term 'jurisdiction' is used in public international law to describe “the limits of the legal competence of a state to make, apply and enforce rules of conduct upon persons. It’s concerning essentially the extent of each state’s right to regulate conduct or the consequences of events”[132]. Jurisdiction thus refers to a state's ability to adopt and apply its laws. Although often related to sovereignty and intrinsically linked to its territory, jurisdiction can exist without connection to territory. Jurisdiction can be considered to exist in a variety of contexts, depending on the location of events, the nationality of the participants or the surrounding circumstances, and will also indicate whether a state May be able to undertake enforcement action to uphold its law.[133]

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[130] CHIMINI ,B.S. An Outline of a Marxist Curs on Public International Law. **Leiden Journal of International Law**, p.18.
[131] LESLIE, Anne; DUVIC, Paoli; VIÑUALES, Jorge. Principle 2: Prevention’ in Jorge Viñuales (ed), The Rio Declaration on Environment and Development: A Commentary (OUP 2015), p. 114
[132] LOWE, Vaughan. Jurisdiction. In: EVANS, Malcolm. **International Law**. Oxford University Press, 2014, p. 329. Available at: https://www.academia.edu/9791106/Evans_International_Law . Accessed on June 30, 2023
[133] ROTHWELL, D.; KAYE, S.; AKHTARKHAVARI, A., & Davis, R. (2010). Jurisdiction. In **International Law:** Cases and Materials with Australian Perspectives (pp. 294-377). Cambridge: Cambridge University Press. doi: 10.1017/CBO9780511997341.008

A sovereign state has general and exclusive jurisdiction over its territory. General jurisdiction implies that the state exercises all legislative, administrative, and judicial competences in its territorial domain. Exclusive jurisdiction means that the state does not face competition from any other sovereign state when exercising these competences.[134]

Thus, the focus of the principle of jurisdiction is to ensure that states do not interfere in matters that are the domain of other states. It is related to the principles of sovereignty and non-intervention, which will be discussed in this chapter. Domestic law will determine the extent to which states make use of the rights derived from these rules[135]. Jurisdiction ensures that the concerns of foreign nations are also considered, and that decisions based on the sovereignty of one state do not unduly usurp other states' sovereignty.[136]

Jurisdiction can be divided into prescriptive jurisdiction and enforcement jurisdiction. Prescriptive jurisdiction is the power to regulate an activity and prescribe certain behaviors [137]. Thus, prescriptive jurisdiction is the ability to draw up laws that can validly regulate people and situations, regardless of their location. Enforcement jurisdiction is the ability of a state to validly apply its law through the exercise of executive and judicial power. In other words, it is the legal competence of a state to arrest, judge, convict and imprison an individual for an offence against its laws.[138]

There is another type of jurisdiction identified by the Council of Europe, the so-called 'adjudicative jurisdiction', which refers to the rights of courts to receive, adjudicate and determine cases referred to them. If the parties choose to submit to the jurisdiction of a national court, there can be no cause for complaint, unless one or more of the parties are subject to an order issued by the law of another state, obliging them not to submit to

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[134] REZEK, José Francisco. **Direito Internacional Público**: curso elementar. 17. ed. São Paulo: Saraiva, 2018, p. 201.
[135] RYNGAERT, Cedric. **Jurisdiction in International Law**. Oxford University Press, 2 edição , 2015, p.167. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false . Accessed on June 29, 2023
[136] Idem.
[137] ROTHWELL, D.; KAYE, S.; AKHTARKHAVARI, A.; DAVIS, R. (2010). Jurisdiction. In **International Law**: Cases and Materials with Australian Perspectives (pp. 294-377). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511997341.008
[138] Idem.

the foreign court. If such an order is made, there is a conflict of prescriptive jurisdiction, as there is if two or more courts hear the same case and issue conflicting orders.[139]

Adjudicative jurisdiction refers to the power of courts to claim jurisdiction over persons. The rules of adjudicative jurisdiction are designed to fulfil the legitimate expectations of the foreign defendant to be brought before a court. As they are primarily concerned with the interests of the party in dispute and not the interests of the party's home state, they can be considered rules of private international law. [140]

In extraterritorial litigation, especially in non-criminal cases brought by private parties, the courts May encounter difficulties in their adjudicative jurisdiction under international law, but at the same time they May have to consider complicated conflict of laws issues and problems of adjudication under domestic law. Not surprisingly, in these cases, the lines between prescriptive jurisdiction, conflict of laws and personal jurisdiction, which arise from the transnational character of domestic litigation, become blurred. A conceptual reconstruction of the exercise of jurisdiction over extraterritorial cases by courts is not an easy task. In such situations, jurisdiction becomes a multifaceted legal concept involving elements of public and private international law.[141]

The rules of public international law mainly contain negative obligations for states. They do not positively require states to exercise their jurisdiction (except for some treaty clauses that require states to exercise their jurisdiction over a perpetrator of an international crime). Thus, the exercise of jurisdiction under traditional international law is a state option.

However, in the context of international human rights law, a specific field of public international law, the concept of jurisdiction plays a completely different role. Human rights treaties normally oblige the contracting party to guarantee the rights provided for in the treaty to all persons within its jurisdiction. If the party fails to

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[139] LOWE, Vaughan. Jurisdiction. In: EVANS, Malcolm. **International Law**. Oxford University Press, 2014, p. 333. Available at: https://www.academia.edu/9791106/Evans_International_Law. Accessed on June 29, 2023

[140] RYNGAERT, Cedric. **Jurisdiction in International Law.** Oxford University Press, 2 edição , 2015, p.12. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false . Accessed on June 29, 2023

[141] Ibidem, p.11

guarantee these rights, it incurs state responsibility for the violation of the treaty. Rather than delimiting the sphere of jurisdiction, it concerns by defining the group of people to whom states are obliged to extend the protection of human rights. [142]

Regarding the scope of the duty of states to protect human rights, there is no normative or doctrinal principle that supports the idea that a state should not also consider the rights of those living outside the state's territory. In this sense, Markus Krajewski argues[143]:

> As a consequence, human rights need to be reconstructed as a relational and not as a territorial concept. The dominant question is not 'Where do human rights apply?' but rather 'Whom do human rights protect?' This could lead to a functional understanding of jurisdiction in human rights law instead of a territorial approach. It is worth recalling that, as early as 1981, the Human Rights Committee held in the famous Lopez Burgos case that the reference to jurisdiction in the International Covenant on Civil and Political Rights is 'not to the place where the violation occurred, but rather to the relationship between he individual and the State'. Jurisdiction could then be construed on the basis of the effectiveness of human rights protection. In other words, the state on whose territory a human rights violation occurs would have jurisdiction not due to the principle of territoriality, but because its activities would be the most effective way to mitigate or prevent human rights violations.

Thus, the concept of 'jurisdiction' in international human rights law is different from the concept of public international law. Therefore, it is not necessarily relevant to this concept whether or not the state has legal competence to act, but it is relevant whether the link between the affected individual and the state is close enough to allow or oblige the state to guarantee the individual's rights.[144] Therefore, the concept of jurisdiction for international law essentially aims to limit expansive assertions of state jurisdiction, the

[142] RYNGAERT, Cedric. **Jurisdiction in International Law**. Oxford University Press, 2 edição , 2015, p.22. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false . Accessed on June 29, 2023

[143] KRAJEWSKI, Markus. The state duty to protect against human rights violations through transnational business activities. **Deakin law review**. Volume 23, 2018. p. 13-39, p. 26.

[144] DEN HEIJER, M.; LAWSON, R. (2012). Extraterritorial Human Rights and the Concept of 'Jurisdiction'. In M. Langford, W. Vandenhole, M. Scheinin, & W. Van Genugten (Eds.), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law (pp. 153-191). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139002974.009

concept for human rights aims to cast a wide net of state guarantees of human rights over jurisdiction[145].

2.1.2 The principles of Sovereignty and non-intervention

The term "sovereignty" is used to describe the set of rights held by a state, firstly in its capacity as an entity authorized to exercise control over its territory and, secondly, in its capacity as an entity representing its peoples and territory at international level[146]. States can freely accept the obligations of international law, either by agreeing to and ratifying treaties or through tacit acceptance of customary international law. The corollary of this is the principle of non-intervention, which prohibits States from intervening directly or indirectly in the internal or external affairs of other states, in accordance with the sovereign equality of all states.[147]

The international law principle of State Sovereignty establishes the exclusivity and plenitude of powers that the State holds over its physical, territorial, and human support. The State exercises its territorial jurisdiction without any competition and makes use of all possible powers in the sphere of public law, without suffering intervention from another state[148]. This means that in relations between States, there is neither subordination nor dependence, but equality, as the UN Charter of 1945[149], and for there to be peaceful coexistence between states, it is necessary to limit sovereignty, so that one state does not invade the domain of another State.

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[145] RYNGAERT, Cedric. **Jurisdiction in International Law**. Oxford University Press, 2 edição , 2015, p.24. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false

[146] CRAWFORD, James. **Brownlie's Principles of Public International Law**. Oxford University Press 9th edition, OUP 2019, ISBN: 9780198737445, p. 447. Available at: https://www.oxfordlawtrove.com/display/10.1093/he/9780198737445.001.0001/he-9780198737445 . Accessed on 20 June, 2023.

[147] CHAMBERS, Rachel E (2019) Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex**. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023

[148] REZEK, José Francisco. **Direito Internacional Público**: curso elementar. 13. ed. São Paulo: Saraiva, 2011, p. 260.

[149] "2. Develop friendly relations between nations, based on respect for the principle of equal rights and self-determination of peoples, and take other appropriate measures to strengthen universal peace;" Available at: https://www.oas.org/dil/port/1945%20Carta%20das%20Na%C3%A7%C3%B5es%20Unidas.pdf

However, in international relations, a state's sovereignty cannot be static; it must be flexible, to allow it to adapt to the various constantly evolving situations that arise in the lives of peoples. Thus, the general rule is that a state's exercise of jurisdiction is restricted to legal relations or facts occurring on the territory of others, and it can only regulate legal relations and judge actions or omissions occurring on its territory. Despite this, there are some exceptions that are accepted by international law, which in specific cases allows a state to intervene in relation to conduct that did not occur within its national borders, which is treated as extraterritoriality, and will be addressed in the next topic of this chapter.

One of the main controversies raised in relation to extraterritoriality, especially in the field of business and human rights, is its potential to infringe on the sovereignty of host states, which can also amount to illegal intervention in the domestic affairs of the host state.[150]

The public international law definition of non-intervention arises from situations related to the use of force. In this sense, intervention is only prohibited by public international law when it deals with matters in which each state has sovereignty to decide freely, such as the choice of a political, economic, and cultural system. The element of coercion that defines prohibited intervention is particularly obvious in the case of an intervention that uses force, either in the direct form of military action or in the indirect form of support for subversive or terrorist activities within another State.[151]

Unless the intervention is conducted by military means or other forms of coercion that are prohibited, an intervention is prohibited only if it relates to a matter that concerns exclusively the 'domestic affairs' of the target state. Generally, domestic affairs are all matters that are not covered by international obligations based on treaties or customary international law. As a result, a state cannot invoke the principle of non-intervention to reject interference aimed at protecting fundamental human rights.[152]

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[150] CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex,** 2019. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.
[151] Idem
[152] KRAJEWSKI, Markus. The state duty to protect against human rights violations through transnational business activities**. Deakin law review**. Volume 23, 2018. p. 13-39, p. 29.

Thus, a regulation requiring private entities to ensure that their subsidiaries or suppliers adhere to the law of the state in which they operate would never be a violation of the principle of non-intervention. This is because respect for existing laws does not negatively affect the social, political, or economic system of a state. It would not be the same if the regulation of transnational commercial activities in the home state provided incentives for local companies in the host state to deviate from existing laws. In this way, a state's activity aimed at producing non-compliance with existing domestic legislation in another state can amount to intervention in the other State's internal affairs. [153]

Sovereignty emerged from a doctrinal idea based on the observation of the international reality that existed since the monarchical governments of Europe, in the 16th century, escaped the centralized control of the Pope and the Holy Roman Empire[154]. During most of this period in which the System of Sovereign States functioned as the fundamental way of ordering the world, the principle of non-intervention played an important role in preserving cultural diversity within national borders. This principle remained fundamental to the Sovereign State System well into the 20th century, although it was occasionally violated by powerful states. African, Asian and Latin American countries saw this principle as a crucial tool to protect themselves from various forms of intervention by imperialist powers and sought to strengthen it.[155]

Towards the end of the 20th century, however, the principle of non-intervention gradually deteriorated. The enormous power of the global market economy and the global flow of information undermined the foundations of the principle of non-intervention. Economic, social, cultural and informational activities transcended national borders. Particularly in the fields of international exchange and cross-border investment, the enormous forces of the market economy have overwhelmed most countries' regulations. Most sovereign states have found it difficult to control these actions developed on a global scale through domestic regulations.[156]

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[153] KRAJEWSKI, Markus. The state duty to protect against human rights violations through transnational business activities**. Deakin law review**. Volume 23, 2018. p. 13-39, p. 29.

[154] REZEK, José Francisco. **Direito Internacional Público**: curso elementar. 13. ed. São Paulo: Saraiva, 2011.

[155] ONUMA, Yasuaki. **Direito Internacional em perspectiva transcivilizacional**: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI. Belo Horizonte: Arraes Editores, 2017, p.43.

[156] ONUMA, Yasuaki. **Direito Internacional em perspectiva transcivilizacional**: questionamento da

Thus, the concepts of sovereignty and non-intervention are not static, but are evolving over time as public international law develops and globalization evolves. Nor are they absolute and rigid[157]. There is no international instrument that defines what constitutes a State's internal domestic affairs, although one aspect of sovereignty that has received explicit attention is the state's exclusive control over its natural wealth and resources. Furthermore, human rights impose limits on state sovereignty, so it cannot be said that such matters fall within the exclusive national jurisdiction of the territorial State.[158]

To better understand the principle of intervention in a context of globalization, it is first necessary to concretize the extent of the duty of non-intervention, analyzing which issues are reserved as part of a state's domestic affairs, and what would amount to unjustifiable interference by another state in these domestic affairs. Initially, there is no international instrument that defines what constitutes states' domestic affairs, although one aspect of sovereignty is a state's exclusive control over its natural wealth and resources. This facet of sovereignty has historically been a concern of host states in the Global South in relation to transnational business activities.[159]

In its Draft Declaration on the Rights and Duties of States, the International Law Commission stated that "the principle of the sovereignty of each State is subject to the supremacy of international law"[160]. Considering that the purpose of public international law is to regulate conduct between states, its content will inevitably have a reducing effect on a state's exclusive domestic jurisdiction, replacing it with a shared or non-exclusive

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estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI. Belo Horizonte: Arraes Editores, 2017, p.44

157 GIBNEY, Mark; TOMASEVSKI, Katarina; VEDSTED-HANSEN , Jens. Transnational State Responsibility for Violations of Human Rights. **Harvard Human Rights Journal**,199, p.267. Available at: https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/12_Gibney_Transnational-State-Responsibility-for-Violations-of-Human-Rights.pdf . Accessed on 29 June, 2023.

158 SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 28. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

159 ZERK, Jennifer**. Multinationals and Corporate Social Responsibility -** Limitations and Opportunities in International Law. Cambridge University Press The Edinburgh Building, Cambridge cb2 2ru, UK, p. 136. Available at http://www.untag-smd.ac.id/files/Perpustakaan_Digital_1/CORPORATE%20SOCIAL%20RESPONSIBILITY%20Multinationals%20and%20Corporate%20Social%20Responsibility.pdf . Accessed on 25 June, 2023.

160 UNITED NATIONS. The International Law Commission. Draft Declaration on the Rights and Duties of States, article 4. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf . Accessed on 25 June, 2023.

jurisdiction when a matter becomes the subject of public international law norms[161]. The effect of this has been particularly noticeable since the advent of human rights.

Jennifer Zerk believes that the more an area of regulation is subject to international standards and obligations, the less susceptible the home State's regulatory initiatives are to accusations of illegal interference in the host State's domestic affairs[162]. The regulation of companies on human rights issues, such as labor standards, health and safety, environmental protection, ostensibly fall under the domestic affairs of the state. However, there is a growing field of regulation that has become subject to international norms and obligations under customary international law conventions, in relation to which sovereign states are correspondingly limited.[163]

There are other ways in which the concept of state sovereignty has evolved over time, particularly because of the growth in activities that transcend national borders. States are often less powerful (especially in terms of human, natural and financial control) than the corporations they are supposed to regulate, which affects the ability of states to exercise sovereign power.[164]

In addition, there are challenges to the concept of sovereign equality, considering that less developed states have hardly experienced the sovereign quality that is presumed to be fundamental under international law, which is a direct result of the power exercised

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161 ZERK, Jennifer. **Multinationals and Corporate Social Responsibility** - Limitations and Opportunities in International Law. Cambridge University Press The Edinburgh Building, Cambridge cb2 2ru, UK, p. 136. Available at http://www.untag-smd.ac.id/files/Perpustakaan_Digital_1/CORPORATE%20SOCIAL%20RESPONSIBILITY%20Multinationals%20and%20Corporate%20Social%20Responsibility.pdf . Accessed on 25 June, 2023.

162 Idem

163 CHAMBERS, Rachel E (2019) Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex**. p. 61. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023

164 GROSSMAN, Claudio; BRADLOW, Daniel. Are We Being Propelled towards a People-Centered Transnational Legal Order? **American University Journal of International Law and Policy** 1. Available at: https://digitalcommons.wcl.american.edu/auilr/vol9/iss1/1/ . Accessed on 2 July, 2023.

by the Bretton Woods[165] institution over the economic sovereignty of the newly created decolonized states.[166]

The cross-border nature of global business coupled with the relative lack of power of many host states, especially when compared to the power of foreign investors, means that corporate misconduct is rife. Thus, reliance on sovereign equality and the principle of non-intervention as arguments for not regulating or judging extraterritorially is questionable[167]. So, what would be the value of these arguments when all states are not equally powerful? Or even when many host states are less powerful than the corporations themselves?

2.1.3 Definition and application of extraterritoriality

The extraterritorial exercise of jurisdiction concerns the exceptional circumstances in which a state has the right to exercise its enforcement jurisdiction (and with it, its legislative jurisdiction) on the territory of another State[168]. The use of the term 'extraterritoriality' derives from the earlier observation that jurisdiction becomes a concern of international law when a state regulates matters which, having a link with another sovereign, are not exclusively of domestic interest.[169]

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[165] The Bretton Woods institution refers to an international agreement established during a conference held in Bretton Woods, New Hampshire, United States, in July 1944. The conference was called to establish a stable global economic structure after the Second World War. At this conference, representatives from 44 countries agreed to establish two key institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), now part of the World Bank. These institutions were created with the aim of promoting global economic stability, international financial cooperation, and the reconstruction of war-torn economies.

[166] SECK, Sara. Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations. **Trade, Law and Development** (Special Issue: Third World Approaches to International Law), Vol. III, N. 1, 2011. Disponivel em: https://digitalcommons.schulichlaw.dal.ca/scholarly_works/219/ . Accessed on 2 July, 2023

[167] CHAMBERS, Rachel E (2019) Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex**. p. 61. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.

[168] LOWE, Vaughan. Jurisdiction. In: EVANS, Malcolm. **International Law**. Oxford University Press, 2014, p. 333. Available at: https://www.academia.edu/9791106/Evans_International_Law

[169] RYNGAERT, Cedric. **Jurisdiction in International Law**. Oxford University Press, 2 edição , 2015, p.6. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false. Accessed on 22 July, 2023.

Extraterritorial jurisdiction must imply that a state exercises its jurisdiction without any territorial link, although the expression is typically used in the context of states asserting their jurisdiction based on some territorial link, admittedly not an exclusive one. The term "extraterritorial jurisdiction" is only accurate if it refers to assertions of jurisdiction over persons, goods or activities that have no territorial connection with the regulating state, i.e. assertions based on the principle of personality, protection, or universality of jurisdiction.[170]

According to Humberto Cantú Rivera[171], the phenomenon of extraterritoriality appears when a state acts in relation to conduct that has not taken place within its national borders. In this sense, a state can enact legislation with extraterritorial effects that do not infringe on the sovereignty of a third state, but require certain subjects to comply with domestic measures, even when their activities take place abroad. In some unusual cases, a state May decide to exercise adjudicatory jurisdiction ("extraterritorial adjudication") to judicially verify whether a case that did not occur within its borders can be judged by it without infringing the sovereignty of a third state and creating diplomatic or legal tensions.

There are two ways in which a state can adopt extraterritorial jurisdiction: firstly, a state can give its courts the power to adopt decisions concerning situations arising abroad, known as extraterritorial adjudicatory jurisdiction. This can occur either when criminal proceedings can lead to convictions for acts committed abroad; or when civil courts declare themselves competent to hear cases that concern extraterritorial situations. Secondly, a state can adopt legislation that is intended to have extraterritorial effect, i.e. that establishes rules on persons, property or conduct outside the national territory, called

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[170] RYNGAERT, Cedric. **Jurisdiction in International Law**. Oxford University Press, 2 edição , 2015, p.07. Available at: https://books.google.com.br/books?hl=pt-BR&lr=&id=UU3CBwAAQBAJ&oi=fnd&pg=PP1&dq=Cedric+Ryngaert,+Jurisdiction+in+International+Law+(2nd+edn,+OUP+2015)+pdf&ots=bUf2BWKhso&sig=c93XA5qv1feWMX6tNWR2Gxcxe68#v=onepage&q=Cedric%20Ryngaert%2C%20Jurisdiction%20in%20International%20Law%20(2nd%20edn%2C%20OUP%202015)%20pdf&f=false. Accessed on 22 July, 2023.

[171] RIVERA, Humberto Cantú. Developments in Extraterritoriality and Soft Law: Towards New Measures to Hold Corporations Accountable for their Human Rights Performance? **Anu. Mex. Der. Inter** [online]. 2014, vol.14, pp.727-763. ISSN 1870-4654, p. 731. Available at:< http://www.scielo.org.mx/pdf/amdi/v14/v14a20.pdf > Accessed on 11 February, 2023

prescriptive extraterritorial jurisdiction. It can, for example, provide that certain conduct constitutes a crime wherever it occurs.[172]

It is also necessary to make a distinction between situations in which international law imposes an obligation to exercise extraterritorial jurisdiction to ensure that certain international crimes or other violations of international law do not go unpunished, and other situations in which states are not under such an obligation. There are situations in which a state's competence to exercise extraterritorial jurisdiction has been explicitly recognized and situations in which, in the absence of such recognition, it remains controversial whether states can exercise extraterritorial jurisdiction. Most of the situations in which there is explicit recognition are crimes with an international bias, which is not the aim of this research. Therefore, the study will focus specifically on extraterritorial jurisdiction exercised over corporations for violations of internationally recognized human rights standards in the civil sphere.

Extraterritoriality is addressed through legally binding documents that aim to combat impunity in relation to serious crimes against humanity, such as genocide, war crimes, torture and enforced disappearances. Initially conceived, extraterritoriality was intended to allow a state to intervene in the activities carried out by another subject of public international law of the same nature, being applicable in specific cases related to international crimes. This logic was established with the justification that any interference in other spheres could result in a violation of a State's sovereign power.[173]

One of the specific situations is in relation to armed conflicts. In 1974, the UN General Assembly included respect for human rights during armed conflicts, which means that human rights are applied in this context not only by the state that originally, or according to the rule of territoriality, should respect them[174]. Thus, the applicability of

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[172] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 9. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[173] ATCHABAHIAN, Ana Cláudia Ruy Cardia**. Transterritorialidade**: uma teoria de responsabilização de empresas por violações de direitos humanos. Rio de Janeiro: Lumen Juris, 2019, p. 117.

