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Is the inclusion of corporations in the crime of ecocide and consequently in the Rome Statute imperative to prevent accountability gaps in its prosecution?

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Abstract

Amidst the discussion if the crime of ecocide should be included in the Rome Statute as the fifth international crime, this research examines the role corporations play in the degradation of the environment and violation of human rights and if sanctioning harmful corporate conduct is provided for in the latest draft for the crime of ecocide by the Independent Expert Panel. It assesses if the Rome Statute, in its current form, contains adequate tools to prosecute corporations for potentially committing ecocide. It explores a possible extension of the jurisdiction of the International Criminal Court to legal entities by looking into the historical evolution of holding legal entities criminally responsible and finds seeds for corporate criminal liability as early as in the Nuremberg Trial. It compares different models for corporate criminal liability and finds that ultimately, criminal corporate conduct is rooted in corporate "culture" which gives ground for holding the legal entity itself liable and not only its individual members. It furthermore explores the transformative potential of reparation orders and concludes that reparations might deter corporations more effectively than sanctions.

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1. Introduction

With a growing climate emergency, global warming, and biodiversity loss our existence and that of other species is endangered. Increasing efforts have been made to contain the effects of actions that are detrimental to our environment through criminal law. In recent years, the movement that has been advocating to include environmental harm as a standalone crime in the International Criminal Court (ICC) has been gaining significant momentum[1] and started in April 2010 with English barrister, Polly Higgins, submitting a proposal for the crime of ecocide to the International Law Commission (ILC).[2] The term "ecocide" was coined by Arthur Galston, a US biologist, who used the term to describe the effect the herbicide agent orange had on the jungle in Vietnam, Laos and Cambodia.[3] Agent Orange was let off the planes of the US army with the aim to kill as much of the forest as possible to remove the hiding space for militant groups.[4] The jungle has yet to recover from the attack. Although environmental destruction appeared in the draft that was later to become the Rome Statute as a standalone crime, it was not until 2010 when Polly Higgins presented her draft to the ILC that the idea was picked up again and the movement became what we know it as today. In June 2021 an independent panel of environmental and criminal lawyers came together to draft a proposal for a possible crime of ecocide.[5] In December 2021 the Pacific Island of Vanuatu proposed expanding the Rome Statue to include ecocide as its fifth crime during the Assembly of States Parties. It remains to be seen if the subject will be picked up again at the next Assembly of States in December 2022.

What puts environmental protection in the context of international law is that the Climate Crisis is transboundary. If only a few states commit to seriously mitigating the effects of Global

[1] Stop Ecocide International, 'Making Ecocide a Crime' (*stopecocide.earth*) <https://www.stopecocide.earth/making-ecocide-a-crime>.
[2] Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime, Law and Social Change 251, 257.
[3] Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30 Fordham Environmental Law Review 9 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr>.
[4] Working Group under the supervision of Professor Laurent Neyret, *FROM ECOCRIMES TO ECOCIDE PROTECTIN THE ENVIRONMENT THROUGH CRIMINAL LAW* (2015) 98 <https://blog.uclm.es/repmult/files/2021/01/EcocideGB-072016.pdf>.
[5] Stop Ecocide International, 'LEGAL DEFINITION OF ECOCIDE COMPLETED' (*stopecocide.earth*, June 2021) <https://www.stopecocide.earth/expert-drafting-panel#>.

Warming, the harm will hardly be contained. Additionally, unlike the other core international crimes, ecocide does not discriminate against religion, ethnicity, nationality, or sex but is an attack on humanity. Genocide, for example, requires the special intent to destroy a group in total or in part and mass rape is often considered a crime against humanity and disproportionately affects women but the commission of ecocide affects an already fragile planet as a whole. The legal tools we have so far protect the environment in relation to us human beings. Nature is protected, if human rights are infringed upon like the right to life, health, water, food or sanitation which makes international law anthropocentric. This is especially dangerous, because often, the harm that is done to our environment remains undetected, e.g., we are only aware of increasing greenhouse levels in a certain area, if we measure them. Unlike us humans, nature is a voiceless victim. Therefore, there is an urgent necessity for an ecocentric crime, one that protects the environment and other living creatures for the sake of their protection. The concept of ecocentrism does not exclude human rights, it simply integrates the needs of human beings into the needs other living creatures and the planet itself.[6] An ecocentric crime is a holistic approach to sanctioning harmful conduct towards our environment. An assessment of the current expert panel draft of the crime of ecocide, especially if it is ecocentric or not, is not part of this research and an ecocentric version of the crime will be assumed.

In a webinar organised by the American Society of International Law Charles C. Jollah commented on the criticism of the exclusion of corporate activity as such in the expert panel draft, admitting that the expert panel was very well aware of the dominant role corporation play in the commission of ecocide.[7] However, the panel feared that their inclusion would decrease the chances of ecocide being admitted into the Rome Statute by the State Parties as an amendment of the Statute requires a two-third majority according to article 121. He took article 46 C annexed to the Malabo Protocol as an example of how States are hesitant to implement corporate criminal liability in international law. Although the Protocol and its annex are the result of multilateral negotiations, to date article 46 C has not been ratified by a single state. Kate Mackintosh added that she believes prosecuting the persons behind the corporations, the

[6] John Nolt, 'Anthropocentrism and Egoism' (2013) 22 Environmental Values 442 <https://www.jstor.org/stable/23460944>.
[7] American Society of International Law, 'An International Crime of Ecocide: The Proposal, Future Opportunities, and Challenges', *Webinar* (November 2021) 35:05-36:02 <https://www.asil.org/international-crime-ecocide-proposal-future-opportunities-and-challenges>.

corporate officers, leads to a higher deterrence effect.[8] If managers have to fear personal liability, having to stand trial next to persons who have committed genocide, crimes against humanity or war crimes and possibly having to serve their sentence in a prison, they will more likely refrain from harmful practices than if they can hide behind the corporation. While it is true that an inclusion of corporate criminal liability would make the introduction of ecocide into the Rome Statute highly unlikely, it does not diminish the fact that the majority of pollutants are attributable to corporations and some of the world's largest corporations are simultaneously the so-called Carbon Majors, the biggest carbon producers. Further, corporate structures have grown increasingly complex to the degree, where it becomes impossible for the prosecutor to make out which of the corporate officer is legally responsible for the crime and the decentralisation and breaking down of decision-making processes calls for a revision of the modes of liability that are currently in the Rome Statute. This research does not aim to make realistic suggestions and realises that an overhaul of the Rome Statute will in all certainty not take place in the next years. Rather, it aims at examining if and what legal amendments would be necessary if the State Parties were united by a political will to hold corporate criminal conduct accountable.

Oftentimes, when corporations engage in harmful conduct, they reframe their practices to make it appear as if they serve a greater good.[9] This form of justification and neutralisation minimises their social responsibility. When Shell, for example, called for assistance in containing the disturbance coming from MOSOP, knowing the authorities used lethal force to quiet the protests, they justified the brutal removal of the protestors as serving he greater good of protecting the state from economic losses.[10] How corporations define the greater good is flexible. If ecocide is introduced as the fifth international crime, environmental harm cannot be reframed as serving a higher good. Ecocide will introduce a new international standard that corporations have to follow. Research in the field of Corporate Social Responsibility has found that in order to comply with international standards corporations need more than only "do no evil" policies, meaning only refraining from harmful behaviour. They need to establish policies and means that enable the corporate officers and employees to adequately make responsible

[8] ibid 36:49-37:45.
[9] Enes Al Weswasi, 'Spending Blood for Oil in Nigeria: A Frame Analysis of Shell's Neutralisation of Acts That Led to Corporate-Initiated State Crime' (2019) 106 Nordisk Tidsskrift for Kriminalvidenskab 280, 280.
[10] ibid 294.

decisions and assess risks actively and continuously.[11] So far attempts to contain the increasing power of corporations have largely focused on soft law, however these instruments are non-binding and do not contain any sanctions[12] apart from the possible reputational damage the corporation will suffer if its irresponsible practices come to light. Non-binding instruments set little incentives to introduce these policies. Being held accountable through investigations of the Chief Prosecutor has a symbolic meaning that not only deters corporation from engaging in harmful conduct but maybe leads to an overall improvement of business-practices and corporate "culture" towards sustainability and ethical decision-making.

This research will examine if embedding the corporate conduct that amounts to "ecocide" in international criminal law is necessary, specifically, if domestic corporate criminal liability is sufficient to protect our planet, if administrative law has an equally powerful deterrence-effect and if international criminal law even allows for corporate criminal liability based on how it evolved historically. Further, it will be assessed if already existing provisions in the Rome Statute are suitable to hold corporations accountable for their harmful conduct and if the *mens rea* of corporations can be determined with the same concepts that we use to determine the *mens rea* of natural persons or if these are inherently human and we need to establish new concepts to capture the wrongdoing of legal entities. This research will use an explanatory and reform-oriented approach to examine if the exclusion of corporations from the current draft for the crime of ecocide by the expert panel leads to impunity and ineffective prosecution of the future crime. The qualitative research will consist of multidisciplinary desk research by reviewing the existing literature in the fields of law, psychology, history, and social science to analyse if international criminal law is the correct legal field for corporate criminal liability, why the international community was hesitant to include it in the final Rom Statute and how the *mens rea* can be applied to legal entities. This research will add to the research that has already been conducted on this topic, the multidisciplinary approach, as well as, by overlooking the political limitations, an outlook into how corporate criminal liability could be implemented, if states were unified in this regard.

[11] David Scheffer and Caroline Kaeb, 'The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory' (2011) 29 BERKELEY JOURNAL OF INTERNATIONAL LAW 65, 383.
[12] Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010) 12 <https://ub.unibas.ch/tox/GBV/621099880/PDF>.

2. Should corporations be included in the crime of ecocide?

The latest draft by the Stop Ecocide Foundation, an expert drafting panel of 12 international criminal and environmental lawyers, defines "ecocide" as "an unlawful or wanton act committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts" (Art. 8 ter (1)).[13] This definition does not exclude corporate activity *per se*, however, in Art. 8 ter (2) "wanton" is defined as "reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated". This implies that damage is justified as long as there are economic benefits expected which factually excludes a number of environmentally harmful activities committed by corporations. The 2017 report of CDP made the shocking revelation that just 100 corporations are responsible for 71 % of the global greenhouse gas emissions.[14] The report points out that by 1988 corporations in the fossil fuel industry were aware of the impact their activities had on the environment, nevertheless continued with their excessive extracting practice, barely investing in more sustainable alternatives like renewable energy sources. Only recently, in 2021, Shell was convicted for its contribution to global warming by the Dutch District Court in The Hague and ordered to a reduction of greenhouse gas emissions by 20% by 2030 and "net-zero" by 2015, which is an incentive to invest in renewables – but shell appealed[15], and the appeal will likely be upheld. Most environmental scandals in recent years involve corporate activity like the Deepwater Horizon oil spill, the Texaco/Chevron oil dumping in the Ecuadorian rainforest or the ongoing deforestation in the Amazon. The *de facto* exclusion of corporations will pose a significant difficulty in prosecuting the crime of ecocide. While it is generally expected that corporations are held criminally liable in the respective domestic legal systems, a report for the UN High Commissioner for Human Rights concluded that there are several factors that impede criminal prosecution of corporation among these are "significant legal uncertainty surrounding the scope of key liability concepts, unevenness in

[13] Expert Panel, 'Independent Expert Panel for the Legal Definition of Ecocide: COMMENTARY AND CORE TEXT' (*STOP ECOCIDE FOUNDATION*, June 2021) 5 <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf>.
[14] Paul Griffin, 'CDP Carbon Majors Report 2017' (2017) 8 <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772>.
[15] Shell plc, 'Shell Confirms Decision to Appeal Court Ruling in Netherlands Climate Case' (*Shell.com*, 20 July 2021) <https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html>.

distribution and use of domestic remedial mechanisms, some political concerns over extraterritorial regulatory and enforcement issues and a general lack of international coordination and cooperation".[16] Additionally, several states do not hold corporations criminally liable in their domestic legal systems but opt for civil and tort-based claims instead.[17] The effectiveness of these remedies is often impacted by the so-called corporate veil, the legal separation between the parent company and its subsidiaries. Corporations operating in the environmental and natural sectors oftentimes hide behind the corporate veil and escape responsibility.[18] Especially in the resource extracting sector companies are split into subsidiaries which creates a completely different legal entity and makes it difficult to prosecute the harm that is committed.[19] Companies take advantage of this legal gap and deliberately decide to organise themselves in a way that hampers investigations of authorities and excludes their accountability which leads to the costs and effects of their conduct being distributed among the victims and the public.[20]

2.1. A legal gap that leads to impunity

Corporations increasingly hold functions that traditionally are reserved for states.[21] Subsequently they should hold similar responsibilities, however, in international law states are the primary duty-bearers who are to respect and protect human rights.[22] With their increasing

[16] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses - Towards a Fairer and More Effective System of Domestic Law Remedies' (2013) 114 <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf>.

[17] Photeine Lambridis, 'CORPORATE ACCOUNTABILITY: PROSECUTING CORPORATIONS FOR THE COMMISSION OF INTERNATIONAL CRIMES OF ATROCITY' (2021) 53 New York University Journal of International Law and Politics 145 <https://www.nyujilp.org/corporate-accountability-prosecuting-corporations-for-the-commission-of-international-crimes-of-atrocity/>.

[18] Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 220 <https://link.springer.com/10.1007/s10609-020-09393-y> accessed 16 April 2022.

[19] Beate Sjåfjell, 'Environmental Piercing of the Corporate Veil: The Norwegian Supreme Court Decision in the Hempel Case' (2010) 7 European Company Law 154, 2.

[20] Mikiel Calleja and Simone Borg, 'PIERCING THE CORPORATE VEIL: Greening Companies' Governance and Shareholder Activism' (2016) 7 IUCN AEL Journal of Environmental Law 39 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjToNDhivn4AhXvxoUKHWfQCh4QFnoECAgQAQ&url=https%3A%2F%2Fwww.iucnael.org%2Fen%2Fdocuments%2F1296-piercing-the-corporate-veil&usg=AOvVaw085r3xTCtrAv3s5m2A80Vz>.

[21] Mohammed Saif-Alden Wattad, 'NATURAL PERSONS, LEGAL ENTITIES, AND CORPORATE CRIMINAL LIABLITY UNDER THE ROME STATUTE' 20 UCLA Journal of International Law and Foreign Affairs 391, 411.

[22] David Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (2016) 23 Indiana Journal of Global Legal Studies 144 <https://www.jstor.org/stable/10.2979/indjglolegstu.23.1.143>.

power and increasing opportunities to engage in harmful conduct corresponding increasing responsibilities under international law have failed to materialise.[23] Instead, they have been complicit in human rights abuses by states, have benefitted from violent regimes and have played a key role in enabling them to hold their power.[24] Furthermore, in many cases of direct human rights abuses, corporations enjoy a high level of immunity.[25] Neither the host state nor the home state show eagerness to investigate. In their attempt to limit costs and increase their profit, many corporations outsource their production to countries where labour rights, laws that protect the health and safety of everyone involved and environmental protection are treated laxly.[26] Host states have little incentives to implement binding legislation to combat violations of human rights by foreign corporations on their territory because the pressure to remain competitive outweighs human rights and environmental concerns. They feel pressured to attract foreign investors and foster development. Additionally, states have to abide by free trade regulations of the WTO and other organisations which can be an impediment for passing stricter and more protective legislation.[27] The desire to participate in development and increase domestic economies caused the so-called race to the bottom – a progressive lowering of protective legislation concerning human rights and environmental protection.[28] Whether stable economies lead to an improvement of human rights is an open question, but fragile economies contribute to their deterioration. Therefore, some governments have their hands tied. This phenomenon is called the "enforcement dilemma"[29] as the governments have to make a choice if to interfere with the corporate activity and risk losing necessary investment or protect the rights of their citizens but stall development. It is causing a "legal gap"[30] as there are two legal systems that could interfere when corporations act in destructive ways towards human rights

[23] Carlos Manuel Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 Columbia Journal of Transnational Law 948 <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1987&context=facpub&httpsredir=1&referer=>.
[24] Wattad (n 21) 411.
[25] ibid.
[26] Regina E Rauxloh, 'A Call for the End of Impunity for Multinational Corporations' (2007) 14 Texas Wesleyan Law Review 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878552>.
[27] Andreas Bieler and others, 'Conclusion: Towards Transnational Solidarity on "Free Trade" Policy?' (2014) 11 Globalizations 155, 159.
[28] Rauxloh (n 26) 1.
[29] Carsten Stahn, 'Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law' (2018) 50 Case Western Reserve Journal of International Law 107 <https://www.ssrn.com/abstract=3127843>.
[30] Lynn Verrydt, 'Corporate Involvement in International Crimes: An Analysis of the Hypothetical Extension of the International Criminal Court's Mandate to Include Legal Persons' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 283.

and the environment, but neither sees itself fit to step in. Furthermore, the host state might lack the legislation, judicial means or an equipped prosecution to intervene.[31] Even though many states have included corporate accountability in some form in their domestic jurisdictions, they refrain from investigating when human rights are violated by their corporations abroad.[32] Additionally, an intervention by the home state poses the much-debated question of an extraterritorial application of human rights and while it might not be prohibited to bring the domestic corporation to justice, home states refrain from becoming active for numerous reasons. It is a diplomatically sensitive matter as it might imply poor leadership or even complicity of the host country.[33] Beyond that, for an investigation from the distance the prosecutor needs to have access to resources like evidence gathering abroad which are much rather provided for issues at home.[34] Further, often the acting company is a subsidiary of the parent company that is seated in the home state and the companies are deliberately legally separated which makes it extremely difficult to pierce the "corporate veil".[35] With both home and host state remaining inactive, a "legal vacuum" is created which allows corporations to accumulate power and cause harm without having to fear repercussions for their actions.[36] International criminal liability therefore would party fill the legal vacuum and together will the other legal efforts that are being made like soft law introduction like the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles (UNGP) or civil tort litigation in many states fill the legal gaps that have allowed for corporate impunity until now.