[174] PAMPLONA, Danielle Anne; CERQUEIRA, Daniel Lopes. Jurisdição Extraterritorial: um passo necessário para enfrentar abusos corporativos. In: MOREIRA, Angelina C. Tavares; BERTAZOLLI, Carolina B. Aloise; PAMPLONA, Danielle Anne. **Atividade Econômica e Direitos Humanos**. Editora Ipuvaíva. Mato Grosso do Sul, 2020, p. 221- 240, p. 222.

extraterritoriality will occur in cases of occupation or invasion of territories by armed conflicts. When part of a state's territory is under the dominion of another state, the latter will be responsible for the violations it commits there, outside its territory.

Furthermore, when a state agent, acting in its official capacity, commits a human rights violation on foreign territory, it is in the same situation, constituting extraterritoriality. In this sense, the UN Human Rights Committee has affirmed the possibility of a state being held responsible for acts committed in another territory by its agents, as follows[175]:

> Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.

There are international treaties and conventions that expressly establish extraterritorial human rights obligations. Some examples are treaties on the investigation and punishment of certain international crimes, such as the Inter-American Convention against Terrorism[176] and the Inter-American Convention against Corruption[177]. At the UN level, there is the International Convention for the Suppression of Terrorist Bombings[178] and the International Convention for the Suppression of the Financing of Terrorism[179], which apply to crimes of a transnational nature. The OECD Convention on Combating

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[175] UNITED NATIONS. UN COMMITTEE ON HUMAN RIGHTS. Sergio Euben Lopez Burgos v. Uruguay, **Communication No. 52/1979**, UN Doc CCPR/C/13/D/52/1979, IHRL 2796, UNHRC 1981, OUP Reference, parag.12.3

[176] See Articles 5.2 and 6.1 of the Inter-American Convention against Terrorism, which relate to the seizure and confiscation of assets derived from financing or facilitating the practice of terrorism, regardless of where the illegal act took place. Available at: < http://www.oas.org/xxxiiga/english/docs_en/docs_items/agres1840_02.htm >. Accessed on 07 de janeiro de 2021.

[177] See Article V, clauses (3) and (4) of the Inter-American Convention against Corruption, which authorize the exercise of extraterritorial jurisdiction in criminal matters by the States Parties. Available at: < https://www.oas.org/juridico/english/treaties/b-58.html.>. Accessed on 07 de janeiro de 2023.

[178] International Convention for the Suppression of Terrorist Bombings - A/RES/52/164, art. 7, 15 de dezembro de 1997. Available at: <http://pfdc.pgr.mpf.mp.br/atuacao-e-conteudos-de-apoio/legislacao/segurancapublica/conv_int_supressao_terrorismo_bombas.pdf> . Accessed on: 07 de janeiro de 2023.

[179] Idem

Bribery of Foreign Public Officials in International Business Transactions[180] and the Council of Europe's Criminal Law Convention on Corruption, which establish legally binding rules to criminalize bribery of public officials in international business transactions. Similarly, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[181] and the Convention against Torture[182], the latter with a provision expressly enshrining quasi-universal jurisdiction.[183]

In this way, international law allows the application of extraterritoriality, especially for the protection of human rights. However, none of these situations cover violations by transnational corporations, which are currently major human rights violators around the globe. This is mainly because the very legal structure of international law does not recognize them as subjects of law.

Despite this, it should also be applied to activities carried out by companies operating in more than one jurisdiction, since it is up to the governments of the states involved to protect the rights and duties of those entities in relation to individuals living in their territory, as well as the fact that the rules of Public International Law do not prohibit its use to hold companies responsible for human rights violations[184]. Thus, the possibility of extraterritoriality in the control of excesses perpetrated by corporations is a rigorous measure precisely when considering the protection of individuals, ruling out possible arguments related to the violation of State sovereignty.[185]

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[180] OECD. Convención de la OCDE para Combatir el Cohecho de Servidores Públicos Extranjeros en Transacciones Comerciales Internacionales, art. 4, 21 de noviembre de 1997. Available at : <https:// www.oecd.org/daf/anti-bribery/convcombatbribery_spanish.pdf >. Accessed on: 07 de janeiro de 2023.

[181] UNICEF. Protocolo Facultativo para a Convenção sobre os Direitos da Criança sobre a venda de crianças, prostituição e pornografia infantis, 25 de Mayo de 2000, arts. 1 a 3. Available at: <https:// www.unicef.org/spanish/crc/index_30204.html >. Accessed on 07 de janeiro de 2023.

[182] OHCHR. Convenção contra a Tortura e outros Tratamentos Cruéis, Deshumanos e Degradantes, AG.Res. 39/46, art. 5.2 y 6, 10 de diciembre de 1984. Available at: <https://www.ohchr.org/sp/professionalinterest/pages/cat.aspx >. Accessed on 07 de janeiro de 2023.

[183] PAMPLONA, Danielle Anne; CERQUEIRA, Daniel Lopes. Jurisdição Extraterritorial: um passo necessário para enfrentar abusos corporativos. In: MOREIRA, Angelina C. Tavares; BERTAZOLLI, Carolina B. Aloise; PAMPLONA, Danielle Anne. **Atividade Econômica e Direitos Humanos**. Editora Ipuvaíva. Mato Grosso do Sul, 2020, p. 221- 240, p. 227.

[184] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 28. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[185] SKOGLY, Sigrun. Regulatory obligations in a complex world: states extraterritorial obligations related to business and human rights. In: DEVA, Surya; BILCHITZ, David. **Building a treaty on business and**

The Universal Declaration of Human Rights brought about a contemporary conception of human rights, thus beginning the development of International Human Rights Law, through the adoption of numerous international treaties aimed at protecting fundamental rights. These instruments reflect the ethical and contemporary conscience shared by states, as they invoke international consensus on central human rights issues. Thus, the domestic jurisdiction of states has come to be influenced by international norms, based on the idea that the individual as a subject of law must have their rights protected at international level.[186]

This has led to the certainty that the protection of human rights should not be reduced to the reserved sphere of a state, because it is a matter of legitimate international interest. In this way, human rights violations cannot be seen as domestic issues of the state, but as a problem of international relevance, and a legitimate concern of the international community[187]. For this reason, it is extremely important for International Human Rights Law to turn its attention to trying to solve one of the biggest current problems relating to human rights, which are the violations committed by large transnational corporations.

The use of the term "extraterritoriality" is not without its more fundamental criticisms, however, Seck[188] advises against using the word in the context of business and human rights. She claims that the continued reference to extraterritoriality in relation to home state jurisdiction can only serve to disguise the existence of real territorial links that provide a solid, albeit preliminary, justification for the reasonable exercise of home state jurisdiction. It can also be argued that the terminology of 'extraterritoriality' reinforces a limited understanding of the State and is problematic if one sees all states as embedded in interdependent relationships that transcend borders. Thus, the term 'extraterritorial' can be seen as failing to capture the evolving nature of state sovereignty. While

human rights: context and contours. Reino Unido: Cambridge University Press, 2017, p. 328

186 PIOVESAN, Flávia. **Temas de Direitos Humanos**. 8ª ed. São Paulo: Ed. Saraiva, 2015, p. 58.

187 PIOVESAN, Flávia. **Direitos Humanos e o Direito Constitucional Internacional**. 14ª ed. São Paulo: Ed. Saraiva, 2013, p. 191.

188 SECK, Sara. Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations. **Trade, Law and Development** (Special Issue: Third World Approaches to International Law) 2011. Disponivel em: https://digitalcommons.schulichlaw.dal.ca/scholarly_works/219/ . Accessed on 2 July, 2023

acknowledging the strength of these arguments, this thesis nevertheless uses the term 'extraterritoriality' in line with the orthodoxy in this field.

There is growing recognition that the fact of the interdependence of states should lead to the imposition of an expanded understanding of State obligations, or an obligation for all States to act jointly in the face of collective action problems faced by the international community of states, especially those relating to human rights[189]. In international human rights law, the obligation of international cooperation is being revitalized. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights states that States parties to the Covenant undertake to take measures, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant. The notion of international cooperation is also mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which States Parties shall take appropriate measures to ensure the realization of this right, recognizing for this purpose the essential importance of international cooperation based on free consent.

The UN Committee on Economic, Social and Cultural Rights has identified certain obligations that States Parties to the Covenant have towards populations under the jurisdiction of other States[190]. Of particular interest in this study are the obligations to protect the rights of such populations when they are threatened by the activities of private actors whose behavior a state can influence. In the General Comment dedicated to the right to the highest attainable standard of health, the Committee noted that decisively.[191]

> States parties have to respect the enjoyment of the right to health in other countries and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political

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[189] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 19. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[190] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000).

[191] Idem.

> means, in accordance with the Charter of the United Nations and applicable international law.[192]

In this way, the Maastricht Principles were conceived after two years of debate and consultation, during a meeting of experts jointly convened by Maastricht University and the International Commission of Jurists in September 2011. The document aims to systematize the customary and treaty-derived norms that shape the international parameters regarding extraterritorial obligations. They seek to establish clear criteria for requiring states to take responsibility for economic, social, and cultural rights beyond their borders. In essence, the Maastricht Principles have the specific scope of clarifying the content of extraterritorial obligations related to these rights.[193]

Principle I.3, which explicitly addresses the existence of extraterritorial obligations, by stating that "all States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially".[194]

These principles define extraterritorial obligations as those related to the acts and omissions of a state, in its territory or beyond, which have effects on the enjoyment of human rights outside the territory of that state; in addition, they are obligations of a global nature that are established in the Charter of the United Nations and in human rights instruments so that they act separately and together through international cooperation to realize human rights universally.

The Maastricht Principles state that states have a responsibility to supervise and should not support multinational companies based in their jurisdictions when they engage in human rights violations in foreign territories. Principle 24 emphasizes that the extraterritorial obligation also includes the requirement that states must take the necessary

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[192] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), paragraph 39.

[193] PAMPLONA, Danielle Anne; CERQUEIRA, Daniel Lopes. Jurisdição Extraterritorial: um passo necessário para enfrentar abusos corporativos. In: MOREIRA, Angelina C. Tavares; BERTAZOLLI, Carolina B. Aloise; PAMPLONA, Danielle Anne. **Atividade Econômica e Direitos Humanos**. Editora Ipuvaíva. Mato Grosso do Sul, 2020, p. 221- 240, p. 227.

[194] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. Available at: https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf?tx_drblob_pi1%5BdownloadUid%5D=23 , Accessed on 22 June, 2023.

measures to ensure that non-state actors over which they have regulatory power, as defined in Principle 25, such as private organizations and individuals, as well as transnational corporations and other enterprises, do not nullify or impede the enjoyment of economic, social, and cultural rights.[195]

According to Pamplona and Cerqueira, one of the main objectives of the Maastricht Principles was to broaden the clear manifestation of international bodies on extraterritoriality, which was focused only on civil and political rights, to also cover economic, social, and cultural rights. It is the instrument that best systematizes the state of the art of international human rights law about extraterritoriality. The authors recognize that although the beneficiaries of human rights obligations are individuals with rights under the authority and/or control of a specific state, the legal obligations to guarantee these rights fall on the international community. Although they are not binding per se, the drafting of a treaty on human rights and business should undoubtedly carefully consider its provisions through careful consultation.[196]

In addition, it is also important to analyze the so-called Brussels Convention, a rule on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - which ensures the integration into European Community law of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Convention was amended and incorporated into Regulation 44/2001 and Regulation 1215/2012[197]. Considering the case studies, this regulation applies in the countries of origin of the companies sued in such extraterritorial litigation.

In this regulation, the Member States of the European Union are obliged to recognize the jurisdiction of their national courts when civil actions are brought against persons (natural or legal) domiciled in their territory, wherever the damage occurred, and

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[195] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. Available at: https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf?tx_drblob_pi1%5BdownloadUid%5D=23 , Accessed on 22 June, 2023

[196] PAMPLONA, Danielle Anne; CERQUEIRA, Daniel Lopes. Jurisdição Extraterritorial: um passo necessário para enfrentar abusos corporativos. In: MOREIRA, Angelina C. Tavares; BERTAZOLLI, Carolina B. Aloise; PAMPLONA, Danielle Anne. **Atividade Econômica e Direitos Humanos**. Editora Ipuvaíva. Mato Grosso do Sul, 2020, p. 221- 240, p. 227.

[197] EUROPEAN UNION. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on judicial jurisdiction, recognition and enforcement of decisions in civil and commercial matters. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32012R1215 . Accessed on July 2, 2023

whatever the nationality or place of residence of the claimants. This includes situations where an alternative forum open to the claimants appears to have closer links to the dispute or to be more appropriate.[198]

Article 4 of the Brussels Regulation states that persons domiciled in a Member State must be sued, regardless of their nationality, in the courts of that Member State. Thus, this rule can be used in the context of human rights litigation, for violations committed by companies abroad, especially in developing countries where European multinationals operate, as explicitly provided for by the European Parliament[199]. In other words, a legal person domiciled in a European country can be sued in that country, even if the violation took place outside it, if its involvement in the case is recognized.

In this way, the nationality of both the perpetrator of the regulated activity (the offender) and the person directly affected (the victim) can constitute the basis for extraterritorial jurisdiction. According to the principle of active personality, State can enact legislation that will apply to its nationals, even regarding their conduct abroad. According to the principle of passive personality, a State May seek to protect its nationals abroad through the adoption of extraterritorial legislation. The former principle is much more widely recognized as a basis for the exercise of extraterritorial jurisdiction than the latter. By exercising extraterritorial jurisdiction based on the active personality principle, State guarantees that its nationals will not act in violation of certain fundamental values abroad by adopting behaviors that would be considered offenses in the forum State[200]. It is based on this principle that the Brussels Regulation applies in cases involving transnational companies.

The problem is whether, in the absence of a positive authorization under international law, States can exercise extraterritorial jurisdiction, or whether this should be considered a violation of the sovereignty of the territorial State, or an interference in

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[198] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 6. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[199] EUROPEAN UNION. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on judicial jurisdiction, recognition and enforcement of decisions in civil and commercial matters. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32012R1215 . Accessed on July 2, 2023

[200] SCHUTTER, Olivier de. Op. Cit. p. 23.

its internal affairs. According to Olivier de Shutter this issue is not resolved. However, it must be examined considering the specific nature of extraterritorial jurisdiction when it is exercised to guarantee the protection of human rights beyond national borders.[201]

2.1.4 Third World Approaches to International Law- TWAIL

Considering that most of the time the host countries of subsidiary companies are countries in the Global South, referred to here as the "third world", because they are places where the governance gap is more pronounced, an analysis based on the Third World Approaches to International Law (TWAIL) is in order.

TWAIL is concerned with imbalances in international law and argues that factors which promote inequalities between developed countries and emerging states remain embedded within the international system. International law developed alongside colonialism and for TWAIL it posits that colonialism is central to the formation of international law, responding to a need to account for colonial relations existing between Europeans and non-Europeans[202]. This approach in no way means that the analysis of a given situation is limited and partial as opposed to other methods, but it does ensure that the situation of the most vulnerable is considered, a necessary component if the goal is true protection under international law.[203]

Three main objectives of TWAIL's heterogeneous field of action should be highlighted. Firstly, the deconstruction of legal mechanisms that perpetuate the subordination of non-European peoples in a hierarchy of values aligned with the Western perspective. Secondly, the challenge of building new, more representative, and fairer normative foundations, meeting the specific demands of the Third World. Finally, the aim is to overcome the underdevelopment of the Third World. These three objectives are interlinked and are addressed through various methodological approaches, including

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[201] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 26 Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[202] ANGHIE, Antony. **Imperialism, Sovereignty and the Making of International Law** (CUP 2012),p. 179. Available at: https://kingdomofhawaii.files.wordpress.com/2011/04/anghie-imperialism-sovereignity-and-the-making-of-international-law.pdf . Accessed on 05 July, 2023.

[203] NAEF, Brendan. The responsibility of home states for violations of international obligations by their corporate citizens in fragile states. PhD Thesis. **University of British Columbia**. August 2019, p. 30

elements of postmodernism, postcolonialism, feminism and critical legal studies, forming a diverse mosaic of perspectives.[204]

TWAIL has been described as a broad dialectic of opposition to the generally unequal and unjust character of an international legal regime that often (but not always) helps to subject the Third World to domination, subordination, and serious disadvantage[205]. From the point of view of Third World states, public international law is an instrument of colonialism:

> TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.[206]

The basis of these critical formulations is the questioning of true emancipation achieved through political decolonization. Sovereignty, often linked to the ideal of equality and recognition in the legal sphere, is seen by TWAIL as an additional shield of domination and subordination, present since modern doctrinal and institutional expressions. For this field of study, the colonial roots, the transition to the civilizing discourse of the 19th century and the subsequent political emancipation that took place during the second half of the following century are interlinked events, connected by complex ties.[207]

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[204] MUTUA, Makau. What is TWAIL? 94 **Proceedings of the ASIL Ann**. Meeting 31. April 4-8, 2000. Available at: https://core.ac.uk/download/pdf/236359788.pdf . Accessed on 12 July, 2023.

[205] OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in Our time: A TWAIL Perspective. **Osgoode Hall Law Journal** 43.1/2 (2005): 171-191. Available at: https://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss1/7/ . Accessed on 12 July, 2023.

[206] AL ATTAR, Mohsen; THOMPSON, Rebekah. How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination. **Trade Law and Development**, 2011, p. 65. Available at: https://deliverypdf.ssrn.com/delivery.php?ID=836003098074001075007103124084074081113072089033089044065118025103091072064019084096019037058000058022054081009004085070102074056045086013087030081025097076006028065021029028124085117068120103109107099115109087112071001085024025107064018097076087102114&EXT=pdf&INDEX=TRUE Accessed on 02 July, 2023.

[207] RAJAGOPAL, Balakrishnan. **International Law from Below**: Development, Social Movements and Third World Resistance. Cambridge: Cambridge University Press, 2009. Doi: https://doi.org/10.1017/CBO9780511494079

In this way, Chimni[208] criticizes the growing incidence of unilateral extraterritorial extension of jurisdiction by industrialized states in the Global North. Examples of this include the demand for certification mechanisms (requiring written guarantees that a product, process, or service complies with stipulated standards, which usually include the origin of the product, process, or service) and choice-of-law decisions, which he uses the term 'substantivism' for US courts, which choose to apply US law in economic conflicts.

Even if there is a reasonable link between the conduct being addressed and the State approving the rule or deciding on the applicable law, the power is being used to 'universalize the national law of imperial States' and this is intrusive on the sovereignty of the target state. However, TWAIL's perspective is not against all forms of extraterritorial jurisdiction. There is criticism of the denial of "jurisdiction of justice" in the situation where mass crimes have been committed by transnational corporations in Third World states and foreign victims seek to use extraterritorial jurisdiction to obtain accountability and justice.[209]

Extraterritorial jurisdiction can be applied in these cases involving violations by transnational corporations, primarily with a view to justice and redress for the victims. However, the focus must be based on the point of view of Third World host states. The TWAIL approach views public international law from the perspective of the lived experiences of people in developing States, how the interests of ordinary people (as distinct from the interests of their States) can be affected by the exercise of extraterritorial jurisdiction.

2.2 APPLICATION OF EXTRATERRITORIALITY IN THE FIELD OF BUSINESS AND HUMAN RIGHTS

Reparation for human rights violations must first be provided by the institutions of the country in which the damage occurred. If the response of the country's institutions

[208] CHIMNI, BS. An Outline of a Marxist Course on Public International Law. **Leiden Journal of International Law** 2004, p. 8. Available at: https://legalform.files.wordpress.com/2017/08/chimni-marxist-pil-course.pdf . Accessed on 02 July, 2023.

[209] ANGHIE, Antony. **Imperialism, Sovereignty and the Making of International Law**. Cambridge University Press, Agosto de 2012. ,p. 179. Doi: https://doi.org/10.1017/CBO9780511614262

is not adequate, victims can still turn to regional human rights protection systems. However, when human rights violations are the result of business activity and victims seek legal redress, the situation is different. At the domestic level, the difficulties can be represented by the impossibility of reaching the parent company, which is economically and financially capable of providing an adequate response, or by the weakness of domestic institutions. The aggravating factor is that if the person responsible for the violation is not the state, it is not possible to access regional human rights protection systems, since, for these, the only entity liable to respond in these courts is the State[210]. So, the question of judicial redress for victims needs to be resolved in another way.

Although a country has broad regulatory powers, it often faces real limitations in the implementation and enforcement of its legislation. This situation is particularly evident in countries with structurally weak legal and administrative systems, which often find it difficult to exercise effective control over transnational commercial activities or hesitate to do so for fear of alienating foreign investors. As a result, the State's fulfillment of its duty to protect often proves inefficient from a human rights perspective. This has sparked debates about the need to assign greater responsibility to states of origin. However, this issue raises doubts about the competence of these States to regulate the activities of companies, even when these activities take place outside their territories.[211]

Thus, when the host state in whose territory the transnational company has invested is unwilling or unable to react to such abuses, by providing remedies to victims, the home state May have an important role to play in ensuring that corporate abuses do not go unpunished. In such cases, does the State of origin have an obligation to exercise extraterritorial jurisdiction? And if they do, even in the absence of such an obligation, can they do so? Under what conditions and according to what instruments?[212]

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210 PAMPLONA, Danielle. Das violações de direitos humanos e do envolvimento das grandes corporações. In: PIOVESA, Flavia, et.al. **Empresas e Direitos Humanos**. Salvador: Editora JusPodivm, 2018, p. 177.

211 KRAJEWSKI, Markus. The state duty to protect against human rights violations through transnational business activities. **Deakin law review**. Volume 23, 2018. p. 13-39, p. 20.

212 SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 1. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

Business activities often transcend the territorial borders of States, usually through companies making Foreign Direct Investments (FDI)[213]. This occurs when a parent company establishes subsidiaries abroad or acquires controlling interests in foreign companies[214]. In addition, business can materialize through the formation of joint ventures with foreign companies, the establishment of international supply chains or more informal alliances. Consequently, the "host" country for FDI is no longer exclusively a developing country, but this relationship is still predominant in the Global South, while the States of origin are mainly the industrialized countries of the Global North. It is in this relationship between the country of origin and the host country that the dilemmas related to extraterritoriality arise.[215]

Each operational structure of a company operating at a transnational level is made up of numerous separately incorporated companies, connected through the ownership, control and/or contractual ties mentioned in the previous paragraph. These companies include the parent company, subsidiaries (defined as companies in which the parent company has a majority or controlling interest), associated companies (defined as companies in which the parent company has a non-controlling or minority interest) and other affiliated companies such as supply chain vendors, joint ventures, and other business partners with similar identities. Thus, each company is considered legally distinct. However, in practice, to varying degrees, parent companies exercise influence and control over the activities of their foreign affiliates, allowing the entire group to pursue joint strategies and function as a unified entity.[216]

Although companies generate jobs and economic development for their host countries, their actions also have notable consequences for local populations, such as changes in social organization and increased inequality. In this sense, according to Pamplona and Olsen[217]:

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[213] The United Nations Conference on Trade and Development has the following definition: 'FDI refers to an investment made to acquire a lasting interest in enterprises operating outside the investor's economy.

[214] CHAMBERS, Rachel E (2019) Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex**. p. 13. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.

[215] Idem

[216] CURRAN, Vivian Grosswald. 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations'. 17 **Chicago Journal of International Law,** 2016, p.409.

[217] PAMPLONA, Danielle Anne; OLSEN, Ana Carolina Lopes. Violações a Direitos Humanos por Empresas Transnacionais na América Latina Perspectivas de Responsabilização. **Revista Direitos**

> A globalização, portanto, gera um quadro de facilitação da exploração econômica de populações em Estados com estrutura jurídica, social e política deficitária por empresas transnacionais. A pulverização das cadeias produtivas torna difícil a responsabilização das empresas diretamente beneficiadas, as quais lucram com violações de direitos humanos não devidamente reprimidas.[218]

The interaction of different legal regimes has allowed companies to consolidate themselves as subjects of important rights and prerogatives, but without minimum obligations to respect human rights or the environment of the local communities where they operate[219]. Global human rights standards applicable to companies are absent, which fosters a conflict between the need to attract foreign investment and the need to reduce state power to regulate these investments and guarantee human rights.