2.2. How corporations have abused their power in the past

How corporations have used the legal vacuum to their advantage to accumulate power and enjoy immunity for the harm committed can be illustrated by the textbook example of Royal Dutch Shell plc's activities in Ogoniland in Nigeria. Starting in 1958, Shell had its largest extraction site outside of North America in Nigeria[37] that led to the degradation of the areas around the extraction sites to a degree that scientists believe to be irreversible.[38] The 2011 report by the

[31] ibid 284.
[32] Stoitchkova (n 12) 18.
[33] Rauxloh (n 26) 7.
[34] ibid.
[35] ibid.
[36] Verrydt (n 30) 284.
[37] Weswasi (n 9) 282.
[38] Aniefiok E. Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1 American Journal of Environmental Protection 78, 85; Cleverline T Brown

UNEP called the clean-up efforts of Shell insufficient and breaching not only environmental law but shell's own policies and went even as far as calling the designated are around the Niger Delta uninhabitable.[39] When the local Ogoni people organised themselves to protest the damage done that impacted their livelihood gravely[40], these protests were brutally and lethally suppressed by MOPOL, the Nigerian paramilitary[41]. Consequently, Shell was accused of complicity in these violations of human rights. Shell enjoyed close ties with the Nigerian government and as revealed in Wikileaks documents from 2010, deliberately deployed its employees in important decision-making departments taking authoritative functions to swing decision-making processes to its favour.[42] This made it impossible for the local community to participate in decision-making and use their democratic rights. Shell was complicit when the Nigerian paramilitary brutally suppressed protests of the Ogoni people against the excessive extracting practices of Shell and its subsidiary in Ogoniland that destroyed their livelihood[43]. Amnesty International published documents that reveal Shell requesting the Nigerian authorities to quell the disturbances caused by the protestors, implying that the country will suffer financial losses if the corporation cannot resume their businesses undisturbed[44] being aware of the brutal approach of the paramilitary[45]. The Scholars go even further than calling Shell's role in the lethal suppression of protests as complicit and categorise it as "corporate-initiated state crime".[46] The corporation used its leverage to make states violate human rights to the corporation's benefit. The court rejected the lawsuit because of insufficient evidence in March 2022.[47] Prior cases, like the one before US courts based on the Alien Tort Statute, were

and Nlerum S Okogbule, 'Redressing Harmful Environmental Practices in the Nigerian Petroleum Industry Through the Criminal Justice Approach' (2020) 11 Journal of Sustainable Development Law and Policy 18, 52.

[39] UNEP, 'Environmental Assessment of Ogoniland' (United Nations 2011) 2–4, 145 <https://www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report>.

[40] Christof Heyns and Magnus Killander (eds), *COMPENDIUM OF KEY HUMAN RIGHTS DOCUMENTS OF THE AFRICAN UNION* (6th Edition, Pretoria University Law Press (PULP) 2004) 321.

[41] Weswasi (n 9) 283.

[42] ibid 285.

[43] Heyns and Killander (n 40) 321.

[44] Weswasi (n 9) 288.

[45] Amnesty International, 'IN THE DOCK: SHELL'S COMPLICITY IN THE ARBITRARY EXECUTION OF THE OGONI NINE' (2017) <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4466042017ENGLISH.pdf>.

[46] Weswasi (n 9) 289.

[47] 'Nigeria: Dutch Court Rejects Suit of "Ogoni Nine" Widows against Shell' (*Business & Humann Rights Resource Centre*, 23 March 2022) <https://www.business-humanrights.org/en/latest-news/nigeria-dutch-court-rejects-suit-of-ogoni-nine-widows-against-shell/>.

dismissed, as well.[48] Similarly, in 1996 the U.S. corporation Unocal had a complicit role in the use of forced labour, rape and murder by the Burmese military that was contractually obligated to oversee the construction sites of the gas pipeline.[49] Later, the corporation was sued by victims and held liable through the Alien Tort Statute. Numerous corporations in the textile industry, like Nike or Wal-Mart have been accused of indirect complicity in employing child labour in their production chain and remaining inactive despite being aware of the human rights violation.[50] Yahoo went even further and was directly complicit in the torture of Chinese dissidents by handing over confidential information to the Chinese government.[51] These examples illustrate how corporations are able to exploit the legal vacuum and, in some cases, actually do and consequently commit major human rights abuses and environmental harm.

2.3. Why we need an international standard

Even if laws are in place that restrict corporate activity and protect the surrounding environment, for corporations it is mostly more advantageous to include the fines in their yearly accounting and pay them instead of implementing extensive policies to avoid environmental harm.[52] They enjoy an extensive set of rights and privileges and take on tasks that are usually reserved for states. R. C. Slye draws a parallel to states when arguing for corporate criminal liability. Similar to why we introduced human rights with states as duty bearers, we need a tool to condemn the violation of protective laws because of the concentration of power in states and corporations.[53] Environmental issues typically transcend national borders. Therefore, relying on national jurisdictions when it comes to holding corporations accountable for the ecological harm they commit, is not enough to contain the effects of global warming and resource depletion.[54] What is more important is, that it not only leads to a prohibition of harming the

[48] 'KIOBEL V. SHELL' (*The Center for Justice & Accountability*) <https://cja.org/what-we-do/litigation/amicus-briefs/kiobel-v-shell/>.
[49] Robert C Thompson, Anita Ramasastry and Mark B Taylor, 'TRANSLATING UNOCAL: THE EXPANDING WEB OF LIABILITY FOR BUSINESS ENTITIES IMPLICATED IN INTERNATIONAL CRIMES' 40 The George Washington International Law Review 2009, 841 f.
[50] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237, 242.
[51] Florian Wettstein, 'The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy' (2010) 96 Journal of Business Ethics 33, 36.
[52] Jacqueline Hellmann, 'The Fifth Crime Under International Criminal Law: Ecocide?' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 274 <http://link.springer.com/10.1007/978-3-319-05993-8> accessed 4 June 2022.
[53] Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33 Brooklyn Journal of International Law 961 <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1205&context=bjil>.
[54] Hellmann (n 52) 277.

environment on a mass scale but also to an "appearance of an obligation" to protect it.[55] Moreover, states chose different ways to implement legislation that protects the environment. While some have resorted to criminal law, others use administrative measures while again others regulate with civil tort laws. This impedes the cooperation between the states that could facilitate investigations in corporate environmental crimes.[56] This lack of cooperation was what Zerk found as one of the reasons why holding corporations accountable for their criminal conduct on the domestic level has so far proven inefficient in her report for UNHCR.[57]

2.4 Why administrative law is not as effective as criminal law

Many states prefer administrative laws to sanction environmentally harmful behaviour and matters are brought before criminal courts only when the corporations do not abide by the sanctions imposed by authorities.[58] Environmental crimes therefore usually are an "appendix to administrative law".[59] There is a reluctance to harmonise the domestic legislations on environmental protection and impose criminal sanction for environmentally harmful conduct. Criminal law is seen as the last resort of states to condemn certain behaviour and only when other measures like civil or administrative regulations do not show the intended effect, the behaviour is criminalised ultima ratio.[60] Some scholars believe, that the criminalisation of corporate conduct that harms the environment is not necessary and that administrative regulations are not only sufficient but more efficient in preventing harmful behaviour.[61] Because the prosecution of crime is cost-intensive, imposing administrative sanctions is seen as more cost-efficient and consequently implies that more corporations will be sanctioned since the authorities do not have to focus on singular cases like a resource-sensitive prosecutor does.[62] This is further enforced through the lower threshold for evidence that is required in

[55] ibid.
[56] Ricardo Pereira, 'Chapter 7: Could the Harmonisation of Environmental Criminal Law Improve the Enforcement of Environmental Law?', *Environmental Criminal Liability and Enforcement in European and International Law* (Brill | Nijhoff 2015) 342 <https://brill.com/view/title/19665> accessed 1 July 2022.
[57] *See* Zerk, *supra* note 3.
[58] Reece Walters, 'Chapter 6: Eco Crime', *Crime: Local and Global* (Routledge 2014) 179.
[59] Michael Faure, 'THE REVOLUTION IN ENVIRONMENTAL CRIMINAL LAW IN EUROPE' (2017) 35 Virginia Environmental Law Journal 322 <https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/53403868/Faure_2017_THE_REVOLUTION_IN_ENVIRONMENTAL_CRIMINAL_LAW.pdf>.
[60] Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 Oxford Journal of Legal Studies 207, 220.
[61] MG Faure and K Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24 Journal of Environmental Law 259 <https://academic.oup.com/jel/article-lookup/doi/10.1093/jel/eqs005>.
[62] ibid.

administrative law.[63] Another reason why administrative sanctions could be better suited to pursue environmentally damaging behaviour is that particularly for this conduct designated departments would have the required expertise to adequately assess and sanction said behaviour as opposed to the prosecutor and the judge.[64] However, research done by the European Commission for the Proposal for a Directive on the protection of the environment through criminal law in 2007 concluded that already implemented sanctions in the Member States were not enough to implement the EU's policies on environmental protection and that only criminal sanctions would achieve the desired deterrence.[65] Not all Member States had introduced criminal law to implement the policy and those that did, had discrepancies in the way they implemented individual crimes which resulted in identical conducts being handled differently in each state. Given that environmentally harmful acts cross borders, the commission called for a harmonisation of criminal law because criminalising certain conduct mirrors the social disapproval that is necessary to condemn environmental damage that cannot be achieved through administrative or civil sanctions. This shows shortcoming in their deterrence effect, especially when the perpetrators are economically strong. Finally, including a prosecutor in the investigations would guarantee impartiality as administrative personnel has granted licences for environmentally harmful activities before and would be subject to criminal investigations now, too. Furthermore, contra to criminal law, where the prosecutor investigates and the judge decides on the culpability and the sanctions, administrative authorities unite both functions which violates the principle to separate who investigates and who sanctions.[66] Additionally, while it may less cost-intensive to impose administrative sanctions because of the lower evidence threshold and therefore more corporations can be supervised, procedural guarantees like evidence standards and the possibility to appeal the judgment of the accused are undermined.[67] The European Commission went even further and countered the claim that administrative measures are less resource-intensive as convictions are more likely to prevent the commission of further crimes.[68] This, too, was confirmed by the research done by the Max

[63] ibid 258.
[64] Pereira, 'Chapter 7: Could the Harmonisation of Environmental Criminal Law Improve the Enforcement of Environmental Law?' (n 56) 296.
[65] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law * COM/2007/0051' <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007PC0051&from=NL>.
[66] Pereira, 'Chapter 7: Could the Harmonisation of Environmental Criminal Law Improve the Enforcement of Environmental Law?' (n 56) 298.
[67] ibid 300.
[68] European Commission (n 65).

Planck Institute for Foreign and International Criminal law that found that administrative and civil measures are not as effective as criminal law.[69] As for the argument that the prosecutor and the judge lack the required expertise in environmental regulations and technicalities to present and decide on a case, it is not unusual for administrative authorities to cooperate with and assist judicial personnel.[70] One of the functions of criminal law is its deterrence effect. It is supposed to manifest in two ways: there is general deterrence to prevent everyone from committing the crime and individual deterrence that aims to prevent the perpetrator from committing another crime.[71] To deter the potential perpetrator, the expected sanction in case of being caught must be worse than the profit they will make from committing the crime, in other words, the "expected punishment costs" have to be higher.[72] Establishing a criminal framework for environmental crimes is crucial because they are very profitable and simultaneously rarely detected. They therefore attract those perpetrators that were successfully deterred from engaging in other highly profitable but more easily detected crimes like drug trafficking or money laundering.[73] However, most environmental crimes are committed by corporations and not "career-criminals". But, here too, the deterrence effect of criminal law comes into play when corporate officers fear imprisonment and the corporation loses its reputation because of the stigma that comes with being convicted.[74] Criminal law attaches "social blame" to the actions and restores the public's faith in the social norm.[75] Administrative and civil fines, on the other hand, can be incorporated more easily in the general expense calculation and be passed on to the consumers. Accordingly, imposing criminal liability will make the state become active and investigate the crime with its resources as opposed to the victim having to shoulder a case against a corporation, bring the required evidence and financially bear the legal costs.[76]

[69] Marc Engelhart, 'Corporate Criminal Liability from a Comparative Perspective' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 66.
[70] Pereira, 'Chapter 7: Could the Harmonisation of Environmental Criminal Law Improve the Enforcement of Environmental Law?' (n 56) 297 f.
[71] Ricardo Pereira, 'Chapter 2: The Role of the Criminal Law for the Protection of the Environment', *Environmental Criminal Liability and Enforcement in European and International Law* (Brill | Nijhoff 2015) 64 <https://brill.com/view/title/19665> accessed 1 July 2022.
[72] Ricardo Pereira, 'Chapter 6: The Harmonisation of Substantive Environmental Criminal Law and Penalties', *Environmental Criminal Liability and Enforcement in European and International Law* (Brill | Nijhoff 2015) 283 <https://brill.com/view/title/19665> accessed 1 July 2022.
[73] Pereira, 'Chapter 2: The Role of the Criminal Law for the Protection of the Environment' (n 71) 67.
[74] ibid.
[75] ibid 73.
[76] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Brill | Nijhoff 2001) 140 <https://brill.com/view/book/edcoll/9789004482678/B9789004482678_s008.xml> accessed 30 June 2022.

Criminalising corporate conduct that leads to environmental harm therefore is necessary to effectively mitigate the effects of our climate crisis. Introducing ecocide as an international crime does not exclude domestic prosecution where it is foreseen or regulating environmental protection through administrative law, it is rather another tool that fills a legal gap that enables environmental harm and as such makes a new contribution to the already existing tools because of its strong deterrence effect.

3. Is the Rome Statute suitable to hold corporations criminally accountable?

3.1 Historical development of corporate criminal liability

3.1.1. Principle of "societas delinquere non potest"

The notion that corporations as artificial entities are not able to commit crimes is based on the principle "societas delinquere non potest". It goes back to Pope Innocent IV who, in 1250, wanted to prevent having to excommunicate corporations and other legal entities for crimes committed by their members and translates to "legal entities cannot be blameworthy".[77] However, in 1886 US Supreme Court ruled in a case that corporations can be treated like natural persons and reinforced the decisions in 1909 by introducing the principle "societas delinquere potest", legal entities can be blameworthy. The idea of individualised guilt and the requirement of *mens rea* when crimes are committed might therefore have its origin in religious ideals that were further developed during Enlightenment and led to criminal law being solely based on human behaviour.[78] Since the 1909 US Supreme Court decision that cemented corporate criminal liability in the States has been increasingly implemented in domestic jurisdictions to the degree that some scholars believe the principle gradually lost its validity.[79]

3.1.2. "Industrialist Trials" in Nuremberg

Corporate Criminal Liability is no novelty in international criminal law either. As early as in the "Industrialist Trials" the possibility of corporate criminal liability was not ruled out. Corporate officers and employees of three corporations, Flick, Krupp and I.G. Farben, were tried for their contributions to the commission of international crimes during the Second World War. The "Industrialist Trial" succeeded the International Military Tribunal and were held on the U.S. controlled sector in Nuremberg at the Palace of Justice, where the Nuremberg Trials were held prior.[80] A statement that was made in one of the judgments declares that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[81]

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[77] Klaus Tiedemann, 'Corporate Criminal Liability as a Third Track' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 15.
[78] Engelhart (n 69) 58.
[79] Wattad (n 21) 398.
[80] Clapham (n 76) 166 f.
[81] Osama Alkhawaja, 'In Defense of the Special Tribunal for Lebanon and the Case for International Corporate Accountability' (2020) 20 Chicago Journal of International Law 459 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1775&context=cjil>.

This is seen by some scholars as a confirmation that international criminal law is not the right tool to hold corporations accountable for harmful behaviour and as the reinforcement of the principle "societas delinquere non potest". Kolieb, however, argues that this is a premature conclusion to draw and that the meaning of this statement depends on which perspective one takes when examining if corporations can be subjects of international criminal law. This explains why the Nuremberg Trials are used by scholars as arguments that support the inclusion of legal entities and those that oppose it, simultaneously. As recently as in 2010 in the judgment of the Second Circuit Court of Appeals in the case Kiobel v. Royal Dutch Petroleum (Shell) the judgments of the Industrialist Trials were drawn on to support both sides.[82] What those scholars that interpret the Nuremberg Trials to have excluded corporate criminal liability per se, see as clear indicator, is that the judges had the mandate to assess whether the legal entities were "criminal organisations" according to article 9 of the London Charter but refrained from doing so.[83] If you look at the Nuremberg Trials through this "judicial lens", the judges cemented the individual responsibility as the cornerstones of international criminal law.[84] However, he believes that the statement is widely misunderstood and suggests a wider "legal lens".[85] The statement was not made to narrow criminal responsibility down to individuals but to widen the scope of international law from only sovereign states to individuals, as well, in order to sanction the real perpetrators of the crime as opposed to the abstract entity "state".[86] The rationale was to apply international law to other subjects than states. According to his interpretation of the statement, the Nuremberg trials did not reinforce the principle of "societas delinquere non potest", on the contrary, made room for the inclusion of legal entities in international criminal law by widening the scope of who is culpable, to sanction the wrongdoing adequately. Moreover, the culpability of the corporate officers was derived from the wrongdoings of the corporations themselves.[87] In the trial against corporate officers of I.G. Farben, for example, the judges inferred that the corporation hat violated international law and its officers and employees were complicit in the commission of the crimes. They went even further in the trial against Krupp, stating that the corporation itself had "collective intent" when slave labour was

[82] Jonathan Kolieb, 'Through The Looking-Glass: Nuremberg's Confusing Legacy On Corporate Accountability Under International Law' (2015) 32 American University International Law Review 578 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957270>.
[83] Stoitchkova (n 12) 47–49.
[84] Kolieb (n 82) 585 f.
[85] ibid 587.
[86] Scheffer and Kaeb (n 11) 362; Kolieb (n 82) 590.
[87] Clapham (n 76) 171.

used in its factories.[88] The culpability of the individual corporate officers was therefore rooted in the corporation's violation of international criminal law.[89] The culpability of the individual officers and employees originated from the culpability of the corporation but simultaneously, the actions of the officers and employees is what constituted the corporation's violation of international criminal law. The judgment in the case against I.G. Farben stated that they used the corporation as an instrument to commit the crimes.[90] Interestingly, the judgment points out that they instrumentalised the corporation individually but also collectively[91] which reinforces modern day findings that actions of one corporate officer alone rarely lead to the commission of crimes but it is a complex division of labour and the "corporate climate" that lead up to the *actus reus* and *mens rea*.