One solution that has recently been adopted is to hold the subsidiary company that violated human rights and its parent company liable, if this is the victim's choice, so that the trial would take place in the courts of the state where the parent company is located (the victim's choice) and not in the territory where the violation itself took place. Extraterritorial jurisdiction occurs when a state's national law is applied to activities that take place beyond its borders, or that take place on another State's territory with no connection to its own territory.[220]

Thus, the jurisdiction of a state is adopted to hold a corporation responsible for the actions of its subsidiaries in another nation, because these actions have violated human rights that must be protected efficiently. In addition, the sectors of the company responsible for making decisions must be sued first and foremost and, when there are difficulties in locating these sectors, States of origin must define legal criteria capable of

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Humanos e Democracia. Programa de Pós-Graduação Stricto Sensu em Direito da Unijuí, nº 13, p. 129-151, junho 2019, p. 133.

[218] Globalization therefore creates a situation in which transnational companies facilitate the economic exploitation of populations in States with a weak legal, social, and political structure. The pulverization of production chains makes it difficult to hold directly benefiting companies accountable, as they profit from human rights violations that are not properly repressed. (free translation)

[219] RIVERA, Humberto Cantú. Los desafios de la globalización: reflexiones sobre la responsbailidad empresarial em materia de derechos humanos. In: Instituto Interamericano de Derechos Humanos. **Derechos Humanos y Empresas**: Reflexiones desde América Latina. San José, C.R.: IIDH,2017. ISBN:978-9930-514-12-2. p. 38.

[220] KALECK, W.; SAAGE-MAAβ, M. Transnational Corporations on Trial: on the Threat to Human Rights Posed by European Companies in Latin America. V. 4 in the Publication Series on Democracy. Berlin: **Heinrich-Böll-Stiftung**, 2008, p.27.

providing for the responsibility of all sectors of the company or companies involved in the decision-making processes that led to the violation of human rights[221]. Regarding the application of extraterritoriality, cases of human rights violations committed in weaker nations are currently being discussed and litigated, in which there has been the possibility of extraterritorial judgment. The foreign jurisdiction has admitted the case in the state where the company's main headquarters are located.

Therefore, there is the possibility of guaranteeing dignified and effective access to justice for the victims of these violations by trying a transnational corporation in the court of the country of its parent company - which is its main headquarters - rather than in the headquarters of subsidiary companies, which are often located in nations that do not have adequate laws and a solid judiciary that can stand up to the great economic power of corporations.

Although there is no international treaty on the subject, companies have an obligation to respect human rights, regardless of their status as legal entities under international law, and they must be held accountable for this in the domestic sphere of the country where the violation took place.

The UN treaty bodies have adopted a more demanding approach to extraterritoriality than the UNGPs, articulating the obligations of the state of origin under internationally recognized human rights to regulate the activities of its national companies on the territory of other States when certain conditions are met. For example, the ESCR Committee issued General Comment n.24[222] stating that states' obligations do not stop at their territorial borders:

> States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the

[221] PAMPLONA, Danielle Anne; OLSEN, Ana Carolina Lopes. Violações a Direitos Humanos por Empresas Transnacionais na América Latina Perspectivas de Responsabilização. **Revista Direitos Humanos e Democracia**, Programa de Pós-Graduação Stricto Sensu em Direito da Unijuí, nº 13, p. 129-151, junho 2019, p. 144.

[222] UNITED NATIONS. **General comment No. 24** (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. 10 August 2017. Available at: https://www.refworld.org/docid/5beaecba4.html . Accessed on 10 July, 2023.

> national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.
>
> […]
>
> The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.

In addition, the OECD Guidelines for Transnational Enterprises, updated in 2023, state that since the operations of multinational enterprises extend throughout the world, international cooperation in this field should extend to all countries. The adherents to the Guidelines encourage companies operating in or from their territories to observe the Guidelines wherever they operate, considering the circumstances of each host country.[223]

Furthermore, the UNGPs recognize extraterritorial jurisdiction. Specifically, the Commentary to principle 2 states that currently, States are generally not obliged by international human rights law to regulate the extraterritorial activities of companies domiciled in their territory and/or jurisdiction[224]. Nor are they prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters, some human rights treaty bodies recommend that States of origin take measures to prevent abuses abroad by companies within their jurisdiction.

States have adopted several approaches in this regard. Some are domestic measures that do not directly address extraterritoriality but have extraterritorial implications. Examples include requirements for parent companies to report on the global operations of the entire company; multilateral soft-law instruments, such as the Organization for Economic Cooperation and Development's Guidelines for Multinational

[223] OECD. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. Available at: https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1690431027&id=id&accname=guest&checksum=348E5537B66A03E3574D4574C1C04D2F . Accessed on 16 July, 2023.

[224] UNITED NATIONS. **Guiding Principles on Business and Human Rights**. Implementing the United Nations “Protect, Respect and Remedy” Framework. New York and Geneva, 2011. Available at: < https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf > Accessed on 05 February, 2023.

Enterprises and National Action Plans; and performance standards required by institutions that support investments abroad.

The adoption of extraterritorial policy measures can serve as a first step towards an international and multilateral consensus on the issue. However, extraterritorial jurisdiction has not been directed primarily at corporate misconduct. Therefore, can the shared international interest in enforcing human rights justify extraterritoriality in this field?

2.2.1. Alien Tort Claims Act (ATS)

A greater reliance on extraterritorial jurisdiction can have various origins. In some cases, States May choose to join forces to tackle collective problems, such as international, transnational crimes or unethical behavior by companies in their operations abroad. In other cases, a state May pursue an individual strategy to achieve specific political objectives. There are also situations in which extraterritorial jurisdiction can develop without having been initially intended by the legal instruments that made it possible. Instead, it can occur because of the inventive use by victims of certain legislation whose original purpose was not to establish a form of extraterritorial jurisdiction. A notable example is the revival of the Alien Tort Claims Act or Alien Tort Statute (ATS) in the United States.[225]

The ATS has a very short wording, published in 1789, and states only: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [226] The legislation remained dormant in the US until 1980, when it became the most notorious legal remedy in the world for trying to hold companies accountable for their direct or indirect involvement in actions carried out in foreign countries that could be qualified as human rights violations and international crimes. [227]

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[225] SCHUTTER, Olivier de. **Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations**. 2006, p. 6. Disponivel em: https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf Accessed on 23 June, 2023.

[226] UNITED STATES. Alien Tort Statute. Available at: https://www.law.cornell.edu/wex/alien_tort_statute . Accessed on 09 July, 2023.

[227] RIVERA, Humberto Cantu. Recent Developments in Kiobel vs. Royal Dutch Petroleum: an Important Human Rights Forum in Peril? **Cuest. Const**. n.28 México ene./jun. 2013. Available at: <

It was in that year that the Court of Appeals for the Second Circuit heard the case of Filartiga v. Pena-Irala and ruled that the ATS established a federal forum for human rights discussions[228]. The Second Circuit found that the ATS granted jurisdiction to the victim over the case, considering that there had been a violation of customary international law, equivalent to the "law of nations" to which the ATS refers.[229] The Filartiga case marked the beginning of the era of human rights litigation in US courts.[230] Since then, foreign victims of human rights violations have been able to file lawsuits on American soil - which often represents a gain over the capacity of their domestic legal system - in order to get reparations for violations that occurred abroad.[231]

From 1996 onwards, the first lawsuits against corporations based on the Alien Tort Claims Act (ATS) emerged. Among them, the most notorious case was Doe v. Unocal, in which Myanmar citizens accused an American oil company of collaborating with and encouraging the Myanmar military to carry out forced labor, as well as murder, rape and torture, during the construction of an oil pipeline by Unocal. This case presented the courts with an unprecedented question, which concerns the possibility of holding a corporation responsible not for having directly committed human rights violations, but for having assisted and directed the actors who committed them. The Ninth Circuit held that supporting and encouraging human rights violations constituted a violation of customary international law, allowing the situation to be judged based on the ATS.[232]

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http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-91932013000100008 > Accessed on 11 July, 2023.

[228] In this case, Joel and Dolly Filartiga, Joelito Filartiga's father and sister, alleged that Americo Pena-Irala, a police inspector in Paraguay, had tortured Joelito to death, in retaliation for his father's political activities. Pena-Irala later went to the United States, but his visa expired and before being deported to Paraguay, he was sued by Joelito Filartiga's family. The case is called Filartiga v. Pena-Irala, judged definitively in 1980, available at https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-4/filartiga-v-pena-irala / accessed on July 15, 2023.

[229] CAMARENA, Fernando Pérez Correa. El Alien Tort Statute: el imperialism judicial de los valores occidentales. **Revista de la Facultad de Derecho de México**. Vol 63, n. 260 (2013), p. 390. Available at: http://revistas.unam.mx/index.php/rfdm/article/view/60710/53588 . Accessed on 15.julho de 2023.

[230] DODGE, William. Business and human rights litigation in US courts before and after Kiobel. In: BAUMANN-PAULY, Dorothée; NOLAN Justine. **Business and Human Rights From Principles to Practice**. Routledge. New York 2016, pp. 244-252, p. 245.

[231] PAMPLONA, Danielle Anne; MORAES, Patricia Almeida de. Os significados dos casos Kiobel e Vedanta para a proteção de direitos humanos . **Revista de Direito Internacional**, Brasília, v. 16, n. 3, p. 9-22, 2019. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6603 . Accessed on 20 July, 2023.

[232] DODGE, William. Business and human rights litigation in US courts before and after Kiobel. In: BAUMANN-PAULY, Dorothée; NOLAN Justine. **Business and Human Rights From Principles to Practice**. Routledge. New York 2016, pp. 244-252, p. 245.

Although many lawsuits have been filed against corporations for human rights violations at the international level, none of them have been decided on their merits, due to settlements between corporations and plaintiffs, or due to the courts deciding to decline jurisdiction. However, a complaint made by Esther Kiobel and others against Royal Duch Petroleum and Shell was sent to the US Supreme Court, which heard two arguments when discussing issues such as extraterritoriality and the applicability of the ATS to corporations.[233]

The Kiobel case changed the way the US Supreme Court interprets and applies legislation. The facts that led to the case before the US Supreme Court took place in a region known as Ogoniland, an area of about a thousand square kilometers in Rivers State in Nigeria, where 500,000 people of the so-called Ogoni people lived.

Shell Company began extracting oil in the area in the 1950s. The company maintained its legal license[234] to operate in Ogoniland through the Shell Petroleum Development Company (SPDC), a joint venture between Royal Dutch Shell and the Nigerian National Petroleum Corporation, the Nigerian state oil exploration company. From the outset, oil exploration and production have caused environmental damage in the territory, with various impacts on the human rights of the local population.[235]

Gradually, civil unrest grew, and, despite continuous demands, the people received no satisfactory response. In 1993, Shell suspended its operations in the region, and in response, the Nigerian government launched a major offensive in Ogoni: villages were burned, women raped and around 2,000 people killed. The actions were those of the Nigerian government, but investigations have shown that the company was involved in different ways, and Shell itself has admitted to helping the military on at least one occasion.[236]

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[233] RIVERA, Humberto Cantú. Recent Developments in Kiobel vs. Royal Dutch Petroleum: an Important Human Rights Forum in Peril? **Cuest. Const**. n.28 México ene./jun. 2013. Available at: < http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-91932013000100008 > Accessed on 11 July, 2023.

[234] The expression is used here to distinguish it from the so-called social license, which is that obtained in the community in which business activities are carried out; it is the community's agreement with the installation of activities.

[235] RUGGIE, John Gerard. **Quando negócios não são apenas negócios** – as corporações multinacionais e os Direitos Humanos. Editora: Planeta Sustentável. São Paulo. 2014.p. 65.

[236] RUGGIE, John Gerard. **Quando negócios não são apenas negócios** – as corporações multinacionais e os Direitos Humanos. Editora: Planeta Sustentável. São Paulo. 2014.p. 65.

The victims and their families, numbering twelve Nigerian citizens, initiated legal proceedings based on the ATS against the Royal Dutch Petroleum Company (Dutch), Shell Transport and Trading Company (British), and their subsidiary Shell Petroleum Development Company of Nigeria (Nigerian)[237]. Based on the ATS, the plaintiffs alleged that the defendants had used the Nigerian government to suppress demonstrations against their oil operations in the Niger Delta; that the Nigerian army and police attacked Ogoni villages, beating, raping, and killing their residents, while defending the company's assets, and had agreed to the use of their property as a base for government activities.[238]

The plaintiffs argued that international law often makes only general recommendations without specifying the actors to whom the prohibitions should apply, leaving the issue for national jurisdiction to decide. Furthermore, they stated that international law is consulted only to determine the content of an international legal norm that May have been violated.[239] However, in the case at hand, US federal common law already provides adequate grounds for assigning liability to corporations for their actions. On the other hand, Shell countered that the statute needs international law not only to recommend actions, but also to specify the actor who will be held responsible for the violation. According to the company, there is no international law that holds corporations responsible for human rights violations.[240]

The Second Circuit Court ruled that under no circumstances could corporations be sued under the ATS because customary international law rejected the idea of corporate liability. In view of this, the Supreme Court accepted the case to determine whether or not corporations could be subject to lawsuits based on the ATS and to decide whether courts could recognize the existence of a cause of action for violations of international law occurring in foreign territory. , that is, outside the United States. However, the US Supreme Court ultimately dismissed the case for a different reason, claiming that the

[237] CARDIA, Ana Cláudia Ruy. **Empresas Diretos Humanos e Gênero:** desafios e perspectivas na proteção e no empoderamento da mulher pelas empresas transnacionais. Editora Buqui. São Paulo 2015, p.85.
[238] DODGE, William. Business and human rights litigation in US courts before and after Kiobel. In BAUMANN-PAULY, Dorothée; NOLAN Justine. **Business and Human Rights From Principles to Practice**. Routledge. New York 2016, pp. 244-252, p. 247
[239] Idem.
[240] RUGGIE, John Gerard. **Quando negócios não são apenas negócios** – as corporações multinacionais e os Direitos Humanos. Editora: Planeta Sustentável. São Paulo. 2014, p. 256.

violations in question did not have sufficient relation to US territory to justify applying the presumption in favor of extraterritorial jurisdiction.[241]

Two controversial points permeated the judgment by the American Supreme Court: whether the ATS was applicable to companies or only to individuals, and whether the law had an extraterritorial scope, in relation to acts committed outside the jurisdiction of the USA and with which there is no connection.[242]

The initial debate focused on whether multinational corporations could be sued under the ATS in US courts, some considered it possible to subject companies to *jus cogens* obligations, while others chose not to grant them legal personality, since positive international law (*hard law*) only recognizes the legal personality of States, and of international organizations and individuals in certain cases.[243]

The issue that appears to be central to similar future cases concerns the extraterritoriality of the law. To better understand, it is relevant to highlight the year 1991, when the United States Supreme Court established the presumption of extraterritoriality, indicating that legislation enacted by Congress is generally intended to be applied only within the limits of the territorial jurisdiction of the United States, unless there is explicit indication to the contrary.[244]

Until then, this presumption had not been discussed in trials related to the ATS (Alien Tort Claims Act), but all this changed with the trial in the Kiobel case. In this case, the question of the extraterritoriality of the law became the crux of the matter and brought to the fore the need to examine the extent to which US laws can be applied to events occurring outside its territory.

The rule of presumption against extraterritoriality prevailed, with the establishment that American legislation is only applied within the country's territory,

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[241] CABOT, Francisco Javier Zamora. Kiobel v. Royal Dutch Corp. y los Litigios Transnacionales sobre Derechos Humanos. **Universitat Jaume I, España**, 1 January 2011, p. 04. Available at: < https://business-humanrights.org/sites/default/files/media/documents/kiobel-commentario-zamora-cabot-2011.pdf > Accessed on 15.julho de 2023.

[242] RIVERA, Humberto Cantu. El caso Kiobel en la Suprema Corte de los Estados Unidos de América: extraterritorialidad y responsabilidad corporativa en materia de derechos humanos. **Muframex Maison Universitaire Franco-Mexicaine**, p. 01 Available at: < http://www.mufm.fr/sites/mufm.univ-toulouse.fr/files/evenement/symposium/ponencias/humberto_fernando_cantu_rivera.pdf > Accessed on: 20 June, 2023.

[243] Ibidem, p.05

[244] In this sense, in EEOC v. Arabian Am. Oil Co. 499 US 244, 248 (1991).

unless there is a clear indication that otherwise. The President of the Court further stated[245]:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

The presumption against extraterritoriality is defined there, however, this paragraph leaves open some possibilities. As William Dogde points out, if the mere corporate presence is not enough, perhaps your domicile is – which must be faced if the allegation of human rights violations is made against an American corporation.[246]

Despite the trial having different opinions, four judges voted to dismiss the case without resolving the merits due to lack of competence to decide purely foreign issues. All the judges agreed on one thing: the ATS should not be interpreted in a way that allows international jurisdiction, in the way that the courts have been interpreting it over the last thirty years.[247]

It is now possible to discuss, to some extent, the consequences of Kiobel's trial, as other similar cases were judged after him, such as the case of *Cardona v. Chiquita Brands International, Inc.*[248] In only one post-Kiobel case has the Court of Appeals found that

[245] DODGE, William. Business and human rights litigation in US courts before and after Kiobel. In: BAUMANN-PAULY, Dorothée; NOLAN Justine. **Business and Human Rights From Principles to Practice.** Routledge. New York 2016, pp. 244-252, p. 247.
[246] Idem.
[247] DIREITO AMERICANO. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659. Available at: http://www.direitoamericano.com/decisoes-recentes/#Kiobel_v_Royal_Dutch_Petroleum_ . Accessed on: 20 June, 2023.
[248] Decided in 2014, Colombian citizens sued the companies Chiquita Brands Internacional Inc. and Chiquita Fresh North LLC. - both created and headquartered in the USA – based on ATS, among others. The plaintiffs alleged that the defendants, from their U.S. offices, approved payments to the terrorist organization Autodefensas Unidas de Colombia (AUC) and facilitated transfers of weapons and ammunition for the purpose of aiding and killing, to suppress labor activism and competition. local. In a separate criminal indictment in the US, Chiquita pleaded guilty to illegal payments to the terrorist organization but argued that this was due to threats to its employees and property. On appeal, the Eleventh Circuit concluded, as in Kiobel, that all the relevant conduct occurred outside the United States. The Court further considered that the American nationality of the defendants was not sufficient to displace the

claims involving human rights violations abroad related so strongly to the United States as to displace the presumption against extraterritoriality.

The case of Al-Shimari v. CACI Premier Technology Inc., which the Fourth Circuit allowed a lawsuit based on the ATS to proceed against the company CACI Premier Technology Inc., for acts of torture committed by one of its employees in Abu Ghraib, a well-known prison located in the city of the same name, in Iraq. The Court found, among other things, that the American nationality of both the corporation and its employees, the interrogation services contract with the U.S. government, and the allegations that persons in the United States gave tacit approval to torture were sufficient for the fact was judged from the ATS.[249]

The admission for judgment of companies based on the ATS by American courts decreased greatly after the Kiobel case. Plaintiffs must convince the court that the companies are capable of being recalled under the ATS by demonstrating that conduct in the United States is sufficient to displace the presumption against extraterritoriality. Therefore, the number of cases likely to be successful appears to be small.[250]

In the Kiobel case, it was established that it is necessary to prove beyond a reasonable doubt that the American corporation exercises control over its subsidiaries in order for the subsidiary to be sued in the United States. Thus, the Nigerian subsidiary was excluded from the action right from the beginning. However, the question of what elements need to be proven to hold a company liable when the allegation is that it assisted or determined violations outside the territory has not yet been resolved. The ATS allows these claims, but it is unclear whether it is necessary to demonstrate the corporation's knowledge or motivation to establish its liability.[251]

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presumption against extraterritoriality, and that the case should, therefore, be rejected. The decision is available at https://law.justia.com/cases/federal/appellate-courts/ca11/12-14898/12-14898-2014-07-24.html, accessed on July 15, 2023.

[249] The case summary and decisions are available at https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al , accessed on July 15, 2023.

[250] PAMPLONA, Danielle Anne; MORAES, Patricia Almeida de. Os significados dos casos Kiobel e Vedanta para a proteção de direitos humanos . **Revista de Direito Internacional**, Brasília, v. 16, n. 3, p. 9-22, 2019. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6603 . Accessed on 20 July, 2023.

[251] PAMPLONA, Danielle Anne; MORAES, Patricia Almeida de. Os significados dos casos Kiobel e Vedanta para a proteção de direitos humanos . **Revista de Direito Internacional**, Brasília, v. 16, n. 3, p. 9-22, 2019. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6603 . Accessed on 20 July, 2023.

Furthermore, the ATS's expression that it will be applied when the illicit act "touches and imports into the United States" also raises doubts. Courts have debated whether the nationality of defendant companies is relevant or sufficient to establish their jurisdiction. It is important to remember that the presumption against the application of the law to acts occurring outside the country makes the task of overcoming these dilemmas and paving the way for holding corporations accountable in cases related to the ATS even more complex.[252]

These claims were significant because they presented the first opportunity for a judicial examination of the role of corporations in some of the most serious human rights violations. These cases mark the beginning of a trend toward issuing lawsuits against corporations under the law.[253] However, the inability to provide an adequate response to human rights violations by companies is often evident in countries with weak institutions. On the other hand, it is reasonable to assume that countries with strengthened institutions, which have the capacity to develop and apply laws appropriately, seek to find some form of response to the victims of these human rights violations.

2.2.2 Domestic initiatives in the field of Business and Human Rights

The UN Guiding Principles on Business and Human Rights lay the foundation for a collaborative approach between States and businesses. Through Resolution A/HRC/RES/26/22, the proposal arose for States to develop National Action Plans (NAPs) for the internal implementation of the international guidelines of the UNGP[254]. It is worth noting that the incentive for the preparation of NAPs originated mainly from European community institutions, which sought to involve their member states in the adoption of this measure.[255]

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[252] Idem.

[253] CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis, **University of Essex** 2019. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.

[254] UNITED NATIONS HUMAN RIGHTS COUNCIL. **A/HRC/RES/26/22**. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/083/85/PDF/G1408385.pdf?OpenElement . Accessed on 15 de outubro de 2018.

[255] RIVERA, Humberto Cantú. Planes de acción nacional sobre empresas y derechos humanos: sobre la instrumentalización del derecho internacional em el ámbito interno. **Anuario Mexicano de Derecho Internacional**. V. XVII, 2017, p. 123.

Initially, the intention was for such standards to adapt not only to the conduct of States, but also to serve as inspiration for implementing changes in the corporate environment. The Working Group established four assumptions that should guide the preparation of National Action Plans: 1. Compliance with the Guiding Principles; 2. Contextualization according to the reality of the adopting State; 3. Establishment of transparent consultation and dialogue processes with interested parties; 4. Need for periodic review and updating.[256]

Currently 32 States have published their NAPs, and 20 States are in the process of developing a NAP[257]. Considering the large number of existing NAPs and the object of this work not being the study of all of them, the focus will only be on the plans of the United Kingdom and Germany, countries that are under analysis considering the extraterritorial demands presented in these countries, related to the dam failures reported in the first chapter. This research will also focus only on the approaches related to extraterritoriality adopted by the NAPs and the internal legislation of these two countries, as they fit into the context of the study.