3.1.3. Discussions leading up to and during the Rome Conference

Even though states requested the International Law Commission to start drafting the Statute for a permanent criminal court in 1948 immediately after the Nuremberg Tribunal, a disagreement over the crime of aggression[92] brought the process to an end until when it was picked up again decades later.[93] In the meantime, the ILC continued with the drafting process. Already in 1984, the question was raised whether environmental destruction should be considered a crime.[94] In 1992 in The Draft Code of Crimes Against the Peace and Security of Mankind, the draft that would later become the Rome Statute, contained the environmental crime of wilfully and severely damaging the environment in its article 26.[95] On record only 3 parties opposed the inclusion of the crime in the draft[96] but when the Assembly cast its vote for the draft, article 26 had disappeared.[97] The Chairman of the ILC had decided to remove the article without further consultation.[98] Today, environmental destruction is included in the Rome Statute as a

[88] Kolieb (n 82) 588.
[89] Stoitchkova (n 12) 59; Kolieb (n 82) 590.
[90] Kolieb (n 82) 590.
[91] ibid.
[92] Greene (n 3) 15.
[93] Nuremberg Human Rights Centre, 'The Road to the International Criminal Court' (Federal Foreign Office Germany) 10 <https://www.corteidh.or.cr/tablas/24618.pdf>.
[94] Greene (n 3) 15.
[95] ibid.
[96] Vanessa Schwegler, 'The Disposable Nature: The Case of Ecocide and Corporate Accountability' (2017) 9 Amterdam Law Forum 75 <https://www.researchgate.net/publication/340942545_The_Disposable_Nature_The_Case_of_Ecocide_and_Corporate_Accountability>.
[97] Greene (n 3) 16.
[98] Schwegler (n 96) 75.

substantiation of war crimes in Art. 8 (2) (b) (iv). Just like ecocide was taken into consideration during the drafting process, the inclusion of legal persons as possible perpetrators was suggested, too.[99] In 1995, during the preparatory drafting process a working group was established that prepared the meetings of the Preparatory Committee that was responsible for the draft Statute.[100] The working group was most divided when the French delegation proposed including corporate criminal liability, however, found consensus and came up with a draft provision that was included in the draft Statute in brackets. France had already implemented criminal liability for legal persons domestically and wanted to prevent the lenient treatment of corporations during the Nuremberg trials and make sure that the ICC has the authority to declare them illegal and dissolve them.[101] In paragraphs 5 and 6 of draft article 23 the court was given jurisdiction over legal persons if the crimes were committed on behalf of the legal person or by its representative and the natural persons behind the legal entity.[102] The drafters, recognising that there was a moral need to ensure the behaviour of any entity is sanctioned, hoped for a deterrence effect for only profit-oriented corporations, but more than that, pragmatically found that legal entities would cover the financial sanctions if the natural person behind the crime is declared insolvent.[103] While the Industrialist Trials in Nuremberg were not authorised to prosecute corporations as such and made the statement that crimes are committed by natural persons[104], the judgements made clear that the corporate entities were ascribed 'collective intent' to violate international law and individual culpability was derived from there, the French proposal envisaged to incriminate the legal person on the basis of the culpability of the natural person.[105] It was viewed as unjust to impose criminality too hastily through collective guilt without establishing that someone was in fact guilty, since the verdict and the sanctions would punish anyone who is associated with the corporation.[106] According to the proposal, the convicted individual should have been in a position of decision-making or exercised some sort of control over the corporation which is one of the common models for imposing corporate criminal liability and will be discussed below.[107] The article caused further discussions during

[99] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 218.
[100] Stoitchkova (n 12) 14.
[101] Clapham (n 76) 146.
[102] ibid 143 f.
[103] Stoitchkova (n 12) 14.
[104] *See* Alkhawaja, *supra* note 59.
[105] Clapham (n 76) 175.
[106] ibid.
[107] *See infra* Chapter 3.

the Rome Conference in July 1998. The division was not so much over whether to widen the jurisdiction of the court to include legal entities, but more about how to implement it. The delegates found for example that sanctions that were in the draft so far were not sufficient to deter legal entities from committing a crime.[108] The draft included in its article 76 sanctions that would be applicable for legal persons only and contained fines, dissolution, prohibition, closure, forfeiture of proceeds, property and assets derived from the crime and reparation.[109] However, due to discord over the list of sanctions only the monetary fine was agreed upon which corporation could easily include in their annual cost-benefit analysis and decide that a violation of the statute would still pay off profitwise.[110] Others worried about procedural rights, while again others were willing to compromise in so far as to include administrative liability and again others were worried if the inclusion was not premature as there was a lack of an international standard. While some common law states were familiar with the concept of corporate criminal liability, it was fairly new to European continental legal systems.[111] Given that the court is based on the principle of complementarity, where it only investigates and prosecutes core international crimes when national jurisdictions are unable or unwilling to do so, states were not ready to harmonise their domestic laws to include criminal liability of legal persons. Nevertheless, states were willing to consider the idea but after the proposal had been watered down after each negotiation[112] the French delegation realised that the time had not yet come to include legal entities and withdrew its proposal[113] since there was not enough time to discuss it in plenum and they did not want to jeopardise the ratification of the Statute altogether.[114] However, the delegates acknowledged that excluding legal persons will present a problem in the future and proposed to follow up at a later date, when national jurisdictions had gained more clarity on and experience in prosecuting legal entities to ensure a smoother process of finding consensus among the states.[115] It was acknowledged that the exclusion might lead to impunity gaps as Mr. Saland, the deputy head of the Swedish delegation, called the discussion

[108] Verrydt (n 30) 283 f.
[109] Clapham (n 76) 144.
[110] Verrydt (n 30) 284.
[111] Fien Schreurs, 'Nestlé & Cargill v. Doe Series: Remedying the Corporate Accountability Gap at the ICC' [2021] Just Security 4 <https://www.justsecurity.org/74035/nestle-cargill-v-doe-series-remedying-the-corporate-accountability-gap-at-the-icc/>.
[112] Clapham (n 76) 150.
[113] Stoitchkova (n 12) 16.
[114] Schreurs (n 111) 4.
[115] Stoitchkova (n 12) 15.

around the inclusion of legal entities "a major political issue".[116] However, what was included in the final Statute is individual responsibility when contribution to a crime that is being committed by a group in article 25 paragraph 3 subparagraph d. That crimes can be committed by a collective entity acting with a common purpose was what all delegates could agree upon.[117] It is noteworthy that the proposal was dropped not as a conscious decision against corporate criminal liability but for pragmatic reasons.[118] It was envisaged to be implemented at a later point in time after the concept of corporate legal liability had been solidified in domestic legal systems and state parties were more receptive towards finding consensus. It was not questioned that corporations are bound by international criminal law, but how to implement it in a timely manner in the Statute.[119] Today, the problem of impunity of corporations for their involvement in international crimes has grown more visible and with a possible inclusion of ecocide as the fifth international crime and corporations being its main perpetrators, the time might be right to raise the question during the upcoming Assembly of State Parties.

3.1.4. Special Tribunal of Lebanon

Just recently, in 2014, in the cases against TV S.A.L. and Akbar Beirut S.A.L. brought before the Special Tribunal of Lebanon, the appeals panel decided that the tribunal has jurisdiction over corporations explaining that it is "in the interest of justice" to include legal persons in the jurisdiction of the court.[120] This marked the first time that a criminal tribunal indicted a corporation.[121] Although the "hybrid-tribunal"[122] was created to convict the perpetrators of the assassination of the former Lebanese prime minister, the prosecution of the privately owned TV station Al Jadeed TV and its parent company NEW TV S.A.L. was due to the commission of a contempt crime. Al Jadeed TV aired interviews of confidential witnesses on TV and uploaded the videos on YouTube and failed to remove the videos from the internet after it was ordered to do so by the Tribunal.[123] Both corporations were charged with two counts of contempt. This decision was criticised internationally because according to article 3 of the Statute of the Tribunal the jurisdiction was limited to natural persons but the Rules of Procedure

[116] Wattad (n 21) 414.
[117] Clapham (n 76) 145.
[118] Scheffer and Kaeb (n 11) 363.
[119] Clapham (n 76) 191.
[120] Schreurs (n 111) 4.
[121] Lambridis (n 17) 147.
[122] Alkhawaja (n 81) 467.
[123] ibid 466.

and Evidence ("RPE"), where the crime of contempt was codified, did not make such a limitation. The judges based their decision on their findings that corporate liability has become a general principle of law[124] that has grown into an international movement that is backed by the UN and that there is a "shared international understanding" that corporate criminal liability needs to be regulated.[125] They acknowledged that states have different ways of implementing corporate liability but the fact that it can be found in many jurisdictions shows that it has become a "major trend". In their decision they demonstrated that corporate impunity so far was not the result of dogmatic obstacles but of a lack of political will.[126]

3.1.5. Culpability of Legal Persons in Other International Instruments

A trend that has become visible in including corporate responsibility in international instruments is to allow the state parties a margin of appreciation in how they will hold corporations accountable. Most of them leave it up to the states if they include the provisions in their domestic legislations as civil, administrative, or criminal law.[127] What these instruments require as a minimum standard is that the sanctions are repressive, in other words, that they are effective, proportionate and deterring.[128] There are more than seventeen multilateral instruments that have included criminal liability in some way or form, like the UN Convention against Transnational Organised Crime.[129] The ILC recently included corporate criminal liability in its draft document on crimes against humanity and was the first legal body to include it for one of the four core crimes since the Rome Statute came into force.[130] The Criminal Convention on Corruption of the Council of Europe, e.g., requires in its article 18 that a natural person that has decision-making authority and a leading position has committed a crime to trigger the criminal liability of the corporation.[131] Already in 1989 in the Global Convention on the Control of Transboundary Movements of Hazardous Waste "person" was referred to as natural or legal, recognising that the role corporations play in waste management needed to be

[124] ibid 470.
[125] ibid 472.
[126] ibid 454.
[127] Engelhart (n 69) 55.
[128] Stoitchkova (n 12) 17.
[129] Stahn (n 29) 95.
[130] ibid; International Law Commission, 'Report of the International Law Commission Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016)' (United Nations 2017) 264 <https://www.un-ilibrary.org/content/books/9789213618608> accessed 8 July 2022.
[131] Clapham (n 76) 153.

captured adequately.[132] State parties feel increasingly comfortable in the implementation of corporate criminal liability in international instruments. However, leaving it up to each state to choose if it will implement it through administrative or criminal law, impedes the development of a uniform standard that might be necessary for cooperation between the competent authorities for a crime like ecocide that is transboundary. It mirrors exactly what Zerk concluded in her aforementioned report about the hurdles in prosecuting criminal corporate conduct where the inconsistent utilisation of domestic legal tools and reluctance to cooperate with other states were one of the core causes for that.[133] If administrative law is as effective as criminal law to protect the environment, was already subject of discussion above. In addition to this, introducing corporate criminal liability in the Rome Statute would speed up the process of conceptualising and standardising the culpability of legal entities.

3.1.6. How has the ICC handled corporate involvement in crimes so far?

Even though the Rome Statute does not allow for the prosecution of legal entities according to article 25 paragraph 1 of the Rome Statute, corporate complicity in the commission of international crimes is undeniable and the Office of the Prosecutor has made attempts to include it in its investigations. In 2003 then Chief Prosecutor of the ICC, Luis Moreno Ocampo stated that he wanted to investigate the situation in the Democratic Republic of Congo (DRC) and specifically the role corporations play in funding the atrocities in exchange for "blood diamonds".[134] He wanted to target businesses in at least 29 countries for possible complicity in the commission of international crimes, especially in the Ituri region.[135] By investigating if the businesses involved were aware that the diamonds were a direct result of grave human rights abuses[136] they could have been held liable through article 28 paragraph b of the Rome Statute for superior responsibility or article 25 paragraph 3 for aiding, abetting or accomplice

[132] ibid 173.
[133] *See* Zerk, *supra* note 3.
[134] Ole Kristian Fauchald and Jo Stigen, 'CORPORATE RESPONSIBILITY BEFORE INTERNATIONAL INSTITUTIONS' (2009) 40 George Washington International Law Review 1039.
[135] Nigel Davidson, 'The Lion That Didn't Roar: Can the Kimberley Process Stop the Blood Diamonds Trade?', *Are Conflict Diamonds Forever?* (ANU Pres 2016) 53 <https://www.jstor.org/stable/j.ctt1rqc976.8>; Julie L Fishman, 'Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem' (2005) 13 University of Miami Business Law Review 241 <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1108&context=umblr&httpsredir=1&referer=>.
[136]Fishman (n 135) 241.

liability.[137] However, despite his announcement, no formal investigations were initiated.[138] Investigations of the Office of the Prosecutor in the situation in the DRC were focused on other crimes.[139] In 2009, the Office investigated the situation in Kenya for the post-election violence starting in 2005 and charged a corporate executive, Joshua Arap Sang, with crimes against humanity for his role as aa radio host at the radio station Kass FM.[140] According to the Prosecutor, Sang intentionally contributed to the crime by letting the main perpetrators have control over his show, announcing the meetings of the main perpetrators so that others could join, feeding into the violence among the people by spreading hate messages and instrumentalising the broadcast by giving instructions for the attacks.[141] A possible conviction would have been based on indirect perpetration through article 25 paragraph 3 subparagraph a of the Rome Statute or having contributed to the crime according to article 25 paragraph 3 subparagraph d.[142] However, in 2016, the case was dropped because of witness interference and Sang was acquitted.[143] In September of the same year, the Office of the Prosecutor under then Chief Prosecutor Fatou Bensouda published a policy paper stating that it would prioritise future investigations on situations concerning the destruction of the environment, land grabbing and illegal natural resource exploitation that are related the commission of the four core crimes.[144] The paper included the responsibility of corporate agents, as well.[145] It is believed that a communication filed in 2014 by the Global Diligence LLP on behalf of the victims of the extensive land grabbing practices in Cambodia gave rise to the Prosecutor's decision.[146] The communication aimed at making the Prosecutor aware of the illegal land grabbing practices and

[137] Julia Graff, 'Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo' (2004) 11 Human Rights Brief 25 f. <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1357&context=hrbrief>.
[138] Kolieb (n 82) 601.
[139] 'Situation in the Democratic Republic of the Congo- ICC-01/04' (*International Criminal Court*) <https://www.icc-cpi.int/drc>.
[140] Caroline Kaeb, 'THE SHIFTING SANDS OF CORPORATE LIABILITY UNDER INTERNATIONAL CRIMINAL LAW' 49 The George Washington International Law Review 375.
[141] *SITUATION IN THE REPUBLIC OF KENYA IN THE CASE OF THE PROSECUTOR V WILLIAM SAMOEIRUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (ICC-01/09-01/11) 131.
[142] 'Case Information Sheet - The Prosecutor v. William Samoei Ruto and Joshua Arap Sang' (International Criminal Court 2016) <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/RutoSangEng.pdf>.
[143] ibid.
[144] The Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (International Criminal Court 2016) 5 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>.
[145] ibid 14.
[146] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 212.

displacement of more than 60.000 Cambodians that were believed to amount to crimes against humanity by means of forced displacement according to article 7 of the Rome Statute.[147] The policy paper was widely positively received as a "green approach" to interpreting the Statute.[148] Helen Brady, Senior Appeals Council at the ICC and involved in its drafting, even underlined that the Policy Paper meant "something" and was not only "symbolic".[149] However, Mwanza points out that a "green approach" does not substitute a specific a prosecution for the destruction of the environment but is linked to the four crimes where environmental integrity and corporate activity plays only a minor role.[150] Greene states that instead, this paper should be interpretated that the absence of "ecocide" has created a gap in the Statute and that it was a mistake to remove the crime on environmental destruction in the drafting process.[151] The Prosecutor had to attempt to bridge this gap with the policy paper[152] but there is only so much a policy paper can do, considering that it is an internal document and non-binding[153]. In the end, no investigations were initiated in this regard.[154] The reasons why are unknown, because the case selection of the Prosecutor remains confidential[155] and perhaps the cases brought to the Prosecutor's attention simply did not reach the required threshold. Nevertheless, it becomes clear that even though the Chief Prosecutors over the years have been well aware of the harm that has been caused by corporate activity and have repeatedly shown ambition to prosecute corporate the involvement in international crimes, the inadequacy of legal tools, challenge of collecting evidence and the lack of a legal basis in particular, have seriously impeded well-meant ambitions.

[147] ibid 213.
[148] Rosemary Mwanza, 'ENHANCING ACCOUNTABILITY FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW: ECOCIDE AS A LEGAL FULFILMENT OF ECOLOGICAL INTEGRITY' (2018) 19 MELBOURNE JOURNAL OF INTERNATIONAL LAW 13 <http://classic.austlii.edu.au/au/journals/MelbJIL/2018/20.html>; Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 183; Greene (n 3) 25.
[149] Phoebe Braithwaite, 'Environmental Crimes Could Warrant International Criminal Court Prosecutions' *Inter Press Service - News Agency* (United Nations, 1 October 2016) <https://www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/>.
[150] Mwanza (n 148) 13 f.
[151] Greene (n 3) 25.
[152] ibid.
[153] The Office of the Prosecutor (n 144) 3.
[154] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 222.
[155] The Office of the Prosecutor (n 144) 7.

3.2. How does the Rome Statute hold corporations accountable for their involvements in crimes?

3.2.1. Article 30 Rome Statue

Article 30 restricts the mental element of the commission of the crime, the *mens rea*, to intent and knowledge. Intent is often referred to as *dolus directus* in the first degree and describes the case when the perpetrator acts with knowledge and willingness to commit the crime.[156] While knowledge is referred to as *dolus directus* in the second degree and means the perpetrator did not desire but knew about the concrete consequences of his conduct and still engaged in the conduct.[157] What is excluded in the Rome Statute is *dolus eventualis* or the common law counterpart recklessness and negligence.[158] The state delegations discussed the inclusions of the concepts during the drafting process but because the concepts of *dolus eventualis* and recklessness, albeit close to each other, have dogmatic differences and overlap with negligence in different ways, they did not reach a consensus.[159] In the end, they decided to limit the *mens rea* to intent and knowledge only because recklessness or *dolus eventualis* and negligence were not needed for the crimes that made it in the final draft.[160] Ecocide is usually not committed with the intention to harm the environment. Often the perpetrators do not pass the threshold of knowledge of the consequences of the acts. Mostly, ecocide happens as a by-product of actions that are taken to maximise profit, the environmental harm deriving from them is the result of negligence. However, Art. 30 (1) leaves room for the introduction of another threshold for the *mens rea* ("Unless otherwise provided…") which will be discussed below.