The first State to establish a NAP was the United Kingdom in 2013, publishing a review of the plan in 2016. Regarding the possibility of extraterritorial jurisdiction, the British NAP has the caveat that the United Kingdom is subject to international rights obligations human rights under customary international law and because of the international legal instruments that have been ratified. Human rights obligations generally apply only within the territory and/or jurisdiction of a State. Consequently, there is no general requirement for States to regulate the extraterritorial activities of companies domiciled in their jurisdiction, although there are limited exceptions to this, for example under treaty regimes. However, the country May choose, as a matter of policy, in certain cases, to regulate the overseas conduct of British companies.[258]

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[256] HOMA. Planos Nacionais de Ação sobre Direitos Humanos e Empresas: contribuições para a realidade brasileira. 2016, p. 5. Available at: http://homacdhe.com/wp-content/uploads/2016/01/Perspectivas-Gerais-sobre-os-Planos-Nacionais-de-Ac%CC%A7a%CC%83o-sobre-Empresas-e-Direitos-Humanos.pdf . Accessed on: 25 July, 2023.

[257] National Action Plan on Business and Human Rights. Available at: https://globalnaps.org/issue/extraterritorial-jurisdiction/ . Accessed on 27 July, 2023.

[258] UNITED KINGDOM. National Action Plan on Business and Human Rights. Available at: https://globalnaps.org/wp-content/uploads/2017/11/uk-2016.pdf . Accessed on 27 July, 2023.

Regarding Germany's NAP, regarding the topic of extraterritoriality, item 4.1 on Access to justice and courts for victims, establishes that Germany's judiciary works independently and efficiently. Anyone who believes that their rights have been violated in Germany by the actions of a company can file a complaint in the civil courts. Any person, furthermore, who considers that his or her rights have been violated abroad by the actions of a German company May bring an action in Germany, normally in the court with local jurisdiction at the company's registered office. Germany's international civil procedure law also contains additional provisions by which German courts May be sued in matters relating to certain offenses committed abroad, provided that a sufficient domestic connection can be demonstrated, such as specific jurisdiction for the offense under the section 32 of the German Code of Civil Procedure, which will be covered in more depth in the next chapter.[259]

In the review of the British NAP, the implementation in 2015 of the "Modern Slavery Act" [260]stands out, binding legislation with the aim of addressing and combating modern slavery and human trafficking in all its forms. This law determined, at the judicial level, more severe penalties for corporations that subject individuals to conditions like slavery and human trafficking. Furthermore, the standard establishes the need for transparency in the companies' supply chain, which May have transnational repercussions when British companies negotiate with companies of other nationalities, since to comply with the law, British companies cannot have in their supply chain involvement with slavery-like work.[261]

Despite this, this legislation has faced criticism regarding its effectiveness and the need for additional improvements, especially regarding the application of rules and the accountability of companies. There is no specification in the document on what measures would be implemented to guarantee effective reparation to victims, so criticism was raised

[259] DEUTSCHLAND. **National Action Plan on Business and Human Rights**. Available at: https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf . Accessed on 27 July, 2023.

[260] UNITED KINGDOM. **Modern Slavery Act**, 2015. Available at: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted Accessed on 01 September , 2023.

[261] UNITED KINGDOM. **Modern Slavery Act**, 2015. Available at: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted Accessed on 01 September , 2023.

regarding the lack of involvement of vulnerable communities potentially affected by business activity.[262]

A further development, in relation to binding legislation in the field of business and human rights, was the due diligence law adopted by Germany in 2021 (Das Lieferkettensorgfaltspflichtengesetz - LKSG). This legislation focuses on supply chains, so the law also applies to branches of foreign companies operating in Germany. The aim of the regulations is to apply due diligence in international supply chains and to regulate followed by the punishment of practices that existing standards in the areas of Human Rights and the Environment cannot prevent.[263] This legislation obliges companies with their headquarters, main branch, administrative headquarters, registered office, or branch in Germany to respect human rights by implementing defined due diligence requirements across the entire supply chain. Furthermore, due diligence obligations concern the business area itself, the actions of a contractual partner and the actions of other (indirect) suppliers, which affects other companies including those located in other States. In this way, the law produces effects extraterritorially, however, which does not mean that the law establishes the German jurisdiction as competent to judge violations occurring outside the country's territory.

It is worth mentioning that the Directive on corporate sustainability and due diligence for the European Union is currently under discussion in the European Parliament. The objective of this directive is to consolidate human rights and environmental considerations in company operations and governance, seeking to ensure that companies face the adverse impacts of their actions, including in their value chains inside and outside Europe, presenting transnational repercussions as well. According to the project, Member States will ensure that victims obtain compensation for damages resulting from non-compliance with the proposed obligations, covering violations perpetrated outside European territory.[264]

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[262] ATCHABAHIAN, Ana Cláudia Ruy. **Transterritorialidade**: Uma teoria de responsabilização de empresas por Violações aos Direitos Humanos. Rio de Janeiro: Lumen Juris, 2020, p. 82.

[263] DEUTSCHLAND. **Lieferkettensorgfaltspflichtengesetz** – LKSG 2021. Available at: https://www.bmwk.de/Redaktion/DE/Gesetze/Wirtschaft/lieferkettensorgfaltspflichtengesetz.html Accessed on 01 September , 2023.

[264] Available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

The adoption of due diligence legislation has the power to change the attitude of companies, to prevent new violations from occurring. Furthermore, for victims of violations that nevertheless occur, there is greater security in seeking redress through extraterritorial litigation in European courts. However, we are still awaiting the approval of the directive, and subsequently the regulation and transposition of the directive into the national law of EU member countries.

2.2.3 The Project for a binding treaty

In June 2014, during the 26th Session of the UN Human Rights Council, resolution 26/09 was approved, which established the formation of the UN Intergovernmental Working Group, which aimed to draft a legally binding international instrument on human rights related to the activities of transnational companies.[265] Resolution 26/09 determined that the first two sessions of the Working Group would be for 'constructive deliberation' to prepare the document and initiate substantial negotiations.

According to Humberto Cantú Rivera[266], the first session, which took place in July 2015, was marked by a political confrontation between developed and developing states, which was due to the fact that they focused exclusively on multinational corporations, in addition to the requirement of developed countries from a panel on the implementation of the UN Guiding Principles on Business and Human Rights by States, favoring continued implementation of the principles before addressing the need for a treaty. Other issues also addressed in this session were the possibility of establishing direct international obligations on companies, internal hierarchy of countries and competing international legal regimes.

The second session, held in October 2016, was more focused on building a new international legal regime, based on the three-pillar structure of the Guiding Principles. In addition, ways to advance at the domestic level in relation to the implementation of the

[265] UNITED NATIONS HUMAN RIGHTS COUNCIL. Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Available at: < https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx > Accessed on 05 August, 2023.

[266] RIVERA, Humberto Cantú. Negotiating a Treaty on Business and Human Rights: The Early Stages. **University of New South Wales Law Journal**, 2017. Available at: < http://classic.austlii.edu.au/au/journals/UNSWLawJl/2017/44.html > Accessed on 13 August, 2023

principles, measures to improve international cooperation and avoid the denial of justice to victims were discussed. The discussion of these issues brought the negotiation stage closer.[267]

In 2017, the session was marked by the theme of remedies in the context of the actions of corporations and their violations of human rights. A document was made available with possible elements for preparing a draft. This document addressed the need for a treaty recognizing the responsibilities of transnational corporations, notwithstanding the primary responsibility of States. Furthermore, the incentive to use a broad concept of jurisdiction stands out, capable of guaranteeing broad access to justice for victims of violations committed by corporations.[268] Furthermore, some actors emphasized the need for States to prohibit the use of the doctrine of *forum non conviniens*, a topic that will be addressed in the subsequent chapter.[269]

In July 2018, the Permanent Mission of Ecuador, on behalf of the Presidency of the Intergovernmental Working Group, presented the draft of a legally binding instrument to regulate the activities of multinationals and other companies that violate human rights, called *Zero Draft.* This project was prepared after analyzing the inputs provided by States and other interested parties in the first three sessions of the Working Group.[270]

It is a draft of a Convention in which States parties undertake to protect human rights against abuses by multinational companies on their territory, or under their jurisdiction or control, and to ensure respect and implementation of international law. of human rights. Furthermore, States must provide effective access to justice and remedy victims of human rights violations in the context of multinational business activity. The

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267 RIVERA, Humberto Cantú. Negotiating a Treaty on Business and Human Rights: The Early Stages. **University of New South Wales Law Journal**, 2017. Available at: < http://classic.austlii.edu.au/au/journals/UNSWLawJl/2017/44.html > Accessed on 13 August, 2023

268 UNITED NATIONS HUMAN RIGHTS COUNCIL. Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf . Accessed on 30 July, 2023.

269 CASSEL, Douglas. The third session of the UN intergovernamental working group on a business and human rights treaty. **Business and human rights journal**. Cambridge University Press, 2018, p. 277-283.

270 UNITED NATIONS HUMAN RIGHTS COUNCIL. Note 4-7-189/2018. Available at: < https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/NV_Doc.780.pdf > Accessed on 13 August, 2023

convention also aims to promote international cooperation with a view to fulfilling the obligations of States under international human rights law.[271]

In subsequent years, three revisions of this document were published. This aims to be the first legally binding instrument to regulate, in international human rights law, the activities of transnational corporations.[272]

Regarding the role of the treaty, there should be no illusion that it would fix all existing gaps in regulation or completely end the current state of corporate impunity. This treaty would simply be an additional regulatory tool to ensure that companies comply with human rights standards. Because companies are complex regulatory targets, multiple regulatory tools must be employed together to achieve some level of effectiveness. Neither the existing regulatory initiatives nor the proposed treaty should be taken as the last word on the matter: additional regulatory initiatives, including other treaties, May be necessary in the future to effectively address growing threats to human rights.[273]

In this first version of the document, it is stated in article 3 that the treaty applies to violations of human rights in the context of any business activities of a transnational nature. The jurisdiction appeals to the court of the State where such acts or omissions occurred or where the alleged aggressor is domiciled. Article 13 establishes that States Parties will fulfill their obligations in a manner consistent with the principles of sovereign equality and territorial integrity of States and non-intervention in the internal affairs of other States. Furthermore, nothing in the text of the draft authorizes a State Party to undertake, in the territory of another State, the exercise of competence and performance of functions reserved exclusively to the authorities of that other State by its domestic law.

In 2019 the draft was revised for the first time, and in 2020 the second revision of this project was published. From the analysis of this revision of the Draft, called the

271 UNITED NATIONS HUMAN RIGHTS COUNCIL. Legally binding instrument to regulate, in international Human Rights law, the activities of transnational corporations and other Business enterprises. Available at: < https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf > Accessed on 14 November , 2023.

272 BUSINESS & HUMAN RIGHTS RESOURCE CENTER. Zero Draft Summary. Available at: < https://www.business-humanrights.org/en/zero-draft-summary > Accessed on 14 August, 2023.

273 DEVA, Surya. The Zero Draft of the Proposed Business and Human Rights Treaty, Part I: The Beginning of an End?. **Business & Human Rights Resource Center**. 14 de Agosto de 2018. Available at: https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end > Accessed on 14 August, 2023.

Second revised draft, it is worth highlighting some articles. Article 9, called "adjudicative jurisdiction", which provides for the possibility of extraterritorial jurisdiction to judge cases of human rights violations by transnational corporations. Therefore, item 9.1 indicates that the victim May file legal proceedings (i) in the place where the human rights violation occurred; (ii) the place where an act or omission that contributed to the abuse of human rights occurred; (iii) in the place where the natural or legal persons who committed the act or omission, including those of a transnational nature, are domiciled.[274]

Article 9, in point 2, further clarifies that a legal entity that conducts commercial activities of a transnational company, including through its commercial relations, is considered domiciled in the place where (i) the corporation is located; (ii) statutory seat; (iii) central administration; (iv) main place of business. It will be up to the victim to choose the place where the action should be processed, so jurisdiction will be mandatory and, therefore, the courts will not be able to reject it based on *forum non conveniens*.[275]

It is also worth highlighting that article 14 of the draft raises the issue of coherence with the principles and instruments of International Law, so that States Parties will fulfill their obligations in a manner consistent with the principles of sovereign equality and territorial integrity of States, and the non- intervention in the internal affairs of other States, except for that contained in article 9.[276]

In the third revision of the draft, published in August 2021, article 9 regarding "adjudicative jurisdiction" was maintained, with wording very similar to the previous version, just adding a few points. In item 9.1 (a), in addition to the possibility of the victim suing the violating company in the courts of the place where the human rights abuse occurred, the possibility of the complaint being presented in the place where the effects were produced was also included. Furthermore, in item 9.1 a fourth possibility of a trial location for victims was included, in the place where the victim is national or domiciled.

[274] EIGWG. CHAIR MANSHIP **SECOND REVISED DRAFT** 06.08.2020. Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Available at : https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf . Accessed on 20 July, 2023.
[275] Idem
[276] Idem

This possibility that has been included is the rule for the law of the place of processing. But the document made it clear that this is also one of the possibilities.[277]

In item 9.2 some changes are also seen, there is a greater scope of the idea of domicile of the legal entity that conducts commercial activities: (i) place of incorporation or registration of the corporation; or (ii) location where the main assets or operations are located; (iii) central administration or management is located; (iv) main place of business or activity on a regular basis. The article maintained the prohibition on the application of *forum non conveniens*.[278]

Item 9.5 states that the Courts May accept demands from people not domiciled in the forum, provided that there is no other effective forum that guarantees a fair trial and there is a connection with the State Party in question as follows: (i) the presence of the complainant in the forum territory; (ii) the presence of the defendant's assets; or (iii) substantial activity of the defendant.[279]

Therefore, this draft treaty establishes the possibility of extraterritorial judgment in these cases, that is, the company May be judged in the place where its main headquarters (parent company) is located, and not necessarily in the place where the event occurred. Therefore, if these companies are judged in their countries of origin, which are generally countries that can stand up to the great economic power of companies, it is a hope for the victims of having their rights guaranteed and an end to impunity for large corporations.

The future treaty should encourage States to act collectively and thus establish a "global action plan" in the field of business and human rights. Collective action could, for example, entail mandatory human rights due diligence, create economic incentives for companies to adopt responsible measures, and establish a mechanism to facilitate international cooperation and mutual assistance between States. In cases where the State is unwilling or unable to fulfill its duty to protect against human rights violations by private actors, some tools can be used to achieve this objective, for example, taking

[277] OEIGWG. CHAIR MANSHIP. **Third revised draft** 17.08.2021. Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf . Accessed on 28 July, 2023.
[278] Idem
[279] Idem

advantage of extraterritorial modes of regulation and creating mechanisms international reporting.[280] Extraterritorial modes of regulation would be bilateral investment agreements, conventions, and other international documents capable of providing for respect for human rights by companies.

[280] DEVA, Surya. The Zero Draft of the Proposed Business and Human Rights Treaty, Part I: The Beginning of an End?. **Business & Human Rights Resource Center**. 14 de Agosto de 2018. Available at: https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end > Accessed on 14 August, 2023.

3. EXTRATERRITORIAL LITIGATIONS IN 'FUNDÃO' AND 'CÓRREGO DO FEIJÃO' DAM COLLAPSES CASES

After describing the facts and analyzing the demands at the domestic level in the cases of the collapse of the Fundão and Córrego do Feijão dams, it was possible to understand why the victims sought extraterritorial litigation to achieve remediation and hold companies accountable. Subsequently, it was understood how extraterritorial jurisdiction is applied in situations involving human rights violations by companies. Now, the analysis of extraterritorial disputes involving these two cases will be carried out.

The lack of an adequate response at the domestic level led victims to seek redress for the violations suffered in foreign courts, located in the countries of origin of the parent companies of the companies directly involved in the cases. In the case of the collapse of the Fundão dam, in Mariana, the victims seek redress in the British courts, against the company BHP Billington. In the case of the collapse of the Córrego do Feijão dam, in Brumadinho, the victims seek redress in German justice, against the company Tüv Sud.

To analyze these two disputes, which take place in different countries with different legal systems, it will be necessary to carry out a comparative study regarding the application of international law in each jurisdiction. It is important to highlight that England adopts the common law system, while Germany adopts the civil law system. Therefore, in this chapter the methodology of comparative law is adopted.

The comparative method that will be used in this research will be the functionalist method, which finds its greatest expression in the work of German professors Konrad Zweigert and Hein Kötz.[281] The functionalist method is characterized by its search to identify similar or different legal responses to social conflicts that are similar, although they occur in different locations around the globe. The legal solution to related problems in different regions of the world May seem discrepant at first glance, however, it exhibits "functional equivalence". This is due to the substantial identity of these same problems in practically all parts of the world.[282] In this work, the problem refers to human rights violations by companies throughout the world.

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[281] ZWEIGERT, K.; KÖTZ, H. An Introduction to Comparative Law. New York: Oxford University Press, 1998.
[282] DUTRA, Deo Campos. Método(s) em Direito Comparado. **Revista da Faculdade de Direito** –UFPR, Curitiba, vol. 61, n. 3, set./dez. 2016, p. 189 –212. DOI 10.5380/rfdufpr.v61i3.46620, p. 198. Available at: https://revistas.ufpr.br/direito/article/view/46620/29831. Accessed on 17 August, 2023.

In summary, the functionalists' agenda follows a line of reasoning that understands that law around the world can be connected to a function considered central and external to it. This law, in turn, seeks to solve the same group of social problems. Functionalism would be focused not on the rules, but on their effects. This method presents the idea that the factual perspective must be understood "in light of its functional relationship with society".[283]

Therefore, this research aims to analyze the development of extraterritorial litigation in each of the two countries in question, seeking to solve a common problem, which would be the search for redress in a foreign jurisdiction, by victims of human rights violations perpetrated by transnational companies. In the functionalist comparatist method, institutions, both legal and non-legal, even if doctrinally different, can be comparable if they are functionally equivalent, as they fulfill similar functions in different legal systems.[284]

Furthermore, Günther Frankenberg's idea of contextualization is also applied.[285] When carrying out an analysis of the sociocultural context of the problem in question, the author is more concerned with identifying and valuing the difference between systems, and not with their similarities. This intellectual process provides a space for the construction of thinking that is sensitive to difference and respectful of others, building a space of tolerance.

Therefore, a study of comparative law will be carried out, starting from the analysis of the antecedents of the cases, which is of special importance in the English context of common law, which is more based on precedents and jurisprudence. Subsequently, the international law applicable in each country will be analyzed, and the specific cases in question will then be analyzed, verifying progress on the subject and the challenges faced by victims in each jurisdiction.

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[283] DUTRA, Deo Campos. Método(s) em Direito Comparado. **Revista da Faculdade de Direito** –UFPR, Curitiba, vol. 61, n. 3, set./dez. 2016, p. 189 –212. DOI 10.5380/rfdufpr.v61i3.46620, p. 198. Available at: https://revistas.ufpr.br/direito/article/view/46620/29831. Accessed on 17 August, 2023.

[284] MICHAELS, Ralf. The Functional Method of Comparati ve Law. In: REIMANN, Mathias; ZIMMERMANN, Reinhard. **The Oxford Handbook of Comparative Law**. Oxford: Oxford University Press, 2008, p. 339-382.

[285] SCOTT, Craig. Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, p. 51. In: SCOTT, Craig (ed). **Torture as Tort**: Comparative Perspectives on the Development of Transnational Human Rights Litigation. Oxford:Hart. Publishing 2001, pp 731. Available at: http://www.ejil.org/pdfs/14/2/426.pdf . Accessed on 10 October , 2023.

Private International Law deals with structural issues that allow decisions to be made about which courts can legally hear a private law dispute. This framework focuses on connecting factors between private actors and the activities in question and the different States involved. Connecting factors include the location of the violation to which the dispute relates and the domicile of the defendant. Private International Law informs the internal norms of civil procedure, that is, the guidelines according to which courts conduct civil trials.[286]

3.1 MARIANA X BHP BILLINGTON IN BRITISH COURTS

The ineffectiveness of adequate remediation and the slowness of legal proceedings in Brazil led the victims to seek effective accountability from BHP in the British courts in November 2018. The actions, seeking compensation for the losses caused by the dam collapse, are filed jointly against BHP. The authors are all Brazilian and comprise (i) more than 720,000 individuals; (ii) more than 1,600 businesses; (iii) 78 churches and religious institutions; (iv) 46 municipalities; (v) 7 dealerships; and (vi) more than 9,500 members of indigenous and quilombola communities. There are public statements from Mariana's lawyers that estimate the value of the claims at £36 million.[287] Thus, this is the largest group litigation order in British judicial history.[288]

Claims are brought in accordance with Brazilian law and include the following causes of action alleged in the Re-Amended General Details of Claim ("the RAMPOC"):

(1) Articles 3(IV) and 14 of the Environmental Law and/or articles 927 and 942 of the Civil Code impose objective liability on BHP for losses and damages caused by the environmental disaster due to its: (a) property and/or control of the entity responsible

[286] CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis. **University of Essex,** 2019. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.
[287] UNITED KINGDON. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: < https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html> Accessed on 25 July,2022.
[288] ALLEN, Jason. **Case note**: Mariana e BHP Group plc, BHP Billiton and BHP Group Ltd. 15 fevereiro de 2021. Available at: https://www.blackstonechambers.com/news/case-note-munic%C3%ADpio-de-mariana-ors-v-bhp-group-plc-bhp-billiton-plc-and-bhp-group-ltd/ . Accessed on 02 de agosto de 2022.

for the damage; (b) lack of supervision of the activity that gave rise to the damage; (c) finance the activity of third parties that led to the damage; and/or (d) benefit from the activity of a third party that led to the damage ("the Strict Liability Action");

(2) BHP is responsible, under articles 186, 927, 932 and 942 of the Civil Code, for losses and damages suffered by Mariana as a result of voluntary act or omission, negligence or recklessness by: (a) disregarding advice and warnings regarding the risks of collapse and/or (b) failing to take satisfactory measures to deal with such risks ("the Failure-Based Claim");

(3) BHP is liable under articles 116 and 117 of the Corporations Act, as controlling shareholders, for the loss and damage suffered by Mariana by permitting activities that involve a significant risk of substantial harm to the community ("the Claim of Controlling Shareholder").

The defendants contested the demand by submitting requests for suspension of the actions, arguing that the Brazilian forum was more appropriate and available and that there was a risk of irreconcilable decisions with the processes underway in Brazil. The defendants also requested the suspension of the requests alleging an "abuse of process"[289] and on the basis that they were "useless, wasteful and duplicative" of Brazilian procedures already underway.

These arguments were accepted, and in November 2020 the demand was rejected for "abuse of process", due to the possibility of "irreconcilable judgments" and "cross-contamination" resulting from parallel processes in Brazil, based on the idea of *forum non conveniens*[290], which will be covered in this chapter later. However, after the applicants'

[289] Abuse of process is a common law wrongful act that involves the misuse of legal process(es) for hidden purposes. Generally, the elements for abuse of process are: (1) the use of illegal or improper process; (2) ulterior motive or improper purpose; and in some jurisdictions (3) damages to a litigant. For the purposes of abuse of process, the arbitration process is a judicial process. Available at: https://www.law.cornell.edu/wex/abuse_of_process . Accessed on February 20, 2024.

[290] Forum non conveniens is a mostly common law legal doctrine whereby a court recognizes that another forum or court where the case May have been brought is the more appropriate venue for a legal case and transfers the case to such a forum.

appeal, on July 8, 2022, the United Kingdom Court of Appeal unanimously accepted the Brazilian applicants' appeal and rejected the requests to suspend the process.[291]

The Court of Appeal held that allowing proceedings in the English courts against BHP England and BHP Brazil would not constitute an "abuse of process". The lack of management capacity (due to the duplication of processes in Brazil) was not a sufficient reason, in addition to there being a real and legitimate advantage for the complainants, which would be to achieve a remedy by holding the English controller responsible, to overcome the disadvantages for the parties in terms of expenses and the public interest in terms of judicial resources.

Furthermore, the Court considered that the overlap with legal proceedings was "relatively limited", since the actions promoted in Brazil only encompass BHP Brazil, so that "If BHP Brazil's control of Samarco is determined, it is uncertain to what extent it will touch upon the control basis of liability advanced against BHP England in this action"[292]. The court considered that BHP England, and not BHP Brazil, exercised control over Samarco's activities.[293]

In this sense, the British Court understood that it was irrelevant that the Brazilian court was better placed to decide issues that did not overlap, as it considered it uncertain whether there would be any decision on overlapping issues, with the degree of overlap being relatively small in this case. Therefore, the court rejected the *forum non conveniens* argument.[294]

The British Court recognized that the actions in Brazil had already been significantly delayed and granting a stay would cause very substantial harm to the victims in obtaining compensation. Furthermore, the judges considered that the compensated claimants had received very modest amounts of moral damages for interruption in the water supply, so the victims would be closer to achieving substantial justice in England.

[291] UNITED KINGDON. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: < https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html> Accessed on 25 July,2022.
[292] If BHP Brasil's control over Samarco is determined, it is not known to what extent it will touch the basis of control of responsibility advanced against BHP England in this action.
[293] UNITED KINGDON. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: < https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html> Accessed on 25 July,2022.
[294] Idem

According to the decision, as a matter of principle, if a claimant demonstrates by convincing evidence that there is a real risk that he will not be able to obtain substantial justice in his country's courts, the English court would at least need to hear the claim.[295]

The Court of Appeal's decision was based on previous precedent in the Vedanta case. In this case, the British Court recognized its jurisdiction to process a claim for human rights violations that occurred in Zambia. The violation was caused by the company KCM, a subsidiary of Vedanta, of British origin. The British Court recognized that it could be an abuse to allow claimants to sue an “anchor”[296] defendant domiciled in England only to pursue a foreign co-defendant, who was the real target in the English courts, but that this was an exception and should apply strictly.[297]

Thus, in the Vedanta case, the Brussels Regulation was applied to justify the jurisdiction of the British Court. This is Regulation (EU) No 1215/2012 of the European Parliament, on judicial jurisdiction and the recognition and enforcement of decisions in civil and commercial matters in Europe. Article 4 establishes that persons domiciled in a Member State must be sued, regardless of their nationality, in the courts of that Member State. The court held that an EU member state cannot decline jurisdiction when the defendant is a company domiciled in that member state. In Mariana's case, the Court adopted the same understanding in relation to the Brussels Regulation.[298]

However, it is worth noting that, although the decision given by the Court of Appeal in England was favorable to the victims, BHP still has an appeal to the Supreme Court of England, which May still take some time before British jurisdiction is considered. definitively competent. Emphasizing that the entire discussion so far involves only the jurisdiction for judgment, and not analysis of the merits of the demand.

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295 UNITED KINGDON. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: < https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html> Accessed on 25 July,2022.
296 An anchor defendant is a person who becomes a defendant in a lawsuit for the primary purpose of acquiring jurisdiction to hear the lawsuit in a particular court. Typically, the purpose of the anchor defendant is to allow claims to be brought in a particular court against another defendant (not the anchor defendant) over whom the relevant court would not otherwise have jurisdiction.
297 UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023
298 Idem.

3.1.1 Applicable legislation

Transnational corporation liability claims emerged in the late 20th century, and have been tested in both the common law and civil law systems. For a number of reasons, the United Kingdom remains a prominent setting for litigation involving personal injury cases against transnational corporations. The rapid development of the legal doctrine of due diligence, especially in the context of business groups, together with the active presence of several NGOs focused on business and human rights agendas, in addition to the wide media coverage of high-profile cases, has contributed to the increase in actions of negligence against transnational companies. Despite variations in the facts and circumstances of each case, these actions share several common characteristics.[299]

The Brussels Regulation, already mentioned, is a relevant standard in this context, and applies to all European Union countries. This convention harmonized private international law regarding jurisdiction and the enforcement of decisions in civil and commercial matters.[300] It identifies three cases in which Member State judges have jurisdiction over civil liability issues with transnational characteristics: when people are domiciled in a Member State, whatever their nationality (art. 4); in case of extension of jurisdiction (articles 25 and 26); when the harmful event occurred or May occur in a Member State (art.7, no. 2). Regarding the last case, the European Court of Justice defined its correct interpretation, clarifying that the article indicates, without distinction, both the place where the damage occurred and the place of the fact that gave rise to the damage.[301]

Thus, on the one hand, domicile-based jurisdiction promotes Brussels' primary objective: legal certainty. Furthermore, domicile reflects the procedural fairness of the rules of jurisdiction, justifying an “advantage” of the court in the country of origin for the defendant. The definition of ‘domicile’ for the purposes of Brussels I is set out in article 63 and provides that the company is domiciled in the place where it has its: a) registered office; b) central administration; or c) main place of business. Article 64 extends this definition to Ireland, Cyprus, and the United Kingdom, specifying that ‘‘statutory seat’

299 ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018. Doi: http://doi.org/10.18352/ulr.444

300 PERRONE, Nadia. Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence. **The Italian review of international and comparative law** 3 (2023) 389–408, p. 397.

301 EUROPE UNION. Processo C-12/76, Bier bv c. Mines de Potasse D´Alsace AS, 1976, p. 1735.

means registered seat, or if there is no such seat, the place of incorporation or local law where the formation of the company took place. To date, establishing personal jurisdiction over the parent company domiciled in England under the Brussels Regulation has not proven to be a significant barrier to claimants. This has meant that victims in foreign countries can sue the parent company domiciled in a European country for liability for damages and violations that occurred outside European territory.[302]

However, the Brussels I regime is exclusively applicable to actions brought against defendants domiciled in the European Union. In the case of defendants domiciled outside the EU, the determination of jurisdiction follows the rules of private international law of the Member States. An English court May exercise jurisdiction over a foreign defendant if proper service of the claim form is possible.

As set out in the British Rules of Civil Procedure, the terms of rules 6.36 and 6.37 apply, which allow the court to grant leave for service in proceedings outside England and Wales under the following conditions: (i) the application of any the rules outlined in paragraph 3.1 of Practice Direction 6B; (ii) the complaint presents a reasonable prospect of success; and (iii) the English court is the appropriate place to bring the claim. The range of grounds of jurisdiction available under Practice Direction 6B is extensive. The most invoked procedural principle in tort claims, facilitating the inclusion of the foreign subsidiary in the English proceedings, is to establish that the subsidiary is a necessary or proper party to a claim against the parent company domiciled in England.[303]

The concept of "necessary or proper party" for claims against a foreign defendant is applicable only in situations where a claim is brought against another defendant (anchor) and a claim form has been or will be served on that defendant. The basis of jurisdiction can be remarkably broad as it does not require the existence of any territorial link between England and the defendant. Accordingly, English courts carefully review claims brought under the "necessary or proper party" concept to ensure that a misleading

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[302] PERRONE, Nadia. Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence. **The Italian review of international and comparative law** 3 (2023) 389–408, p. 398.

[303] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p. 11. Doi: http://doi.org/10.18352/ulr.444

claim against an English anchor defendant is not used as a strategy to attract a foreign defendant into the jurisdiction.[304]

The first component of the concept of "necessary or appropriate party" consists of verifying the presence of an anchor defendant. The court needs to assess the validity and reasonableness of the allegations directed at the English-domiciled parent company to determine whether there is a substantial issue justifying a trial. If the claimants can demonstrate that there is a substantial issue against the parent company, the English court will consider that it has jurisdiction to hear the claims. This leads to consideration of the second component, that is, whether the foreign subsidiary is a necessary or proper party to the action. However, where the court concludes that the claimants do not make a plausible claim against the parent company in England, there is no anchor defendant, and the claims against the foreign subsidiary will not progress in the English legal system. The application of these jurisdictional principles in recent court decisions will be examined in more detail in the following subsections.[305]

Thus, if the victim of a human rights violation by a non-EU corporation is successful in establishing the civil action jurisdiction of the English court, the additional question arises as to the application of the law governing the dispute. The Rome II Regulation is relevant in this context as it provides, as a rule, that the applicable law will be that of the country where the abuse occurred. Host State law has been found to apply in several tort cases. There is an exception when the application of the law is manifestly incompatible with public order. Courts will only reject foreign law in exceptional circumstances, but these May include foreign knowledge provisions incompatible with international or domestic human rights law.[306]

There are other exceptions that May displace the general rule in Rome II, such as when the wrongful act is closely related to a country other than the one where the harm occurs. However, these exceptions can only be invoked in exceptional cases. Damages

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[304] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p. 11. Doi: http://doi.org/10.18352/ulr.444

[305] UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023

[306] UNIÃO EUROPEIA. **Regulamento (CE) n.º 864/2007** do Parlamento Europeu e do Conselho de 11 July,2007 sobre a lei aplicável às obrigações extracontratuais (Rome Regulation II).

are also assessed in accordance with the law and procedures of the country where the damage occurred.[307]

Considering that England is a Common Law country, which develops its legal basis mainly from judicial decisions and precedents over time. Previous court decisions are considered as a basis for future decisions. Courts are influenced and to some extent bound by previous decisions in similar cases. Therefore, for the present analysis, it is necessary to analyze previous cases related to the topic judged by the British Court, seeking to identify the precedents to be applied.

3.1.2 Background of the case

The most significant aspect of foreign direct liability cases is the focus on the acts and omissions of the parent company, not the subsidiary. Civil Liability demands attempt to establish the direct responsibility of the parent company as the person primarily responsible for the illicit act, through breach of the duty of care. The allegations are based on common law principles which provide that, in certain circumstances, the parent company can be considered to have assumed a duty of care.[308]

The result of the admissibility judgment regarding the jurisdiction of the Mariana case results from the idea that the company involved has a duty of care towards those Zambians who claim to be victims. British courts have been grappled with several similar cases over the past 25 years.[309]

The existence of a duty of care under English law is determined in accordance with the three-pronged test set out in *Caparo Industries plc V. Dickman*: a) foreseeability of the damage; b) a sufficient degree of proximity in the relationship between the parties;

[307] CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis. **University of Essex,** 2019. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.
[308] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p. 7. Doi: http://doi.org/10.18352/ulr.444
[309] HOLLY, Gabrielle; STRATEGY, Omnia. Zambian farmers can take Vedanta to court over water pollution. What are the legal implications?. **Business & Human Rights Resource Centre**. Available at: https://www.business-humanrights.org/en/blog/zambian-farmers-can-take-vedanta-to-court-over-water-pollution-what-are-the-legal-implications/ . Accessed on 28 August, 2023.

c) the imposition of liability must be fair and reasonable.[310] The first two elements are often used by applicants to characterize the control relationship between members of the corporate group.[311]

In the case of *Connelly v. RTZ*, the claimants claimed that the duty of care existed because the parent company advised the subsidiary on the content of its health, safety, and environmental policies[312]. In the case of *Guerrero v. Monterrico Metals*, the claimants, who were subjected to torture, inhuman and degrading treatment by a Peruvian service company, brought proceedings against the UK-based parent company, alleging that it had negligently failed to ensure that there was adequate risk management at the subsidiary's facilities, as it exercised "effective control" over the subsidiary's management.[313]

In *Chandler V. Cape plc* the interpretation of the duty of care was set out even more extensively. In this situation, the author had worked at the subsidiary between 1959 and 1962, and years later developed asbestosis because of exposure to asbestos. The subsidiary no longer existed and did not have an insurance policy. The basis of the request was the duty of care that the parent company should have towards the employees of its subsidiary. In April 2012, the British court understood that the duty of care existed given the head office's knowledge of the actual working conditions of the subsidiary's employees and the risk caused by asbestos.[314]

This case made it possible to identify the circumstances of the parent company's responsibilities for the illicit acts of its subsidiaries committed abroad. This led to the introduction of the principle of the parent company's due diligence, which defined its responsibilities if: a) the businesses of the parent company and the subsidiary are, in a

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[310] UNITED KINGDON. Supreme Court. Caparo Industries Plc v Dickman [1990] UKHL 2. Available at: https://e-lawresources.co.uk/cases/Caparo-Industries-v-Dickman.php#google_vignette . Accessed on 10 October , 2023.
[311] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p. 7. Doi: http://doi.org/10.18352/ulr.444
[312] UNITED KINGDON. Supreme Court. Connelly v. RTZ Corporation plc and others [1997] AC 854 (HL). Available at: https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/con01.htm . Accessed on 10 October , 2023.
[313] UNITED KINGDON. Supreme Court. Guerrero v. Monterrico Metals Plc [2009] EWHC 2475 (QB). Available at: https://vlex.co.uk/vid/guerrero-others-v-monterrico-793676789 . Accessed on 19 de outubro
[314] UNITED KINGDON. Supreme Court. David Brian Chandler V. Cape plc. 25 April 2012. Available at: http://www.bailii.org/ew/cases/ EWCA/Civ/2012/525.html. Accessed on 28 August, 2023.

relevant aspect, the same; b) the parent company has, or should have, superior knowledge about some relevant aspect of health and safety in the specific industry; c) the subsidiary's work system is unsafe as the parent company knew or should have known; and d) the parent knew or should have anticipated that the subsidiary or its employees would rely on the use of this superior knowledge for the protection of employees.[315]

The Chandler decision highlighted that a parent company can be held liable for injuries caused to its subsidiary's employees, even in the absence of full control over the latter's operations. Although the case itself does not involve foreign elements, this decision has significant relevance in the context of transnational companies. The English courts have used the principles set out in Chandler to define the extent of an English-based parent company's duty of care in relation to personal injury occurring abroad.[316] This case represented a major advance in the protection of human rights, as it expanded the application of the duty of care, considering that the adoption of distinct legal entities leads to the application of the general rule that there is no confusion between them.[317]

The most emblematic case, which represented the most advances in the context of business and human rights, and which became an important precedent, was the case *Lunfowe et al. v. Vedanta.* The relevance of this case arises from the change in the court's understanding, as in previous cases it was understood that the English courts did not have jurisdiction over claims against a parent company in the United Kingdom for acts of its overseas subsidiary.

In the Vedanta case, the company used the same allegations as in previous cases, asserting the absence of a duty of care or responsibility for the acts of the subsidiary due to the distinction between legal entities. However, the authors were able to produce documents, such as sustainability reports, which demonstrated that the headquarters

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[315] UNITED KINGDON. Supreme Court. David Brian Chandler V. Cape plc. 25 April 2012. Available at: http://www.bailii.org/ew/cases/ EWCA/Civ/2012/525.html. Accessed on 28 August, 2023.

[316] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p. 8. Doi: http://doi.org/10.18352/ulr.444

[317] PAMPLONA, Danielle Anne; MORAES, Patricia Almeida de. Os significados dos casos Kiobel e Vedanta para a proteção de direitos humanos. **Revista de Direito Internacional**, Brasília, v. 16, n. 3, p. 9-22, 2019. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6603 . Accessed on 02 September , 2023.

exercised a significant level of control, direction and knowledge over the subsidiary's actions.[318]

The case was brought to court in 2015 by 1,826 people. The dispute revolved around the right to compensation for people who suffered from the devastation of their lands and water pollution due to the activities of the Nchanga mine. In 2016, the Supreme Court of the United Kingdom ruled that the Zambian judicial system would not allow claimants to achieve justice in an action against a large company such as KCM – Konkola Copper Mines, of which Vendanta Resources, an English company, holds 51 % of shares.[319]

The company appealed this decision, and in 2019 the Supreme Court of Great Britain ruled on the admissibility of the case. The essential allegations on each side were, on the part of the authors, that the action be admitted on English soil, on the other, the company asserting the need to respect the distinction of legal personality between parent company and subsidiary.

The British Court concluded that the claim that Vedanta was responsible for pollution in Zambia was moot under both English and Zambian law. The judge identified the following principles based on previous rulings on the parent company's duty of care: i) claimants must satisfy the tripartite test for the existence of a duty of care; ii) depending on the facts, it is arguable that a negligence claim against a parent company arising from the operations of its subsidiary May give rise to liability; iii) such a complaint is more likely to be successful if filed by former employees. Following the application of these principles to the facts of the case and in light of the evidence presented, the Court identified that the applicants made a 'careful and detailed attempt' to establish that Vedanta owed a duty of care to the applicants.[320]

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[318]ELDRIDGE, Louise. The Zambian farmers who are suing a mining company in a British Court. In: Africa is a country. 15 de fevereiro de 2019. Available at: https://africasacountry.com/2019/02/THE-ZAMBIAN-FARMERS-WHO-ARE-SUING-A-MINING-COMPANY-IN-A-BRITISH-COURT . Accessed on 05 May, 2024 e o quanto indicado nos paragraphs 55 e 58 da decisão, Available at https://www.supremecourt.uk/cases/ docs/uksc-2017-0185-judgment.pdf , Accessed on 28 August, 2023
[319]UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023.
[320] Ibidem, paragraph 121.

To establish the duty of care, the Court took into account that: i) Vedanta's board of directors supervised all of the transnational's subsidiaries; ii) under the terms of the management agreement between Vedanta and KCM a range of services, including project development and management, were provided by Vedanta; iii) the Irish court published a decision that considered the important role of the company's employees in the Vedanta business group; iv) a former KCM employee testified as a witness, providing direct evidence of Vedanta's control over KCM.[321]

Thus, once the court was satisfied that there was a real issue to be adjudicated between Vedanta and the claimants, and that therefore there was an anchor defendant in the jurisdiction, it turned to the question of whether KCM was a necessary party. or appropriate in the demand against Vedanta. Initially, it was considered that the complaint had a real prospect of success against KCM, as it was primarily responsible for the operation of the mine. It was later concluded that the complaints against both were based on common facts and legal principles, with the same arguments of causality and loss, and an investigation against both was necessary. Furthermore, KCM's participation in the process was reasonable, to avoid parallel proceedings regarding similar facts and events in other countries. Thus, the existence of an arguable claim against Vedanta made England the most appropriate jurisdiction to hear the claim against KCM as well.[322]

Furthermore, it is important to highlight the analysis of the reasons why the general rule, which determines that the issue must be resolved by the jurisdiction of the place where the damages occurred, was rejected. The focus of the debate is on the feasibility of compelling the English parent company to respond, in English territory, for the acts of its subsidiary, due to the imposition of a legal duty of care in relation to Zambian nationals. The victims argued that the parent company owed a duty of care to people affected by the activities of its subsidiaries. This commitment arises from the fact that the parent company exercises influence over its subsidiary and actively participates in decisions that impact it.[323]

[321]UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), paragraph 119. Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023.
[322]Ibidem, paragraph 141.
[323] Ibidem, paragraph 53.

This decision is relevant because it determines that it is not necessary for the head office to exercise its power of interference for the duty of care to exist. Since the Court considered that it is sufficient for the parent company to have stated that it has the power to interfere over the subsidiary, that is, even if it has not exercised it – by admitting the existence of this power – it also has a duty of care. And in the Vedanta case, the authors demonstrated this using sustainability reports produced by the company itself. In the report presented in the process, called "Embedding Sustainability", the English headquarters expressly stated its responsibility for maintaining quality standards in the subsidiary's activities, including their implementation through training and supervision. The parent company can interfere in the subsidiary but does not impose a duty to do it.[324]

Finally, the Court considered that as the claimants were in good faith, there was a genuine intention to seek compensation for damages, and the guarantee of justice, since based on other cases previously judged in the countries where the subsidiaries operate, it is unlikely that the applicants would have access to effective justice. Thus, one of the main arguments is to guarantee victims access to substantial justice, which would not be guaranteed if the claim were judged in the country where the violation occurred.[325]

The decision to accept extraterritorial jurisdiction ends up extending the duty of care of parent companies towards those communities that surround the activities of their subsidiaries. In this case, the judges expressly indicated situations in which there is true control by the head office, which can occur when the head office establishes policies to be followed by all components of its group, or when parent companies make public statements expressing their commitments to services. provided and the areas explored by its subsidiaries. It was these characteristics that led the Court to conclude that Vedanta exercised control over KCM, since the public commitments assumed by Vedanta indicated influence over KCM's activities.[326]

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324 UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), paragraph 58. Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023.

325 Idem.

326 PAMPLONA, Danielle Anne; MORAES, Patricia Almeida de. Os significados dos casos Kiobel e Vedanta para a proteção de direitos humanos . **Revista de Direito Internacional**, Brasília, v. 16, n. 3, p. 9-22, 2019. Available at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6603 . Accessed on 02 September , 2023.

This decision is recognized as a significant achievement for foreign victims seeking redress and facing the jurisdictional hurdle in tort claims. Analysis of this case suggests that the existence of an arguable claim against a parent company domiciled in England also establishes the jurisdiction of the English courts over the foreign subsidiary, even if the factual basis of the case occurred almost exclusively overseas.[327]

However, in the case *Okpabi and others v. Royal Dutch Shell*, the foreign claimants were unable to establish the jurisdiction of the English courts over the claims against the company. The demand was generated because of the oil spill resulting from the company's activities, causing serious and continuous pollution and environmental damage. The plaintiffs alleged that Royal Dutch Shell (RDS) and its local subsidiary, Shell Petroleum Development Company of Nigeria Limited (SPDC), were liable for negligence, demanding a duty of care from RDS because it controlled the operation of the pipelines and infrastructure from the which spills that polluted the rivers occurred and why it had assumed direct responsibility for protecting environmental and human rights defenders.[328]

In January 2017, English High Court judge Fraser J ruled the claim against RDS and SPDC could not proceed as under the rule of English common law it was necessary for the judge to establish that there was a real issue to be adjudicated between RDS and the foreign claimants, therefore, whether there was an arguable allegation about the existence of a duty of care on the part of RDS in relation to the damage caused by SPDC. The judge followed the list of principles developed in the Vedanta case to determine the scope of the parent company's duty of care. It was considered that there was a lack of proximity between the companies, based on the facts that RDS was not a direct parent company of SPDC; only two RDS directors were members of the Shell Group Executive Committee; RDS was only a holding company and did not itself conduct any oil exploration in Nigeria; the due diligence imposed on RDS May be too broad given the number of Shell subsidiaries in more than 100 jurisdictions. The judge maintained a conservative position in relation to the concept of distinct legal personality between the

[327] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.13. Doi: http://doi.org/10.18352/ulr.444.
[328] UNITED KINGDON. Supreme Court. Lucky Alame and others v. Royal Dutch Shell Plc [2018]. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2018/191.htm . Accessed on 28 August, 2023.