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[156] Stoitchkova (n 12) 97.
[157] ibid.
[158] Sarah Finnin, 'MENTAL ELEMENTS UNDER ARTICLE 30 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMPARATIVE ANALYSIS' (2012) 61 The International and Comparative Law Quarterly 325, 328 f.
[159] WAR CRIMES RESEARCH OFFICE, 'Modes of Liability and the Mental Element: Analyzing the Early Jurisprudence of the International Criminal Court' (International Criminal Court 2010) Legal Analysis and Education Project 25 <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-13-modes-of-liability-and-the-mental-element-analyzing-the-early-jurisprudence-of-the-international-criminal-court/>.
[160] Gerhard Werle and Florian Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 Journal of International Criminal Justice 52 <https://www.researchgate.net/publication/31116203_%27Unless_Otherwise_Provided%27_Article_30_of_the_ICC_Statute_and_the_Mental_Element_of_Crimes_under_International_Criminal_Law>.

3.2.2 Article 28 Rome Statute

Article 25 paragraph 1 of the Rome Statute restricts jurisdictions to natural persons only. However, corporate activity could be penalized through article 28 paragraph b which statutes superior responsibility. The superior is responsible for the crimes committed by their subordinates who they have effective authority and control over. To be liable according to Art. 28 (b) the superior must have either known or deliberately closed himself off to the information about the subordinates committing the crime. The actions involved must have been within his field of responsibility and control. Lastly, he must have failed to take all necessary steps within his power to prevent or repress the commission of the crime or handed the matter over to the competent authorities. He is sanctioned for his failure to properly exercise control over the subordinates. His responsibility does not decrease with an increasingly physical or hierarchical distance.[161] The article includes directors, board members or shareholders, so everyone who is awarded decision-making authority.[162] The prosecutor must prove that the superior had knowledge of the crime or that his lack thereof was negligent. In the case of ecocide, this will prove difficult because of corporate veils and how responsibility is decentralised in the structures of modern corporations. What could prove to facilitate this process are soft law instruments and guidelines for corporations that were negotiated and implemented to improve corporate social responsibility.[163] If the superior did not follow them, it might allow to draw conclusions on his responsibility to prevent the crime or provide the competent authorities with the necessary information for its investigation or prosecution.[164] However, these instruments and guidelines are soft-law, they never became binding for the actors involved but were negotiated as non-mandatory behavioural rules. Not only would then soft law introduce legal obligations on the superiors through the backdoor, which is exactly what it wants to avoid, but more than that, soft law would impose criminal liability. Against the backdrop that criminal law is considered the last resort of the legislator because its repressive nature is a massive infringement of the liberty rights of the citizens, using soft law instruments as evidence for the *mens rea* would violate the "ultima ratio" principle.

[161] Lydia de Leeuw, 'Corporate Agents and Individual Criminal Liability under the Rome Statute' (2016) 5 State Crime Journal 249 <https://scienceopen.com/hosted-document?doi=10.13169/statecrime.5.2.0242> accessed 17 April 2022.
[162] ibid.
[163] ibid 250.
[164] ibid.

3.2.3. Article 25 paragraph 3 Rome Statute

Article 25 paragraph 3 subparagraphs a to d regulate primary and accessorial liability. Primary liability can occur in three forms according to article 25 (3) (a), direct, joint and indirect perpetration, meaning perpetration of the crime through another person. These ways of perpetration come from Roxin's control theory which states that when committing a crime through another person the perpetrator must exercise control over that person.[165] Art. 25 (3) (b) creates liability when someone orders, solicits, or induces the commission of the crime. It is a form of accessorial and not principal liability which means that the criminal liability of that person is triggered only if the direct perpetrator attempts or actually commits the crime.[166] When ecocide is committed it is rarely committed with intention, but it is rather a consequence of saving-business practices and maximisation of profit. Therefore Art. 25 (3) (b) be relevant when ecocide is prosecuted. Art. 25 (3) (c) regulates the accessorial perpetration of crimes and includes the liability for aiding and abetting. However, if a corporate officer is involved in a crime, they usually lack the required intent and are neutral towards its commission. Again, usually, the intention is targeted at generating profit and not committing the crime itself. According to Art. 25 (3) (d), a person is criminally liable if they contribute to the (attempted) commission of the crime by a group of people acting with a common purpose in any other way. The contribution must be intentional. Subparagraph i requires for the person to contribute to the commission with the aim to assist the principal perpetrators. Under subparagraph ii a corporate officer would be criminally liable if they contributed to the commission in the knowledge of the intention of the group to commit the crime. As noted, it will be difficult to prove the required intent of Art. 25 (3) (a) to (c) because actions of corporate officers are profit-based. Similarly difficult it is to prove the contribution with the aim of furthering the crime of the principal perpetrators according to Art. 25 (3) (d) (i). However, under subparagraph ii, it is sufficient if the corporate officer had knowledge of the groups' intention to commit the crime. To determine if the corporate officer is liable it needs to be assessed if his contribution to the crime was significant (e.g., providing the means to commit the crime) and if he intentionally. He needs to have made the contribution either knowing that it would contribute to the commission of crimes or with the awareness that it will contribute to its commission in the ordinary course of events.

[165] Kai Ambos, 'The International Criminal Court' (1999) 10 Criminal Law Forum 8 f. <https://www.taylorfrancis.com/books/9781351146395> accessed 10 July 2022.
[166] WAR CRIMES RESEARCH OFFICE (n 159) 54.

Article 30 defines knowledge as the awareness that a circumstance exists, or a consequence will occur in the ordinary course of events. Article 25 (3) (c) requires intentionally provided assistance, therefore under article 25 (3) (d) (i) and (ii) any form of assistance has to be sufficient.[167] Intentional under Art. 25 (3) (d) consequently refers to the contribution only: the contribution itself must happen intentionally. However, the knowledge of the contribution must relate to the specific crime as opposed to the overall criminal undertaking.[168] The relatively high degree of knowledge is supposed to compensate the low *actus reus* of any form of contribution. Although Art. 25 (3) (d) is easier to prove than (a) to (c) it will still be difficult for the prosecutor to prove that the individual corporate officer had knowledge of the commission of the crime. The structures of corporations have grown extremely complex over the decades. Reporting lines, communication channels, decision-making processes and the division of tasks make it challenging to pinpoint to one specific corporate agent who is criminally liable and should be the subject of the prosecution.[169]

3.2.4. Article 77 – a direct application?

Corporations can be held liable indirectly through article 77 paragraph 2 subparagraph b of the Rome Statute according to which the judges are authorised to order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime. This affects the corporation itself and not only the corporate officer that was convicted. Any involvement in the commission of international crimes will reflect poorly on the corporation and lead to a reputational damage. Being sanctioned through Art. 77 implies that the corporation bears some form of responsibility.[170] However, the sanction remains indirect and presupposes that a corporate officer was convicted. This, on the other hand, is difficult because of the increasing complexity of corporate structures and decision-making processes that impede to reach the threshold for the required *mens rea* to prosecute. Furthermore, there are reasons for punishment like deterrence and affirmation of the moral norms that law is based on. Therefore, only a direct sanction would mirror the wrongdoing of the corporation. A direct application of Art. 77 (2) could be possible according to wording of the provision. Even though the Rome Statute is tailored to natural persons article 77 mentions persons without specifying that it is natural

[167] de Leeuw (n 161) 247.
[168] ibid.
[169] ibid 249.
[170] Stoitchkova (n 12) 103.

persons necessarily. Under Art. 77 (2) (a) judges may order a financial fine. Both subparagraphs may therefore be applied to corporations.

3.3. Is what we have in Rome Statute so far enough?

The sanctions the Rome Statute provides for, might not be entirely fitting for corporations as they are tailored to natural persons. A corporation cannot be incarcerated. What can be considered for corporations are financial sanctions. The problem here is that they need to be imposed at the right amount. They need to be high enough to fulfil the function of deterrence but not too high to make the employees whose livelihood depend on the existence of the corporation have to carry the consequences.[171] Financial sanctions are problematic from another perspective, as well. They will most likely not bring about a sustainable transformation of the corporate system since the impression is created that as long as the corporation can pay the fine, it can continue with its harmful practices and include the fine in its annual accounting as an additional expense which will pay off because it will generate more profit than refraining from harmful practices. The risk of suffering reputational damage and consequently financial losses might not always even it out because either the risk of being caught is low, the corporation is providing services that people depend on or enjoys market dominance. In the case of Nike for example, after it was made public that child labour was used in its factories and that workers never received the benefits they were entitled to, the brand image took a toll, but Nike nevertheless continued to be highly profitable.[172] Alternative sanctions like e.g., setting the corporation on probation, could prove more efficient in sustainably changing how decisions are made. In the U.S. and Canada convicted corporations are prohibited from engaging in certain conduct for example.[173] Considering that the ICC was built with the objective to provide corrective and reparative justice[174] the limitation in penalties and remedies that would result if corporate activity was sanctioned would defeat this purpose.[175] Further, the Rome Statute allows for the victim to receive from funds where the perpetrator pays into but does not include regulations that recover or remediate the harm as such.[176] In case of an conviction for ecocide, it would provide the individuals affected with financial compensation and order the restoration of the environmental harm created, but only if it is coupled to a victim [177], which again defeats the objective of ecocide. What impedes the conviction of corporate activities in the options we

[171] Schwegler (n 96) 87.
[172] Scheffer and Kaeb (n 11) 373.
[173] Schwegler (n 96) 87.
[174] *The Prosecutor v Bosco Ntaganda (Reparation Order)* (ICC-01/04-02/06-2659) 37.
[175] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 220.
[176] Greene (n 3) 40.
[177] ibid 38.