RDS and the SPDC. This position was confirmed by the Court of Appeal in a split decision.[329]

The Court of Appeal found that the applicants did not present evidence regarding the high level of involvement of RDS in directing and supervising SPDC's day-to-day operations, concluding that RDS did not exercise control over SPDC's day-to-day operations. or that RDS was responsible for the procedures that allegedly caused the alleged damage. Thus, the Court of Appeal, by majority, decided that the case could not be judged by the English courts.[330]

A similar position was adopted in *AAA & Others v. Unilever PLC and Unilever Tea Kenya Limited*, in April 2018. In this case, the authors demanded responsibility from the British parent company for the lack of adoption of safeguards in favor of its employees that could protect them from the ethnic violence that erupted in Kenya after the presidential elections 2007. The Court ruled that the parent company did not owe such a duty of care especially because the events in question were not sufficiently predictable for the parent company or the subsidiary, and it would not be fair and reasonable to impose such a duty on them.[331]

Another relevant case related to the subject was the case *Young v. AASA*, as it delimited the concept of 'central administration' of the corporation in the context of civil liability claims. The litigation against the Anglo-American Group is the only one relating to a claim brought in the English court directly against the foreign subsidiary, without alleging the parent company's liability. The South African plaintiffs claimed to have contracted silico-tuberculosis through employment with Anglo American South Africa Ltd. They filed the lawsuit in England arguing that AASA's central administration or main business was in the country, as that was the location of parent company Anglo American plc. However, Anglo American only became AASA's controller in 1999, after the events described occurred, and therefore did not face the civil liability claims.[332]

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[329] UNITED KINGDON. Supreme Court. Lucky Alame and others v. Royal Dutch Shell Plc [2018]. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2018/191.htm . Accessed on 28 August, 2023.
[330] Idem
[331] UNITED KINGDON. Supreme Court. AAA e outros V. Unilever PLC (2) Unilever Tea Kenya Limited. 24 to 26 April 2018. Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2018/1532.html . Accessed on 28 August, 2023.
[332] UNITED KINGDON. Supreme Court. Young v. Anglo American South Africa Ltd (2014) EWCA Civ 1130, paragraph 109. Available at: < https://uk.practicallaw.thomsonreuters.com/D-026-

The claimants argued that the location of the company's 'central administration' was in England, seeking to directly expose the foreign subsidiary to the jurisdiction of the English courts under the Brussels rule. The plaintiffs alleged that the definition of central administration in Brussels was unclear and required interpretation by the Court. The Court considered that there were no uncertainties, and no additional measures were necessary. The Court defined ‘central administration’ as the place where the company concerned, through its competent bodies, in accordance with its own constitutional provisions, takes decisions that are essential for the performance of the company's operations. The Court of Appeal recognized the integrated nature of the Anglo-American Group, but refused to conclude that the parent company's decisions, regarding the group's operations, had any relevance in determining the subsidiary's domicile.[333]

This decision is important as it demonstrates that it is challenging to establish jurisdiction over a foreign subsidiary under Article 4 of the Brussels Regulation. Although the meaning of 'central administration' (under the Brussels Regulation) has been clarified, uncertainty remains regarding jurisdiction over subsidiaries that share common management and control elements with the parent company. This raises concerns about the jurisdictional relevance of the integrated nature of a transnational company and its administrative structure.[334]

The British Court used Everling’s definition of ‘central administration’ given in 1964, and provided in the context of freedom of establishment in the common market: “The central administration is located where the company’s organs take the decisions that are essential for the company’s operations. In this connection, only the organs of the company itself count; it is irrelevant whether the company depends upon the decisions of a parent company which has its domicile outside of the Community.”[335]

9748?transitionType=Default&contextData=(sc.Default) >. Accessed on 20 September , 2023.

[333] UNITED KINGDON. Supreme Court. Young v. Anglo American South Africa Ltd (2014) EWCA Civ 1130, paragraph 109. Available at: < https://uk.practicallaw.thomsonreuters.com/D-026-9748?transitionType=Default&contextData=(sc.Default) >. Accessed on 20 September , 2023.

[334] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.18. Doi: http://doi.org/10.18352/ulr.444

[335] EVERLING, U. The Right of Establishment in the Common Market. 1964, p. 75. Apud: ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.18. Doi: http://doi.org/10.18352/ulr.444

However, this description was prepared without the intention of being applied exclusively as a universal solution to European Union laws that use the expression 'central administration'. Since the inception of this definition, there have been substantial changes in the corporate and organizational structure of transnational companies. Currently operating transnational companies have considerably more complex agreements, operating through a globally integrated network.

Another relevant aspect of the decision in focus is linked to the association established by the court between the company's central administration and the place where fundamental decisions for its operation are made. Furthermore, the Court did not detail the nature of the "essential decisions" for the company's operations. In the court's view, the company's daily activities are considered as such. However, the parent company of a transnational entity May be involved in making decisions regarding the subsidiary's budget, financing, and project approval. Therefore, if the subsidiary adopts the parent company's policies and procedures, this will influence the decision-making process in the subsidiary's daily operations and in determining the location of "essential decisions". [336]

Given the cases analyzed, establishing jurisdiction in the parent company´s country regarding to damages caused by the direct conduct of its subsidiary in a host country, represents one of the greatest challenges faced by foreign citizens. Case law reveals that foreign subsidiaries, even with the domicile rule of the Brussels Regulation, are not currently subject to proceedings in the English courts. One proposal suggested that home countries should adopt a rebuttable presumption of control when determining the 'central management' of the subsidiary in the parent's country of incorporation. Thus, in the absence of legislative developments in this regard, foreign claimants would face difficulties in seeking action in the English courts against foreign subsidiaries, unless they make a substantial allegation against the parent company based in England.

With the United Kingdom's withdrawal from the European Union in 2020, both the Brussels Regulation and the Rome Statute no longer apply to actions brought in the country's courts. However, as it is a *common law* country, previous precedents, which applied these standards, continue to be relevant bases for future decisions. In the Mariana

[336] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.19. Doi: http://doi.org/10.18352/ulr.444

Case decision itself, in 2022, the British Court rejected the *forum non conveniens* allegation made by the defendants and considered the precedent of the Vedanta case to accept the demand, as previously mentioned. This indicates a tendency for British courts to continue applying EU legal precepts, albeit indirectly, through precedents. However, this is not a guarantee for victims.

3.1.3 *Forum non conveniens*

The doctrine of forum non conveniens (FNC) is mostly common law, it allows a federal court to reject a case that has been submitted to it, believing that a court from another sovereign country is more appropriate to judge the claim.[337]

Forum non conveniens is a well-known basis for legal objections to extraterritorial civil jurisdiction, although largely confined to common law jurisdictions, is that the plaintiff chose the wrong forum to determine the dispute. For example, instead of initiating proceedings in State X, the plaintiff should have chosen the courts of State Y. This is known as the doctrine of *forum non conveniens* (or "inconvenient forum") and is a basis on which courts in common law jurisdictions (i.e. USA, UK, Australia, Canada, New Zealand) have been able to "stay" (or block) proceedings in their own courts involving people, companies, activities, or things in other jurisdictions. In the UK, however, the courts' ability to rely on this doctrine was severely restricted following the European Court of Justice's decision in *Owusu v Jackson*.[338]

Approaches to the issue of *forum non conveniens* vary from State to State. UK decisions have emphasized the need for efficiency and convenience, but more importantly, the need for fairness for both parties. In addition to these private interests, US courts, in their own version of the "balancing test", also consider the public interests involved, including the foreign state's regulatory interests in the subject matter of the dispute and therefore in retaining jurisdiction over it.[339]

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[337] DODGE, William S.; GARDNER, Maggie; WHYTOCK, Christopher A. The many state doctrines of forum non conveniens. **Duke Law Journal**. Volume 72, number 6, March 2023.
[338] ZERK. Jennifer. **Extraterritorial Jurisdiction**: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. June 2010 | Working Paper No. 59, p. 151. Available at: https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf . Accessed on 10 December , 2023.
[339] ZERK. Jennifer. **Extraterritorial Jurisdiction**: Lessons for the Business and Human Rights Sphere

The doctrine of *forum non conviniens* has already been applied in the English courts. Until 2005, the English courts interpreted Brussels Regulation I as granting them the discretion to reject cases against one or more parties domiciled in the European Union (EU) in situations where there was a more appropriate court in a non-EU member state. This basis, known as *forum non conveniens*, allows the court to decide whether to object to business and human rights cases, as in *Connelly v RTZ, Cape, Sithole v Thor Chemicals*, among others. In deciding whether to exercise this discretion, English courts consider the objectives of civil litigants in this type of case in the face of objections to proceedings in the jurisdiction. The leading case in the application of these doctrines is *Spiliada Maritime Corporation v Cansulex Ltd*, in which it was established that the fundamental issue is essentially a practical one: identifying the most appropriate court to hear the case, considering the interests of all parties and the purposes of justice. To determine this question, the court carries out a two-stage investigation.[340]

Firstly, the defendant needs to demonstrate that there is another court available which is clearly and distinctly more appropriate than the English court. Secondly, even if the court concludes that the other court is clearly more appropriate to hear the action, it can nevertheless refuse to grant a stay if it is persuaded by the claimant that justice so requires. The first stage of the analysis, therefore, involves assessing whether a particular court is the one with which the action has the most real and substantial connection. Several connecting factors that the court must consider include aspects related to convenience or expense, such as the availability of witnesses, and factors such as the law governing the relevant transaction and the parties' places of residence or business. In order for the applicant to convince the court at the second stage of the analysis that justice requires that the stay not be granted, it is necessary to demonstrate that, in all the circumstances of the case, he or she would suffer grave injustice in the foreign court, including being unable to proceed in that court. Courts have refused a stay of proceedings on the grounds that the foreign court would treat the applicant in a blatantly unfair manner, the judicial system is inexperienced, inefficient or lacks independence, there is

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from Six Regulatory Areas. June 2010 | Working Paper No. 59, p. 151. Available at: https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf . Accessed on 10 December , 2023.

[340] UK PARLIAMENT. Lubbe v Cape Plc [2000] 1 WLR 1545. Available at: https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm . Acessom em 12 September , 2023.

excessive delay in the conduct of judicial business, and there is an absence of appropriate remedies.[341]

In 2005, a ruling by the European Court of Justice clarified that the national courts of the European Union did not have the authority to reject cases brought against defendants domiciled in the EU on the grounds that a court in a non-member state would be better suited to hear the case. This was because respect for the principle of legal certainty was one of the objectives of the Brussels Convention, and allowing the competent court to apply the doctrine of f*orum non conveniens* would undermine this principle. As a result, the *forum non conveniens* defense can no longer be used in this type of case, since the Brussels regime leaves no room for the discretionary refusal of jurisdiction by the courts of EU member states in cases falling within the scope of the regulation.[342]

Furthermore, in the first instance judgments in the *Vedanta and Unilever* cases, the courts concluded that where there is a real issue to be tried between the claimants and an English parent in the English courts, this will "practically conclude" the question of the appropriate forum in favor of England, thus extending the restriction to subsidiaries domiciled abroad. However, this restriction is not immutable. Firstly, the Court of Appeal in the Vedanta case did not approve of the first instance judge's reasoning. Instead, it concluded that the judge was entitled to this view before unilaterally declaring that: "*There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally."* [343]This leaves judges in similar cases with the possibility of concluding that, despite the existence of a parallel action against a defendant domiciled in the UK (or another European state), England is not the appropriate forum to hear an action against a foreign defendant. Secondly, the post-Brexit application of the existing rules on jurisdiction is shrouded in uncertainty. One possible outcome is that the

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341 CHAMBERS, Rachel. Corporate misconduct, human rights, and the challenges of extraterritorial solutions. PhD thesis. **University of Essex,** 2019. p. 56. Disponivel em: https://repository.essex.ac.uk/24919/ . Accessed on 29 June, 2023.
342 UNIÃO EUROPEIA. Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others. Available at: https://eu.vlex.com/vid/opinion-of-mr-advocate-838497709. Accessed on 12 December , 2023.
343 343 UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), paragraph 58. Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023.

European rules will no longer apply, and the English courts will revert to the common law rules on jurisdiction, according to which the restriction on *forum non conveniens* would not apply.[344]

There is an established precedent in the English High Court that confirms its jurisdiction over class actions related to environmental disasters in other jurisdictions. The recent verdict in the Fundão Dam case seems to mark a new point of reference. Now, not only can English parent companies be held liable in class action proceedings in the English High Court in relation to environmental disasters in other jurisdictions, but also other non-English parties who May have contributed to such events. The willingness of the English High Court to reaffirm its jurisdiction over these class actions, coupled with the recent indication that it is willing to extend this jurisdiction to non-English defendants, suggests that there is likely to be an increase in the number of claimant groups (usually backed by English or US financiers) bringing environmental class actions in the English High Court.

3.2 BRUMADINHO X TÜV SÜD IN GERMAN COURT

The case of the Córrego do Feijão dam collapse in Brumadinho, discussed in the first chapter of this work, resulted in a lawsuit filed in October 2019. The Brumadinho City Council and six people related to one of the fatal victims of the dam collapse filed a lawsuit at the Munich Regional Court I (Landgericht München I) against Tüv Süd AG, the parent company of the Tüv Süd group.[345]

Four months before the catastrophe, the German company issued certification of the dam's stability. The civil lawsuit filed in Germany includes allegations of negligence

[344] LOVELLS, Hogan. Forum non-conveniens and access to remedy in transnational business and human rights litigation: an update from Brexit Britain and a glance across the pond. **Lexology**. Dezembro de 2017. Available at: https://www.lexology.com/library/detail.aspx?g=108497df-d0f6-4b3a-8f27-856f1103ed0f . Accessed on 12 January , 2024.

[345] BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. TÜV SÜD lawsuit in Germany (re role in Brumadinho dam collapse). 01 de outubro de 2019. Available at: https://www.business-humanrights.org/en/latest-news/t%C3%BCv-s%C3%BCd-lawsuit-in-germany-re-role-in-brumadinho-dam-collapse/ . Accessed on 12 January , 2024.

in the operation and certification of the dam and a claim for compensation from the victims of the dam collapse and their families. [346]

The plaintiffs claim that Tüv Süd made "market adjustments" to the safety standards that reduced them below international standards. The company, meanwhile, claims that it has no legal responsibility for the Brumadinho dam collapse and believed that its Brazilian division and Vale had complied with local laws and standards at the time. The plaintiffs say they are bringing the action in Germany under Brazilian law because access to justice in Brazil is slow and inefficient. They will initially seek an indication from the district court in Munich, southern Germany, that Tüv Süd is liable in principle, before properly quantifying damages.[347]

Initially, 183 surviving workers and victims' relatives demanded a total of more than 12 million euros in reparations, but over time, other victims joined the process. At a hearing in February 2022, more than 1,000 claimants were added to the case, and in January 2024 the Munich Higher Regional Court included another 300 victims in the lawsuit. The case then grew to around 1,400 plaintiffs, who are claiming 600 million euros in compensation.[348]

On September 19, 2022, there was an initial hearing in which there was no agreement between the parties. After the hearing, the judge gave the parties 90 days to produce additional information. The German company argues that it has no legal responsibility for the collapse, as the dam operator is responsible for its stability, and that the causes of the dam collapse have not yet been conclusively clarified. The company

[346] BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. TÜV SÜD lawsuit in Germany (re role in Brumadinho dam collapse). 01 de outubro de 2019. Available at: https://www.business-humanrights.org/en/latest-news/t%C3%BCv-s%C3%BCd-lawsuit-in-germany-re-role-in-brumadinho-dam-collapse/ . Accessed on 12 January , 2024.
[347] BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. Brazil: Group lawsuit filed in Germany against TÜV SÜD over alleged role in deadly collapse of Brumadinho dam. 22 de Janeiro de 2021. Available at: < https://www.business-humanrights.org/pt/latest-news/brazil-group-lawsuit-filed-in-germany-against-t%C3%BCv-s%C3%BCd-over-alleged-role-in-deadly-collapse-of-brumadinho-dam/> Accessed on 12 January , 2024.
[348] BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. Brasil: Cerca de 1,4 mil pessoas pedem R$ 3,2 bilhões em indenização da TÜV Süd, contratada pela Vale para avaliar a barragem Mina Córrego do Feijão, em Brumadinho. 29 January , 2024. Available at: https://www.business-humanrights.org/en/latest-news/brasil-cerca-de-14-mil-pessoas-pedem-r-32-bilh%C3%B5es-em-indeniza%C3%A7%C3%A3o-da-t%C3%BCv-s%C3%BCd-contratada-pela-vale-para-avaliar-a-barragem-mina-c%C3%B3rrego-do-feij%C3%A3o-em-brumadinho/ Accessed on 03 February, 2023.

claims that the dam was stable in June and September 2018, when the certifications were issued.[349]

The plaintiffs claim that, at the time of the disaster, Tüv Süd was found to have used safety verification standards that were lower than international parameters, circumventing the supervision of the competent bodies. The prosecution claims that there were even internal communications in May 2018 in which company employees inferred that they would lose business with Vale if Tüv Süd refused to certify one of the mining company's containment structures.[350]

It is expected that an expert report will be issued on the case in July 2024, with assessments from a specialist in Brazilian law. The German courts are awaiting the document in order to try the case under Brazilian law. [351]

As the process is still in its early stages, there are no decisions on the merits yet to be analyzed. Unlike England, in Germany there is no initial judgment regarding the jurisdiction of the court hearing the claim. The claim has already been accepted for processing in the country's courts, and the question of jurisdiction is analyzed later at the end of the process.

3.2.1 Background of the case

The first and only previous case involving human rights violations in another state that was brought before a German court was called the KiK Cases.[352] In September 2012, a fire at the Ali Enterprises textile factory in Karachi (Pakistan) killed 260 people and left

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[349] BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. Brasil: Cerca de 1,4 mil pessoas pedem R$ 3,2 bilhões em indenização da TÜV Süd, contratada pela Vale para avaliar a barragem Mina Córrego do Feijão, em Brumadinho. 29 January , 2024. Available at: https://www.business-humanrights.org/en/latest-news/brasil-cerca-de-14-mil-pessoas-pedem-r-32-bilh%C3%B5es-em-indeniza%C3%A7%C3%A3o-da-t%C3%BCv-s%C3%BCd-contratada-pela-vale-para-avaliar-a-barragem-mina-c%C3%B3rrego-do-feij%C3%A3o-em-brumadinho/ Accessed on 03 February, 2023.

[350] CONEXÃO MINERAL. Cinco anos após Brumadinho: 300 vítimas se unem à ação contra Tüv Süd na Alemanha.25 January , 2024. Available at: < https://www.conexaomineral.com.br/noticia/3708/cinco-anos-apos-brumadinho-300-vitimas-se-unem-a-acao-contra-tuv-sud-na-alemanha.html > Accessed on 03 February, 2023

[351] Idem

[352] EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR), KiK: Paying the price for clothing produced in South Asia (2022). Available at: <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/> Accessed on 12 January , 2024.

32 injured. According to an investigation by Forensic Architecture, most of these deaths and injuries could have been avoided if the factory had adhered to basic safety standards.[353]

The German clothing store KiK buys around 75% of the factory's products. The basis of the business relationship was, among other things, a code of conduct developed by the defendant in 2006 on the basis of international agreements and relevant United Nations regulations, in which minimum requirements were set for the defendant's producers in order to safeguard fundamental rights and international standards, namely with regard to: working conditions, safety at work and the remuneration to be paid to workers.[354]

Several families have decided to claim compensation in a civil case before the German courts. Muhammad Hanif, Muhammad Jabbir, Abdul Aziz Khan Yousuf Zai, and Saeeda Khatoon - one survivor and three bereaved - therefore filed a claim for compensation against KiK in March 2015 at the Regional Court of Dortmund, Germany.[355]

The plaintiffs claimed that the KiK company had partial liability, as it could have effectively demanded basic safety standards, and demanded damages of €30,000.00 each. They claim that because the defendant used at least 75% of the factory's capacity, it is bound by its dominant position and its code of conduct and failed to ensure that the textile factory complied with the requirements for adequate fire protection, which in fact was not the case and which cost so many lives. The conditions on site were known to its employees.[356]

The regional court ordered an expert opinion on the relevant legal situation under Pakistani law and instructed the expert to first comment on the issue of the limitation period for claims under Pakistani law. It then dismissed the case with the contested decision and held that all of the plaintiffs' claims were time-barred, since the limitation

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[353] OPENJUR, OLG Hamm, Beschluss vom 21.05.2019 - 9 U 44/19 (2019). Disoponível em: < https://openjur.de/u/2174526.html >. Accessed on 13 January , 2024.
[354] Ibidem, paragraph 4.
[355] EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR), KiK: Paying the price for clothing produced in South Asia (2022). Available at: <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/> Accessed on 12 January , 2024.
[356] OPENJU, OLG Hamm, Beschluss vom 21.05.2019 - 9 U 44/19 (2019). Available at: < https://openjur.de/u/2174526.html >. Accessed on 13 January , 2024.

period under Pakistani law is one or at most two years and began to run with the fire on September 11, 2012.[357]

The plaintiffs appealed the decision and argued that the regional court wrongly assumed that their claims were time-barred. They consider that a limitation period of only one year, which cannot be extended through negotiations and agreements, violates public policy, and should therefore not be applied by the German court. The length of the limitation period and its start, regardless of knowledge, differ significantly from German law. It should also be noted that the essential circumstances giving rise to a claim, such as causation, especially in the case of major damage, can only be clarified very late. In addition, the claimants argued that in the present case, it was only the first instance report of January 15, 2018 that provided evidence of the extent to which the building's architecture, management decisions and lack of safety precautions were related to the high number of victims and that significantly fewer people would have been harmed if the prescribed standards had been respected.[358]

The plaintiffs also argued that the Pakistani statute of limitations would be unconstitutional under German law because it would restrict access to the court and thus to objective legal protection in the sense. Article 19(4) of the Basic Law is inadmissibly restricted. In the present case, to guarantee an effective right of access to the court, account must be taken of the unusual circumstances and the excessive demands placed on the applicants by the complexity of the matter. Due to the financial impact of the loss of family members or the severe disability itself, the immediate psychological effects of the accident and the complexity of the intercontinental legal dispute, the claimants would under no circumstances have been able to exercise their rights within the limitation period. Without establishing cross-border contacts with human rights organizations and their legal representatives, they would not have been able to take legal action.[359]

In addition, the plaintiffs argued that the claims were not time-barred because the parties had effectively agreed to the application of German law to the issue of limitation. Article 14(1), sentence 2. The Rome II Regulation expressly provides that the choice of

[357] OPENJU, OLG Hamm, Beschluss vom 21.05.2019 - 9 U 44/19 (2019). Available at: < https://openjur.de/u/2174526.html >. Accessed on 13 January , 2024.
[358] Ibidem, paragraph 8.
[359] Ibidem, paragraph 9.

law May also be made implicitly if it follows from the circumstances of the case with sufficient certainty. In the present case, such circumstances would consist of two German lawyers, neither of whom had any training in the applicable Pakistani law, who agreed in German, in Germany, to waive the limitation period using the wording customary in German legal transactions. It also seems impossible that the German lawyers involved would have chosen a legal system other than the German legal system that only they knew, since otherwise the agreement would have required them to obtain appropriate reports on Pakistani law beforehand. [360]

The court rejected the lawsuit in January 2019 on procedural grounds, namely on the basis that the limitation period had expired under Pakistani law. According to Pakistani law, cases involving personal injury are time-barred within two years of the injury occurring. The court therefore did not rule on the merits.[361]

Following the court's decision, the plaintiffs requested legal aid to appeal the decision, but were unsuccessful. Proceedings continued other fronts, such as an OECD complaint against the Italian certifier RINA, which issued the international SA 8000 certificate for the factory three weeks before the fire. This was also unsuccessful, as RINA denied any wrongdoing, leaving the affected rights holders without an effective solution once again. The official cause of the fire was never found, and many suspicions circulated. Eight years after the fire, a local anti-terrorism court in Karachi sentenced two factory workers to death for arson, although investigation reports identified different causes of the fire.[362] The cause is, however, irrelevant in the question of KiK's shared responsibility.

In this case, neither Ali Enterprises nor KiK were held responsible for the violations. Even after the incident highlighted the poor working conditions that Pakistani workers faced in the factory in question, there was no imputation to or imposition of improvements in conditions on the workers. As this was the only case of a civil liability claim against a parent company in Germany, there are not enough precedents that can be

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[360] OPENJU, OLG Hamm, Beschluss vom 21.05.2019 - 9 U 44/19 (2019). Available at: < https://openjur.de/u/2174526.html >. Accessed on 13 January , 2024.

[361] Appellate Court of Hamm, Verditct of 21 May 2019, Az. 9 U 44/19

[362] SAHOUTARA, Naeem . ATC hands death sentence to two MQM workers in Baldia factory fire case; Rauf Siddiqui acquitted. **Dawn**, 22 September 2020 <https://www.dawn.com/news/1581033> Accessed on 22 January , 2024.

applied to the case against Tüv Süd, and it is difficult to analyze the position of the German court in cases involving extraterritorial human rights litigation and companies.

3.2.2 Applicable legislation

As British justice, the Brussels Regulation, and the Rome Regulation, which have already been analyzed, are also applicable here, as they are European Union laws to which Germany is also a party. Therefore, everything mentioned in relation to these legislations will be considered in this section. Therefore, by applying the Brussels Regulation, the claim can be processed in Germany, as this is the domicile of the parent company Tüv Süd. The Rome Regulation states, as a rule, that the applicable law will be that of the country where the abuse occurred.[363]

Here it is important to highlight the Rome II Regulation, especially because of its application to the Kik Case. Even in the face of the plaintiffs' claims in the Kik Cases that the Rome Regulation would not apply because the parties agreed to apply German law, and because the application of German law derives from the safeguard clause in Article 4(3) of the Rome II Regulation. According to this provision, the law of the place of the damage should not be applied if it appears from the totality of the circumstances that the wrongful act has an obviously closer connection with another country. Even so, the Court did not accept the plaintiffs' arguments, using the Rome Regulation and applying Pakistani law. [364]

In the case of Brumadinho, which is being heard in Germany, the Court will follow the same path, i.e. Brazilian legislation will be applied. This is because the judge in the case has already appointed a special expert and ordered him to draw up a report on the Brazilian legislation that will be applied. Thus, here we will analyze the Brazilian legislation to be applied to the case, which would be the legislation on civil liability.

Civil liability in Brazil consists of the duty to make reparation for damage to someone else's legally protected property, whether due to an unlawful or lawful act. The

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[363] UNIÃO EUROPEIA. **Regulamento (CE) n.º 864/2007** do Parlamento Europeu e do Conselho de 11 July,2007 sobre a lei aplicável às obrigações extracontratuais (Rome Regulation II).
[364] OPENJU, OLG Hamm, Beschluss vom 21.05.2019 - 9 U 44/19 (2019), paragraph 10. Available at: < https://openjur.de/u/2174526.html >. Accessed on 13 January , 2024.

type of civil liability that is appropriate in this case is non-contractual liability, i.e. liability for situations that are subject to the law and do not arise from contracts, as these are subject to their own rules and principles.[365]

Firstly, regarding the statute of limitations, according to article 206 §3 of the Brazilian Civil Code, the claim for civil reparation is time-barred in three years. In this case, as the victims filed their lawsuit in Germany in the same year as the incident, there is no need to talk about a statute of limitations.

In Brazil there are two forms of civil liability: subjective and objective. Subjective liability requires the existence of damage, fault, or intent on the part of the agent and a causal link in order to characterize the obligation to make reparation. Objective liability, on the other hand, is exceptional and can only be applied in cases provided for by law. In this sense, the sole paragraph of article 927 of the Brazilian Civil Code states that there will be an obligation to repair the damage, regardless of fault, in the cases specified by law, or when the activity normally carried out by the author of the damage implies, by its nature, a risk to the rights of others.

Regarding the exceptions provided for by law, in which the relevant objective civil liability will apply, the one that applies to the present case refers to environmental damage caused by legal entities governed by private law, a hypothesis present in §3 of article 225 of the Federal Constitution. In the same vein, Paragraph 1 of Article 14 of Law 6.938/81 establishes that the polluter is obliged, regardless of fault, to indemnify or repair the damage caused to the environment and to third parties affected by its activity. Thus, in cases of environmental damage, it is not necessary to prove the company's fault, and the realization of the damage is enough to impose on the company the duty to repair it.[366]

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[365] BACELLAR FILHO, Romeu Felipe. SCHIO, Adriana Cavalcante de Souza. **Novos Aspectos da Responsabilidade Civil das Empresas Estatais.** Sequência, UFSC, Florianópolis, n. 62, p. 261-298, jul. 2011. p. 10. Available at: https://periodicos.ufsc.br/index.php/sequencia/article/view/2177-7055.2011v32n62p261 . Accessed on 22 January , 2024.

[366] BELCHIOR, Germana Parente Neiva, PRIMO Diego de Alencar Salazar. **A responsabilidade civil por dano ambiental e o caso Samarco:** desafios à luz do paradigma da sociedade de risco e da complexidade ambiental. RJurFA7, Fortaleza, v.13, n.1, p.10-30, jan./jun. 2016. p. 11. Available at: https://periodicos.uni7.edu.br/index.php/revistajuridica/article/view/38/28 . Accessed on 22 January , 2024.

In addition, environmental degradation generally has diverse and uncertain causes, widespread and often anonymous victims, and damage of a delayed or cumulative nature, which in addition to affecting the property or physical integrity of individuals, harms the interests of society in general. As a result, it is essential to use a special instrument, such as objective civil liability, to deal with repairing damage caused to the environment. And this is the consensus of the Brazilian courts.[367]

The damage caused by the dam collapse is obvious and unquestionable, and there is a duty to compensate all the companies involved in the disaster. Mining is an activity that, by its nature, involves risks, in addition to the serious environmental damage that has been caused. However, this applies to the company that carries out the mining activity, Vale. Since Tüv Süd is a company that issues certificates, this activity would not entail risks or cause environmental damage, but it is necessary to analyze the context in which the company's activity was carried out. By providing a report attesting to the dam's safety for operation, there is a causal link, because in view of the report provided by the German company, the mining company could continue with its activities, which triggered the dam collapse. Thus, the misleading report provided by Tüv Süd contributed to the disaster and can be considered an indirect polluter.

However, in the legal entity liability lawsuit filed by the Minas Gerais Public Prosecutor's Office against Tüv Süd, it was alleged that the company was objectively liable for committing an act harmful to the public administration, since it hindered the State Environmental Foundation's inspection activities and the MPMG's investigations. According to the Public Prosecutor's Office, by issuing and submitting a Declaration of Stability Condition (DCE) for Dam I of the Córrego do Feijão Mining Complex, despite being aware of the anomalies and conditions of the structure that made it impossible to

[367] BENJAMIN, Antonio Herman de V.**A Responsabilidade Civil pelo Dano Ambiental no Direito Brasileiro e as Lições do Direito Comparado**. p. 12. Available at https://core.ac.uk/download/pdf/79061950.pdf . Accessed on 05 February, 2023.

achieve the minimum safety factors necessary to guarantee people's safety and lives, it incurred in the practice provided for in Article 5, V, of Law 12.846/2013[368].[369]

Furthermore, mining company Vale and certifier Tüv Süd are jointly and severally liable, so that any of those who contributed to the damage can be sued, including indirect polluters, as provided for in item IV of article 3 of Law 6.938/1981.[370]

Accordingly, under Brazilian law, Tüv Süd can be classified as an indirect polluter or as having practiced an act harmful to the public administration, making it objectively liable for the damage caused by the dam collapse. However, the application of strict liability will depend on the interpretation of the judge who will apply the law. This can be a major problem in this context, as it is a German judge, who is not inserted in the Brazilian context, and cannot possibly have the same understanding and interpretation as a Brazilian judge, who experiences the reality of the country, identifies cultural, political, and social issues in the country.

If objective civil liability is not applied, subjective civil liability will be applied to Tüv Süd. For the obligation to repair damage under subjective liability to be imposed, three requirements must be met: guilt, damage, and causal link. It is necessary to prove the damage, contrary to the law, suffered by someone, the fault for this damage and the relationship of the conduct with the damage caused, establishing conditions that determine their responsibility and define the measure of reparation.[371]

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[368] Art. 5 - For the purposes of this law, all acts committed by the legal entities mentioned in the sole paragraph of art. 1 that violate national or foreign public assets, public administration principles or international commitments assumed by Brazil, as defined herein, constitute acts that are harmful to the public administration, whether national or foreign, are as follows: V - hindering the investigation or inspection activities of public bodies, entities or agents, or interfering in their activities, including within the scope of regulatory agencies and national financial system inspection bodies.

[369] BRASIL. Ministério Público de Minas Gerais. Processo n. 5000218-63.2019.8.13.00090. Available at: https://www.mpmg.mp.br/data/files/E5/E5/AA/A3/2D44A7109CEB34A7760849A8/A__o%20LAC%20-%20decis_o%20liminar%20defere%20indisponibilidade%20e%20suspens_o%20atividades.pdf . Accessed on 02 February, 2023.

[370] Art. 3 - For the purposes set out in this Law, the following definitions shall apply: IV - polluter, the individual or legal entity, whether governed by public or private law, responsible, directly or indirectly, for an activity causing environmental degradation;

[371] SANTOLIM, Cesar. **Nexo de causalidade e prevenção na responsabilidade civil**. Revista da AJURIS – v. 41 – n. 136 – Dezembro 2014. p. 81. Available at http://ajuris.kinghost.net/OJS2/index.php/REVAJURIS/article/view/354/289 . Accessed on 28 January , 2024.

Guilt can be made up of negligence, malpractice, and recklessness, disconnecting the will of the author, but maintaining the idea of reprehensible and unlawful behavior, as can be interpreted in article 186[372] of the Brazilian Civil Code, which, in fact, has become a major obstacle to the effective reparation of damages. However, in recent years, in relation to the applicability of civil liability, there has been an erosion of the 3 requirements mentioned, causing a significant loss in the importance of proof of guilt and causal link, valuing the generation of the damage itself as the main aspect and clearing obstacles to compensation in lawsuits.[373]

There is a relaxation of the traditional assumptions of civil liability, which indicates a gradual and eminently jurisprudential change in the structure of civil liability, reflecting the appreciation of its compensatory function and the growing need to assist the victim in a social reality marked by the insufficiency of public policies in the administration and reparation of damages.[374]

It is therefore understood that damage is the most important requirement for civil liability and should also be the most relevant point when it comes to imputing responsibility to someone, since it is impossible for responsibility to precede damage. However, this is an interpretation that has been made by Brazilian courts and scholars.

It is important to note that, despite this, the subjective theory is more difficult to apply, since the victim needs to prove the fault of the agent who caused the damage, which is even more difficult when that agent is a large company. Therefore, in this case, it would be more appropriate to apply strict liability.

The application of civil liability to Tüv Süd is a question of the judge's interpretation and understanding, identifying in the context of the specific case whether it would be more appropriate to impute objective or subjective liability. However, this calls into question the way in which Brazilian law will be interpreted and applied by a German judge, who has had his training, experience and professional experience in another reality and context. Will the interpretation that has been made by Brazilian judges

[372] Art. 186. Anyone who, through voluntary action or omission, negligence or recklessness, violates a right and causes damage to another, even if exclusively moral, commits an unlawful act.
[373] SCHREIBER, Anderson. **Novos paradigmas da responsabilidade civil. Da erosão dos filtros da reparação à diluição dos danos**. N.Cham. 342.121, S378n, 2013. p. 12.
[374] Idem.

be considered? Will the Brazilian reality be considered? Will the context in which the disaster occurred be considered?

These questions reflect all the efforts to have extraterritorial litigation accepted and these claims processed in the countries of the parent companies. Would extraterritorial litigation really be a good solution for compensating victims and holding companies accountable? Is extraterritorial litigation really a step forward in the field of business and human rights?

4. THE OBSTACLES FOR VICTIMS IN SEEKING REMEDY IN A FOREIGN JURISDICTION

The conception of human rights in the international sphere marks the search for a new paradigm of cooperation between countries, with the aim of realizing the basic rights of every human being and, consequently, safeguarding the achievement of human dignity, which is highlighted by Flavia Piovesan[375]:

> a abertura do diálogo entre as culturas, com respeito à diversidade e com base no reconhecimento do outro, como ser pleno de dignidade e direitos, é condição para a celebração de uma cultura dos direitos humanos, inspirada pela observância do mínimo ético irredutível, alcançado por um universalismo de confluência. [376]

This means that the internationalization of human rights demands the creation of minimum standards of protection that must be effectively adopted globally by states, regardless of their scope of internal normative protection, being a matter of legitimate international interest, transcending strictly domestic parameters and questioning the absolute sovereignty of states.

International law, which governs state jurisdiction over transnational corporations and human rights, is not frozen in a fixed set of rules. The law evolves to reflect ongoing efforts to balance the interests of states between sovereignty and the protection of human rights in a globalized economy. At present, the balance of interests still tips towards state sovereignty, at the cost of impunity for human rights violations by companies. According to Douglas Cassel, this results from an inherent incompatibility between territorially limited states and transnational companies with global operations, so that the only way to fill this regulatory and corrective gap is for states to exercise jurisdiction over transnational business activities.[377]

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[375] PIOVESAN, Flávia. **Direitos humanos e o direito constitucional internacional.** 16. ed. São Paulo: Saraiva, 2016. p. 241.

[376] the opening of dialogue between cultures, with respect for diversity and based on the recognition of the other as a being full of dignity and rights, is a condition for the celebration of a culture of human rights, inspired by the observance of the irreducible ethical minimum, achieved by a universalism of confluence. (free translation)

[377] CASSEL, Doug. Chapter 10: State jurisdiction over transnational business activity affecting human

However, today, international law allows and encourages states to exercise regulatory and adjudicatory jurisdiction over transnational business activities emanating from or affecting their territories. Firstly, general international law allows states to exercise jurisdiction over transnational business activity, at least if there is a "reasonable connection" between the state and the activity, and a recognized basis for jurisdiction.[378]

International law on jurisdiction is generally not a major barrier to holding companies accountable for human rights violations outside their home states. However, practical, and legal obstacles, such as the doctrine of separate corporate identities, often interact with jurisdictional rules to prevent companies from being held accountable. For example, the home state of a parent company has no jurisdiction over its foreign subsidiary. The result is a regulatory and remedial gap.[379]

However, extraterritorial civil liability litigation has presented challenges and obstacles that need to be overcome. As noted above, some litigation has been conducted in the courts of the United Kingdom and Germany, revealing aspects worthy of reflection and shortcomings to be addressed. By identifying the specific problems faced by each of the jurisdictions examined in relation to litigation involving companies and human rights, there will be a basis for seeking to improve this form of litigation.

The first obstacle that victims must face when pursuing extraterritorial litigation is the so-called "corporate veil". Extraterritorial litigation seeks to sue the parent company, so it is necessary to prove that there is in fact a relationship between the parent company and the subsidiary that violated human rights. Proving this relationship is difficult, as it is not always obvious, and is often hidden under the corporate veil.

In a transnational corporation, the parent company and its subsidiary are two separate legal entities. According to the doctrine of limited liability, the shareholders of a corporation cannot be held liable for the debts of that corporation beyond the level of their investment. This makes it difficult for victims of the subsidiary's conduct to seek

rights. IN: DEVA, Surya. BIRCHALL, David. **Research Handbook on Human Rights and Business**. 08 July,2020. ISBN: 9781786436399, pp. 198–222, p.198.

[378] Idem.

[379] Ibidem, p.199

redress by bringing an action against the parent company in the jurisdiction of that company's home state.[380]

To "break through the corporate veil", a close examination of the factual relationship between the parent company and the subsidiary is necessary, to identify whether the nature of this relationship is not more akin to that between a principal (the parent company) and an agent (the subsidiary). Thus, victims need to demonstrate to the courts that the parent company exercises such a degree of control over the subsidiary's operations that the latter cannot be said to have a will or existence of its own, and that treating the entities as separate (and thus allowing the parent company to shield itself behind its subsidiary) would sanction fraud or lead to an unjust result.[381]

Thus, to establish that the corporate form has been abused, or that the subsidiary has acted as an agent of the parent company, the plaintiffs have to demonstrate that the separation of legal personalities is a mere legal fiction to which the economic reality does not correspond. This approach, however, can be a source of legal uncertainty, since there is no closed list of circumstances that allow the "breaking of the corporate veil", and such circumstances are not hierarchical.[382]

The British court has already indicated in its case law a way for the plaintiffs to prove the relationship between the parent company and the subsidiary. It is sufficient to show that the parent company has a practice of intervening in the subsidiary's business operations, such as in relation to production and financing issues. From there, the duty of care is considered, which has already been studied, but which will be explored in greater depth below.

4.1 MAIN CHALLENGES IN THE UK JURISDICTION

Although civil liability claims offer a promising avenue for victims of corporate human rights abuses to seek judicial redress, these plaintiffs face significant challenges

[380] SCHUTTER, Olivier de. Towards a New Treaty on Business and Human Rights. **Business and Human Rights Journ**al, 1 (2015), pp. 41–67, p.49. Cambridge University Press. doi:10.1017/bhj.2015.5
[381] Idem.
[382] Idem.

in the courts of the states of origin. The first obstacle to overcome is the question of jurisdiction, which is resolved through the rules of private international law. In English courts, there is no automatic jurisdiction over corporate wrongdoing that occurred on foreign territory. Claimants in civil liability actions must establish personal jurisdiction over the defendant corporations. Various potentially applicable regimes govern the jurisdiction of the English courts, depending on the location of the defendant.[383] The determination of jurisdiction over the parent company domiciled in England is currently governed by the rules of the Brussels Regulation. In the absence of the application of the Brussels Regulation (i.e. when the TNC's foreign subsidiary is in a non-member state), the English courts resort to common law rules to decide whether to exercise jurisdiction over the foreign defendant.

This point, concerning the jurisdiction of the English courts to hear a case, demonstrates great legal uncertainty for victims, since it is not clear from the case law analyzed above what all the requirements are for the Court to recognize its jurisdiction to hear a case. Recent case law has shown that claimants May still find it difficult to assert the personal jurisdiction of the English courts over the companies' local and foreign legal entities. This can happen when claimants fail to establish an arguable claim in respect of breach of duty of care by the parent company domiciled in England, or claims against the foreign subsidiary are brought in the English courts in the absence of a statutory claim against the UK parent.

Furthermore, when victims manage to bring their claim before the courts of the company's country of origin, the first obstacle is demonstrating that that is the competent jurisdiction. In cases where extraterritorial jurisdiction has been recognized, the discussion about the competent forum has lasted for years within the process, bringing a high financial and emotional cost to the victims. In the Mariana case, the English Court held that this delay can cause substantial harm to victims in obtaining effective remediation[384]:

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383 SKINNER, Gwynne; MCCORQUODALE, Robert; SCHUTTER, Olivier De. The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business**. European Corporate Justice**. December 2013. Available at: https://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf . Accessed on 20 November , 2023.

384 UK. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: <

> The claims in this action are already three years old and the only reason they have not substantively progressed is the delay caused by the applications which have been made by the defendants. For there to be a further delay of years, and quite possibly over a decade, before they could resume would cause very substantial prejudice to the claimants in obtaining relief and would be inimical to the efficient administration of justice because of all the well-known problems which delay brings to the process.[385]

Until now has been no comprehensive judicial consideration of the substantive rules of parent company liability at the merits stage because most tort claims have either failed for procedural reasons or have been settled after the jurisdiction of the home state court has been upheld. However, the courts have recognized in principle that a parent company domiciled in England can, based on appropriate facts and under certain circumstances, be recognized as assuming a duty of care owed to the subsidiary's employees or local communities.[386]

However, there is controversy as to the extent of the limits of negligence damages in relation to the exercise of the economic activity of transnational corporations, i.e. whether the parent company's liability would be a different category from ordinary negligence liability. This question is related to demonstrating that the parent company takes advantage of the opportunity to take over, intervene, control. Supervising or advising on the management of the subsidiary's relevant operations.[387]

The main objective of the duty of care doctrine is to establish the parent company's liability for the damage caused to the claimant. According to Douglass Cassell, in the case

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https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html Accessed on 25 July,2022.

[385] As reclamações nesta ação já têm três anos e a única razão pela qual não progrediram substancialmente é o atraso causado pelos recursos que foram apresentados pelos réus. O fato de haver um atraso adicional de anos, e possivelmente mais de uma década, antes que eles pudessem ser retomados causaria um prejuízo muito substancial aos requerentes na obtenção de alívio e seria prejudicial à administração eficiente da justiça como resultado de todo o bem -problemas conhecidos que o atraso traz ao processo. England and Wales Court of Appeal (Civil Division) Decisions. Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 (08 July 2022). Available at: < https://www.bailii.org/ew/cases/EWCA/Civ/2022/951.html> Accessed on 25 July, 2023.

[386] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.8. Doi: http://doi.org/10.18352/ulr.444

[387] UNITED KINGDON. Supreme Court. Judgment Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), paragraph 49. Available at: < https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf >. Accessed on 08 August, 2023.

of the parent company, this duty of care would include due diligence regarding the human rights impacts of the activities of all the entities of a company, including its subsidiaries.[388]

However, the doctrine of separate legal personality and the principle of limited liability resist automatically attributing liability to the parent company for the acts of its subsidiaries. In contrast, the duty of care doctrine outlines the circumstances in which control exercised by a parent company can result in liability. The advantage of establishing the direct liability of the parent company lies in the claimants' ability to avoid the need to penetrate the company's legal personality. They do not need to present evidence that the subsidiary was created to circumvent the parent company's pre-existing legal obligations. Instead, the plaintiffs focus on the conduct of the parent company and identify the actual control it exercises over the operations of the entire corporate group. Thus, by establishing the case against the parent company, the claimants automatically target a pool of assets that would otherwise not be available if litigation were brought against the subsidiary in the host State.[389]

From the analysis of case law above, it was possible to identify some requirements that the Court considers necessary to recognize the duty of care, however, the presence of such requirements does not guarantee that the trial will take place in the British Court. Furthermore, in several cases it is very difficult to prove the existence of these requirements.

As previously noted in case law, if the parent company only had shares in the capital of a foreign subsidiary, this would not lead to the establishment of a duty of care and additional circumstances would be needed to conclude whether the parent company could be held liable. Direct and substantial supervision by the parent company of the subsidiary's operations, on the other hand, is likely to give rise to a duty of care, but it is not a guarantee.

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[388] CASSELL, Douglass. Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence. **Notre Dame Law School** NDLScholarship. 1 Bus. & Hum. Rts. J. 179 (2016), p. 179. Available at: < https://core.ac.uk/download/pdf/268222209.pdf>. Accessed on 08 January 2024.

[389] WARD, Halina. Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options. **Hastings Int'l & Comp. L. Rev.** 451. 2001 Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/hasint24&div=27&id=&page= Accessed on 10 December , 2023.

Importantly, a prejudgment on substantive liability issues is not appropriate at the initial jurisdictional stage of the proceedings, prior to full disclosure of the relevant documents. This approach is in line with existing authorities which state that a "genuine issue to be tried" test is not a heightened test. Claimants are not required to establish the facts on the merits, but rather to show that the cause of action is plausible. It is an unreasonably high burden for plaintiffs to establish at the interlocutory stage, prior to full disclosure of evidence and full legal pleadings on these points.[390]

Thus, imposing a significant evidential burden on claimants at such an early stage of the proceedings, especially when they have limited access to the internal documentation of transnational companies, puts the progress of tort claims in English courts at risk. The ability of victims to obtain evidence to support their claims against the parent company has been identified as one of the main practical challenges in civil liability claims, especially in the early stages. In most cases, the individuals affected do not have all the relevant information about the specifics of the control relationship in the corporate structure and the effective involvement of the parent company in the day-to-day activities of the subsidiary.[391]

Another question concerns the context in which the notion of "necessary or proper party" is applied. The practical objectives of avoiding two separate judgments on similar facts and events in different parts of the world outweigh the need for a territorial connection between England and an action brought against a foreign subsidiary in tort cases. In addition, the absence of *forum non conveniens* control under English common law has a significant impact on claims against the parent company domiciled in England, adding further uncertainty for victims.[392]

Another obstacle to extraterritorial litigation concerns the possibility of "irreconcilable judgments". If the determination of the appropriate jurisdiction to deal

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[390] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.17. Doi: http://doi.org/10.18352/ulr.444

[391] SKINNER, Gwynne; MCCORQUODALE, Robert; SCHUTTER, Olivier De. The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business. **European Corporate Justice**. December 2013. Available at: https://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf . Accessed on 20 November , 2023.

[392] ARISTOVA, Ekaterina. Op. cit, p. 14

with the case depends exclusively on this factor as a defining criterion, the likelihood of irreconcilable judgments or multiple judgments often becomes insurmountable, as it will result in a restriction on the exercise of jurisdiction when there is a foreign defendant.[393]

The absence of a uniform precedent on the liability of the parent company imposes serious restrictions on the possible advantages arising from civil liability litigation. So far, all the cases have been closed for procedural reasons or settled after the jurisdiction of the home state court was upheld. This last outcome shows that companies are only inclined to negotiate a settlement when the first stage (the decision on jurisdiction) favors the plaintiffs. It is not in the interest of transnational companies to continue contesting cases if this could entail the significant consequences of a final judgment on the merits. In addition, claimants' lawyers, who are often involved in litigation based on success fees, also have no interest in protracted proceedings.[394]

The effectiveness of tort claims as an instrument to regulate corporate liability is questioned due to their predominantly compensatory nature. The pursuit of financial compensation is the main motivation behind plaintiffs initiating an action against the parent company. The ramifications of liability suits include media pressure on companies to consider more deeply the social impact of their operations, the adoption of corporate social responsibility policies and greater public attention to standards of corporate behavior in the countries where they operate.[395]

Furthermore, it remains uncertain whether the impacts of litigation in the states of origin actually result in the creation of global standards of responsible corporate behavior or whether they simply contribute to maintaining a positive image of large transnationals. Tort claims are decided on a case-by-case basis, and do not seek to establish a universal standard of corporate responsibility that is applicable regardless of the location of the plaintiffs or the management center and operational base of the corporate group. It can be

[393] BOUWER, Kim. Substantial Justice?: Transnational Torts as Climate Litigation. **Carbon & Climate Law Review** (CCLR), 2021, p. 193-195. Available at: https://cclr.lexxion.eu/data/article/17399/pdf/cclr_2021_02-010.pdf . Accessed on 14 February, 2023.
[394] ZERK, Jennifer**. Multinationals and Corporate Social Responsibility -** Limitations and Opportunities in International Law. Cambridge University Press The Edinburgh Building, Cambridge cb2 2ru, UK, p. 207. Available at http://www.untag-smd.ac.id/files/Perpustakaan_Digital_1/CORPORATE%20SOCIAL%20RESPONSIBILITY%20Multinationals%20and%20Corporate%20Social%20Responsibility.pdf . Accessed on 25 November , 2023.
[395] Ibidem p.236

argued that claims based on duty of care in England do not pay sufficient attention to the absence of redress in host states. Such litigation does not directly consider the subsidiary's misconduct and what actions the host states could take to correct that misconduct.[396]

So far, none of the cases brought before the British courts involving parent companies domiciled in England in relation to damage caused by their subsidiaries have been decided on the merits. However, the Vedanta case confirmed that the parent company May have a recognized duty of care (depending on the circumstances), and consequently the English courts May have jurisdiction to hear such cases, even when a foreign court is apparently the more appropriate venue. This development reflects a growing trend for home state courts to agree to recognize claims against the parent company and its foreign subsidiaries.[397]

4.3 MAIN CHALLENGES IN GERMAN JURISDICTION

To protect collective rights in Germany, there is only aggregate litigation, similar to what in Brazil is called an Incident for the Resolution of Repetitive Demands (IRDR). This makes access to justice difficult for victims who don't have the resources to litigate in another country. In addition, lawsuits with compensation claims only have the potential to indirectly prevent future disasters. In Brazil, on the other hand, the collective protection system is more advanced, with the presence of class actions and repetitive cases, and institutions such as the Public Prosecutor's Office, and to a more limited extent, the Public Defender's Office and associations, are responsible for this protection.[398]

Furthermore, in class actions in Brazil, the qualified primary public interest is present, favoring the predominance of interests that go beyond the merely individual.

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[396] ARISTOVA, Ekaterina. Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction. **Utrecht Law Review**. Volume 14, Issue 2, 2018, p.20. Doi: http://doi.org/10.18352/ulr.444

[397] VARVASTIAN, Samvel; KALUNGA, Felicity. Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe. **Transnacional Environmental Law** 9 (2). 2020. p. 323-345. Available at: https://orca.cardiff.ac.uk/id/eprint/131740/1/Varvastian_Kalunga_accepted.pdf . Accessed on 15 February, 2023.

[398] ZANETI JR., Hermes; DIDIER JR., Fredie. **Ações coletivas e o incidente de julgamento de casos repetitivos** – espécies de processo coletivo no direito brasileiro: aproximações e distinções. Repro. São Paulo: RT, V. 256, 2026, p.213.

There is no system of procedural costs that restricts access to justice, and therefore class actions waive court costs and lawyer's fees, which encourages the filing of these actions. In addition, the prominent role of the Public Prosecutor's Office in filing class actions helps to prevent problems found in other countries, such as "rapacious lawyering", which is related to the high costs of litigation. [399]

Brazil has robust and stable institutions and legislation, as well as effective mechanisms for access to justice. However, the presence of bureaucracy and the overload of the judicial system contribute to the slow resolution of cases. In addition, cases of corruption are not uncommon. The search for a quick solution often leads victims to accept settlements that do not provide an adequate and fair remedy.

A relevant issue is the analysis of jurisdiction. The analysis of jurisdiction is only carried out at the end of the process when the judge passes sentence. Throughout the process, time and effort is spent on producing evidence and analyzing the dispute. If, in the end, the judge does not consider himself competent to judge, all the evidence produced and arguments presented throughout the process will not even be analyzed, as there will be no analysis of the merits. Thus, all the victims' efforts and time spent end up being in vain, since the issue of jurisdiction could have been analyzed initially.

Another relevant issue to be addressed at this point is the applicable law. As in the Kik case, Pakistani law was applied by a German judge in a German court. This situation raises many questions. A foreign court does not have the same ability to apply the legislation of the state that created it. Initially, ordinary legislation, when it is developed, also encompasses the entire legal basis of the country, such as the constitution, legal principles that are applied in that country.

Furthermore, the analysis of the applicable Brazilian legislation must consider the entire subsumption of the laws. That is to say: the social reality, its historical moment, its objective, the forces that led to its elaboration. The law will be applied by one or more judges, who are citizens of another country, have not experienced the culture and reality of the country, have no knowledge of the social and political issues surrounding society,

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[399] ZANETI JR., Hermes; DIDIER JR., Fredie. **Ações coletivas e o incidente de julgamento de casos repetitivos** – espécies de processo coletivo no direito brasileiro: aproximações e distinções. Repro. São Paulo: RT, V. 256, 2026, p.193.

have not lived in the country. They don't belong to that country, which makes it unfair for them to interpret and apply a law from another country to nationals of that same country.

To apply laws, it is often necessary for the judge to interpret them, and this is done based on case law, i.e. previous interpretations made by other judges. The judge of a foreign court has no knowledge of the case law of another country and how the interpretation is made, or the context in which that interpretation is inserted. In addition, the language barrier can often be an obstacle. Legal expressions and nomenclature that are unknown to foreigners, sometimes legal institutes that don't exist outside that state. Furthermore, if we consider that many cases of human rights violations by companies have already been tried in domestic courts, so that the country's legislation has already been applied in these cases. It makes no sense for this same legislation to be applied again, which could incur the allegation of *bis in idem.*

What's more, many companies choose countries with lenient laws to set up their subsidiaries. Often the legislation in the country where the damage occurred is flawed, and this is due to various reasons: corruption, economic interests, technical incapacity. In these cases, the application of the law of the country of the damage would not bring sufficient redress for victims and adequate accountability for the company (exactly as happened in the Kik chaos), and there is no reason for it to be applied.

4.2 PATHS TOWARDS EFFECTIVE ACCESS TO REMEDIES

Transnational companies generally advocate restricting lawsuits to the jurisdiction of the place where the damage occurred, arguing that this results in less economic impact. There are several reasons for this position, including the weakness of the justice system in the country where the subsidiary is located, the lack of adequate collective techniques for dealing with disputes and the high cost associated with legal proceedings. The limited financial resources of subsidiaries, when compared to the resources of parent companies, is also considered a relevant factor. In addition, restricting litigation to the place of damage favors transnational companies in the event of possible recognition and enforcement of a foreign judgment, given the considerable difficulty in recognizing foreign judgments in complex collective litigation.[400]

Furthermore, it is not uncommon for transnational companies to seek to set up their subsidiaries in countries with lenient or even non-existent legislation, precisely so that they do not suffer punishment or legal sanctions because of the damage they cause. In this context, there would be no point in applying the law of the place of the damage in extraterritorial litigation, as this law would be totally inefficient and the aim of the litigation, which is to seek a fair remedy, would never be achieved.

Thus, domestic litigation seeking to hold companies accountable for human rights violations, if pursued at the place of the damage, represents a benefit for the company. This does not seem to be the best solution for holding companies accountable and making amends to victims.

Seeking redress through domestic courts May not be enough to satisfy victims. Extraterritorial litigation could offer the possibility of a more effective remedy. However, as we have seen, there are many obstacles to overcome, especially regarding the application and interpretation of the law by a judge in another country.

Despite the obstacles to extraterritorial litigation, there is a great deal of importance to be gained from these types of claims. In addition to compensation, extraterritorial litigation is of great importance when seeking deterrent relief[401], especially injunctions, because it looks to the future to prevent damage from recurring. Thus, actions brought for abuses committed by transnational corporations in their home country gain relevance, achieving full access to justice. This is because the ability to prevent future damage does not only concern the local company (usually a subsidiary), but also the parent company, usually located in a country other than the place of damage.[402]

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[400] VARVASTIAN, Samvel; KALUNGA, Felicity. Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe. **Transnational Environmental Law** 9 (2). 2020. p. 323-345. Available at: https://orca.cardiff.ac.uk/id/eprint/131740/1/Varvastian_Kalunga_accepted.pdf . Accessed on 15 February, 2023.

[401] They refer to judicial measures arising from collective protection, and the consequent mass civil liability, so that potential violators feel discouraged from practicing illicit conduct and resist the temptation to make easy profits at the expense of the rights and interests of a vulnerable community. GIDI, Antônio. A Class Action como instrumento de tutela coletiva dos direitos. São Paulo: Revista dos Tribunais, 2007, p.36.

[402] SECK, Sara L. Home State Obligations for the Prevention and Remediation of Transnational Harm. PhD Thesis. **Osgoode Hall Law School**. York University, 2008.

Thus, since the parent company is obliged to adopt positive measures to prevent damage to human rights and the environment in its corporation as a whole, subsidiaries and other companies controlled or coordinated by them must also adapt and adopt such measures, in a kind of cascading obligation to prevent future damage.[403]

Furthermore, extraterritorial litigation is relevant to avoid a real risk of denial of justice, when a competing jurisdiction proves inadequate to deal with the case in the interests of the parties and the ends of justice, guaranteeing access to justice for the victims. It is in this way that extraterritorial litigation, by guaranteeing access to the jurisdiction of the parent company's country, contributes to full access to justice, seen as the possibility of implementing a top-down deterrent effect, i.e. from the parent company that can be obliged to adopt positive measures to prevent human rights violations and environmental damage, the subsidiaries will also have to adhere to such measures indirectly.

Finally, a legal claim against the parent company gives the victims the possibility of achieving more robust financial compensation, as the parent company May generally have financial resources that are not available to the subsidiary to satisfy the claim.[404]

As explained in Chapter 2, an international treaty on human rights and business is currently being developed. This new legally binding instrument aims to clarify the scope of states' duty to protect human rights by regulating transnational corporations, and could also help to define more precisely the requirement to ensure that victims of cross-border damage have access to effective remedies.[405]

Principle 25 of the UNGPs implies the duty of the State of origin to provide access to remedies in its national courts for human rights violations occurring in a host State, whenever victims cannot access effective judicial remedies in that State. In addition,

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403 SECK, Sara L. Home State Obligations for the Prevention and Remediation of Transnational Harm. PhD Thesis. **Osgoode Hall Law School**. York University, 2008.

404 VARVASTIAN, Samvel; KALUNGA, Felicity. Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe. Transnational Environmental Law 9 (2). 2020. p. 323-345. Available at: https://orca.cardiff.ac.uk/id/eprint/131740/1/Varvastian_Kalunga_accepted.pdf . Accessed on 15 February, 2023.

405 SCHUTTER, Olivier de. Towards a New Treaty on Business and Human Rights. **Business and Human Rights Journa**l, 1 (2015), pp. 41–67, p.54. Cambridge University Press. doi:10.1017/bhj.2015.5

article 9 of the treaty under discussion clearly establishes the possibility of litigation in the home state of the parent company, if this is the victim's choice.

Despite the possibility and viability of extraterritorial litigation, some obstacles are still identified, making it difficult for victims to achieve redress. Many of these obstacles are procedural in nature, as mentioned throughout this chapter. For example, the burden of proof (victims having to prove the relationship between the parent company and the subsidiary), the applicable legislation, which is that of the host State, which will be interpreted and applied by a judge from another State.

These and other issues should be standardized in a single procedural legislation to be applicable in all cases of extraterritorial litigation that seeks to hold the parent company responsible. The idea is to include an appendix or annex with procedural rules to be applied in these cases along with the draft treaty being developed at the UN. These rules, being general, can be applied by judges and courts of any country (which is a signatory to the treaty) in which demands for human rights violations by companies are brought. It is important to establish rules in this regard to guarantee greater legal security for victims.

A binding and collectively developed instrument, so that there is an agreement between interested parties involved in the protection and respect for human rights, will demonstrate a global commitment, as it will provide satisfaction and justice. For Selvanathan, treaties, resolutions, and agreements are the foundations of our global society, "as we climb ever higher, we rely on these structural elements to harness our hopes and Shelter our insecurities from a fear of heights".[406]

The inclusion of rules that regulate extraterritorial disputes, through an international treaty, would bring greater legal certainty to victims when they seek adequate remedy. In addition to unifying and harmonizing the rules, this would facilitate the judgment and interpretation of legislation by the Courts of the Member States. Furthermore, with a rule clearly establishing the possibility of extraterritorial jurisdiction, no time would be spent discussing the jurisdiction of the court to judge or the legislation

[406] SELVANATHAN, Puvan J. The Business and Human Rights Treaty Debate: Is Now the Time?. **The Duke Human Rights Center at The Kenan Institute for Ethics**, p.01. Disponivel em: https://media.business-humanrights.org/media/documents/files/documents/IsNowtheTime_TreatyDebate.pdf . Accessed on 12 February, 2023.

applicable to the case, which would mitigate judicial delays in extraterritorial cases involving companies and human rights.

This would also be interesting for companies, since it would be easier for them to adapt to a single standard applicable to both the parent company and subsidiaries, rather than to different laws in the different countries in which they operate. This would reduce the legal risk inherent to its activities.

The construction of an international treaty takes a lot of time, reaching consensus among States will not be easy. The difficulty, however, should not deter the commitment that large corporations are held legally responsible. It is necessary to remember that, even if discussions on a treaty advance significantly, a binding instrument will not resolve all the problems involving the matter, mainly because the rules of a treaty will always be generic and will need greater detail to be able to be applied and must - consider each region and the context of each case.[407]

[407] PAMPLONA, Danielle; SANTANA, Anna Luisa Walter. Contribuições do ICCAL: o constitucionalismo transformador frente às violações de direitos humanos e empresas. In: PIOVESAN, Flávia; BOGDANDY, ArminVon; ANTONIAZZI, Mariela Morales. **Constitucionalismo transformador, inclusão e direitos sociais**. Salvador: Editora JusPodivm, 2019, p. 190

CONCLUSION

The Fundão and Córrego do Feijão dam collapses occurred in Brazil because of the extractive activities of mining companies operating in the country, causing countless human rights violations. There is a time gap of just four years between one disaster and the next, demonstrating that the State was not effective in preventing another similar disaster from happening. In both cases, foreign companies were involved through national subsidiaries. This led the victims to seek to sue the parent company in the courts of the home State, through extraterritorial litigation.

Domestic litigation in Brazil has not yielded a good result so far, which is why this paper seeks to analyze the alternative adopted by victims, which is extraterritorial litigation. Even though Brazil has a well-structured and solid justice system, with the existence of class actions, guaranteed access to justice and protective human rights legislation, victims have not been able to achieve an adequate remedy in the domestic jurisdiction. The slowness and dysfunctions in the execution of agreements are presented and questioned in the first chapter. In addition, the search to reach the parent company, which is also responsible for the violations, is another factor that has influenced victims to seek extraterritorial litigation.

The research was developed based on the Third Pillar of the UN Guiding Principles, relating to the provision of effective remedy to victims, opting for the judicial system, considering the need to effectively guarantee access to justice. Based on the analysis of principles 25 and 26, extraterritorial litigation is understood as a way for victims to have access to an effective remedy. States must ensure that there is no barrier preventing cases from being brought before the courts and must ensure that the provision of justice is not hindered by the corruption of the judicial process.

After studying the cases of the Fundão and Córrego do Feijão dam collapses, initially was understood access to effective remediation through extraterritorial litigation, and its viability under international law. Considering that classic principles of international law such as sovereignty and non-intervention are being relaxed in the face of globalization in modern society, extraterritorial litigation becomes viable. Next, was understood how extraterritorial litigation is applied under international law, and then analyzed litigation in the foreign jurisdictions that were the basis for the cases studied (England and Germany). In England in particular, there are more precedent cases, in which it is possible to identify more nuances relating to the issue. After analyzing each jurisdiction, was identify the main obstacles to victims achieving remedy in each of the two jurisdictions studied, with the aim of identifying solutions to these obstacles.

International law can initially prove to be a barrier to extraterritorial litigation, due to its basic principles such as sovereignty and non-intervention. Extraterritorial jurisdiction is only acceptable in exceptional cases, so there are no regulations providing for its application in cases of human rights violations by companies. However, in these cases, the courts of the home States have recently accepted the application of extraterritorial jurisdiction.

When national courts in home States are recognized as a means of providing foreign citizens the access to justice, the decision of this court to accept jurisdiction over a civil liability claim, may open the possibility for plaintiffs to bring proceedings in a foreign court, presenting the potential for substantial compensation for damages. However, this could be interpreted as an intervention in the internal affairs of another sovereign State since the dispute maintains a strong connection with the territory of the host State.

However, the regulation of international law that addresses state jurisdiction over transnational corporations and human rights does not remain static in a fixed set of norms. It is constantly evolving to reflect ongoing efforts to seek a balance between sovereign state interests and the protection of human rights in a globalized economy. Currently, the balance of interests tends to favor state sovereignty, often resulting in impunity for human rights violations committed by companies. This imbalance stems in part from a fundamental incompatibility, a "governance gap" between territorially limited States and transnational corporations operating in a global economy. One way to fill this regulatory gap and correct it (in the absence of some new or improved international mechanism) is for states to exercise jurisdiction over transnational business activities.[408]

[408] CASSEL, Doug. Chapter 10: State jurisdiction over transnational business activity affecting human rights. IN: DEVA, Surya. BIRCHALL, David. **Research Handbook on Human Rights and Business**. 08 July,2020. ISBN: 9781786436399, pp. 198–222, p.198.

The possibility of adjudicatory jurisdiction, when it is possible to prove a reasonable connection between the case and the country, or the application of *forum necessitatis*, make extraterritorial disputes legally viable. In cases where the home Sate is part of the European Union (such as those analyzed in this paper), the Brussels II Regulation also establishes the possibility of extraterritorial jurisdiction.

There is limited scope for arguing that the parent company could not foresee disputes relating to corporate abuses abroad when based in its home State. The fact that parent companies are based in European nations, manage operations globally and supervise the activities of their subsidiaries from Europe suggests that European courts are an appropriate forum for solving disputes involving a parent company as a defendant. Even when companies domiciled in European countries choose to conduct operations abroad, the political and economic link with the home State persists, subjecting them to the regulatory requirements established by their home States. The choice of European countries, especially England, as the jurisdiction to establish the headquarters of the corporate group, is often justified by the advantages obtained, such as stable politics, access to capital markets, economic expansion, and advanced corporate legislation. Therefore, it would not be unreasonable or unfair to expect the parent company of a transnational corporation domiciled in Europe to be liable to litigation in European courts.

International law regarding jurisdiction generally does not present itself as a significant barrier to regulating transnational business activities or holding companies accountable for human rights violations beyond their home countries. However, practical, and legal obstacles often intertwine with jurisdictional norms, often hindering effective accountability.

Extraterritorial litigation has its contributions to remedying victims and holding companies accountable. They are relevant for guaranteeing access to justice for victims and for the parent company to be held accountable. In this way, extraterritorial litigation guarantees wider access to jurisdiction by enabling litigation in the parent company's country, contributes to full access to justice, seen as the possibility of implementing a top-down deterrent effect. Since the parent company can be obliged to adopt positive measures to prevent human rights violations and environmental damage, the subsidiaries will also have to comply these measures indirectly.

In addition, a legal claim against the parent company gives victims the possibility of achieving more robust financial compensation, as the parent company generally has financial resources that are not available to the subsidiary to satisfy the claim.

Thus, extraterritorial litigation has an important role to play in holding companies accountable and applying an appropriate punishment. This has an "educational" effect. It makes companies take measures to prevent new human rights violations in the future. This is very important to prevent repeated damage and new victims. However, is extraterritorial litigation effective in remedying victims who have already suffered harm?

So far, it is not possible to affirm this. In none of the cases studied did the lawsuit reach a final decision holding the company responsible and compensating the victims. In similar previous cases, it has been seen that companies reach agreements with the victims to avoid a conviction. These agreements provide financial compensation to the victims from the parent company, which appears to be more satisfactory than a response from the subsidiary only.

However, there are several obstacles to pursuing extraterritorial litigation: the difficulty victims have in proving the link between the subsidiary and the parent company is the biggest one. The delay resulting from the discussion about the legitimacy of the court to judge, the distance of the victims from the place of judgment and the financial costs of this, are other significant obstacles.

Furthermore, in these disputes, the law applied is that of the country of the damage, and it will be applied by a judge from another state, who speaks another language, is not part of the social, economic and political reality of that place, does not know the jurisprudence, doctrine and the way the laws are interpreted in that country, does not live the culture and customs of that country, is a totally alien person. In this context, could this judge give a fair verdict, appropriate to the victim's reality?

When the problem is exactly the law? when the country in which the damage occurred is the country chosen by the company to set up its subsidiary, precisely because it is a country with lenient, or even non-existent, laws. Why apply this law?

We cannot accept impunity for transnational corporate violators and the suffering of victims without remedy. We cannot accept only domestic trials, punishing only the subsidiary (created for this purpose), hiding the parent company under the corporate veil, and providing victims with derisory financial compensation.

Faced with this panorama, it is proposed to development an international rule that could be applicable in cases of extraterritorial litigation involving human rights violations by companies. The international treaty on Business and Human Rights, currently under development at the UN, seeks to establish global parameters on the subject. It would be appropriate to draft an annex or appendix to the treaty establishing procedural and substantive standards that should be applied in cases of extraterritorial litigation.

In this way, there would be greater legal certainty, with the application of the same standard regardless of the state and the uniformity of procedure. The time spent arguing in the courts about the legitimacy of the jurisdiction for the trial would be eliminated. The applicable legislation would be the same for all countries that are signatories to the treaty, eliminating the time spent studying the legislation of another country.

This proposal would also benefit companies, as they would have to adapt to a single standard applicable to both the parent company and its subsidiaries, instead of different laws in the various countries in which they operate.

Extraterritorial litigation has a positive impact on the protection of human rights, since it provides access to justice and has a dissuasive effect by leading to the possibility of punishing the parent company, with the potential to prevent future violations. By holding the parent company directly responsible, the initiative extends to other companies linked to it in the exercise of economic activity. However, it cannot be claimed that extraterritorial litigation is effective in compensating victims who have already suffered the damage, given the various barriers examined in this study. To achieve an adequate remedy for victims, the applicable law in cases of extraterritorial litigation should be a single international law. This would guarantee victims access to effective remedy and full justice. In addition to establishing legal certainty for both victims and companies.

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