have in the ICC so far, namely through the prosecution of corporate officers through Art. 25 (3) (c) (ii) and Art. 28 (b), is that they can claim they lacked knowledge or intention. Corporations have grown larger and increasingly complex over the decades with the effect that decision-making processes are decentralised and rarely does one person alone have extensive information about the entire processes going on in the everyday business of the corporation and consequently no extensive responsibility, knowledge, or intent.[178] It is difficult to pinpoint the specific contribution of each person and demonstrate the required *mens rea*. Further, if holding corporations for their criminal activities accountable is only possible if the corporate officers are prosecuted and convicted, an essential part of the wrongdoing and injustice gets lost. While the "societas delinquere non potest" principle aimed to get past artificial barriers and through to the real actors behind the conduct[179], nowadays these barriers are used to establish immunity through the corporate veil. Holding only the corporate officer accountable ignores the innately collective character of corporate business activities. They involve multiple actors who systematically abuse their authority on different levels and are ultimately attributable to the corporate "culture" that enabled it.[180] Decisions often do not mirror the choices the individual would have made within the organisation, but decisions are the result of a process of negotiation and compromise between different stakeholders.[181] The corporate officer most likely would not have acted in the same way outside of the corporation and would have chosen a morally different approach if he had to make similar decisions in his personal life. The specific surrounding, the corporate structures and "culture"[182] are the driving force behind the decisions that the corporate officer ultimately makes. This implies that a corporation is not the mere sum of its employees, CEOs, shareholders etc., but the dynamic that these individuals create: a community with specific values that makes the individuals commit acts that they might normally refrain from committing. As early as in 1936, Charles Abbot noted that corporations have a "group personality" that differs from the different personalities of the individuals it is composed of and that a "corporate organisation" is more than the sum of the people it comprises.[183] Additionally, collective actions are more likely to lead to more damage than

[178] Fauchald and Stigen (n 134) 1043; Greene (n 3) 27.
[179] Wattad (n 21) 394 f.
[180] Schreurs (n 111) 2.
[181] Slye (n 53) 963.
[182] Schreurs (n 111) 2.
[183] Slye (n 53) 960.

individual actions and require systemic prohibition to effectively deter.[184] Therefore, the argument of removing artificial barriers to get through to the "real" perpetrator might be outdated and rethought if the objective is to get to the root of the wrongdoing and sanction the genuine injustice committed. The inclusion of corporate liability does not necessarily exclude individual criminal liability– it is not an "either-or". If the corporate officer as well as the corporation as a legal entity are prosecuted there is neither the risk that the behaviour of the corporate officer is being written off as an individual case and used as a scapegoat nor can the corporate officer hide behind the corporate veil.[185] A dual approach will compensate the cases in which the corporate officer violated his duties as a corporate officer and the individual is the "real" actor behind the conduct[186], making corporate criminal liability and individual criminal responsibility work in "symbiosis". Moreover, including corporate criminal liability would mirror the dominant role corporations have taken over in modern day societies.[187] Therefore, to uphold the function that international criminal law plays as found in the preamble to the Rome Statute, namely to "put an end to impunity" and "prevent" the commission of crimes, there is a necessity to include them in the Statue. Further, an inclusion of corporate criminal liability would significantly contribute to norm building and creation of a uniform international standard. Even though many states have introduced corporate criminal liability in their domestic systems it is not the overall standard to hold corporations criminally liable. Including legal persons in the Rome Statute might significantly contribute to norm-building as national legal systems will harmonise their laws with the Rome Statute to comply with the principle of complementarity. Besides the possibility to prosecute corporations for the environmental damage they are causing, and their decisive contribution to climate change, an inclusion of corporate criminal liability would result in the modernisation of domestic criminal law, as well.[188]

Voices against corporate criminal liability refer to the artificial composition of corporations that is not compatible with the dogma of criminal law. According to the traditional understanding of criminal law the perpetrator needs to fulfil the *actus reus* and the *mens rea* to be found guilty of the crime[189]. The *mens rea* can only be fulfilled by human beings as only they possess the

[184] ibid.
[185] Fauchald and Stigen (n 134) 1043.
[186] Schreurs (n 111) 2.
[187] Schreurs (n 111).
[188] Lambridis (n 17) 151.
[189] Wattad (n 21) 399.

state of mind to commit a crime.[190] But, even though it might not be compatible with the dogma of traditional criminal law, many states, especially common law countries, have incorporated corporate criminal liability in their legal systems and have developed and tailored criminal law to the needs of modern-day societies. Even dogmatists cannot deny that an accountability gap exists, and a solution is necessary. Already in 1911, Machen pointed out that corporations are more than the mere sum of the individuals they are comprised off and has a distinctive personality.[191] Other scholars have a differentiated view on corporate liability. They agree with the latter insofar as the corporate entity is not fictious but don't go as far as attributing a personality to the corporation. Instead, they view the corporation as a legal union with own capacities, in the sense that it is legally separate from its shareholders, organs, board directors and other persons equipped with the legal capacity to act on behalf of the corporation, but with its own rights and obligations.[192] It is capable to hold property or to sign contracts. This separation is realised through the corporate veil. The veil is supposed to facilitate the commercial activity of the corporation.[193] Furthermore, the persons acting on behalf of the corporation are shielded by the corporation itself and do not risk being held accountable for their decisions legally or with their private assets or legally. However, there are instances where the veil is "pierced" – a term that originated in corporate law and allows to get through to the people acting on behalf of the corporation. If the person is acting outside of his competencies and is criminally implicated there is no need to uphold the corporate veil because the person abused his privileges and is no longer entitled to protection. In cases where the power is abused the individual is criminally liable. In all other cases the people acting on behalf of the corporation are protected by the veil. Furthermore, it is possible that the actions of one individual might not be enough to activate the *actus reus* and the *mens rea* for the commission of the crime. In some cases, the *mens rea* might lie with one individual while the *actus reus* with another or the sum of the actions and mental state of more than one individual meet the threshold of the crime. Although a crime was committed in these cases, too, it is not attributable to one person and goes unpunished. Therefore, it might prove more effective to criminalise the

[190] ibid 393.
[191] Arthur W Machen, 'Corporate Personality' (1922) 24 HARVARD LAW REVIEW 253, 258.
[192] Wattad (n 21) 396.
[193] OECD, 'Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes' (OECD 2001) 13 <https://www.oecd-ilibrary.org/finance-and-investment/behind-the-corporate-veil_9789264195608-en> accessed 14 July 2022.

behaviour of the entity itself.[194] Furthermore, corporations could dismiss the conviction as the actions of one "bad apple" while the conviction of the whole corporation will have a great impact on its reputation and consequently most likely on the consumer-behaviour.[195] Now, not only corporate officers but a wider range of individuals that make up the corporation are deterred.

3.3.1 Pre-Trial Chamber

In 2010 the pre-trial chamber of the ICC decided on the situation involving violence in post-election in Kenya. Judge Kaul issued a dissenting opinion stating that violence coming from an organisation falls under the jurisdiction of the Court only if it has "state-like" characteristics. He relied on the organisational policy requirement the drafters had insisted on for the commission of crimes against humanity. However, the other judges concluded that it is not necessary for the organisation to uphold state-like characteristics but that it is capable of violating "basic human values".[196] Hellman sees the decision as an evolution towards loosening the requirements made for organisations in the jurisdiction of the court towards eventually accepting purely private organisations.[197] However, since then, no single corporate officer has been prosecuted and even though policy papers of then Chief Prosecutors Moreno-Ocampo and Bensouda showed ambition to sanction harmful corporate activity no investigations have been initiated in that regard. This could indicate that despite all efforts, the tools that are in the Rome Statute are not sufficient to close the legal gap that leads to impunity of corporations and to effectively deter corporations from engaging in harmful conduct is, to include corporate criminal liability in the Statute.

3.3.2 Can corporations be deterred?

Having to fear imprisonment is believed to serve as a big deterrence for corporate officers but does it have the same deterrence effect on the corporation? The biggest hurdle in implementing corporate criminal liability still is the *mens rea* and how to establish personal guilt out of collective actions. A study on district attorneys in California concluded that prosecutors are more hesitant to prosecute corporations because of how complex it is to apply "intent" – an

[194] Slye (n 53) 963.
[195] Pereira, 'Chapter 2: The Role of the Criminal Law for the Protection of the Environment' (n 71) 69.
[196] Hellmann (n 52) 276.
[197] ibid.

inherently human concept - for corporations.[198] When assessing if the behaviour of a person is worthy of punishment, characteristics like motivation, intent and character are taken into account.[199] These are characteristics that corporations do not possess. But exactly herein might lie the key to incorporating corporate criminal liability in international criminal law. Discussions oftentimes focus on the difficulty of establishing the *mens rea* as we have been known to establish it for centuries. Perhaps though, instead of focusing to mould non-human actions into legal principles that were created to assess the behaviour of humans, we should consider creating new ones that are tailored to the wrongdoings of corporations, in other words, instead of treating unequal matters equally, we need to find out what underlying structures cause criminal activity and create new principles to establish their culpability. Punishment has many purposes and one of them is the purpose to deter the perpetrator from committing another crime and the rest of society from committing the same one.[200] However, new studies have come to the conclusion that deterrence does not play as big of a role in why human beings refrain from committing crimes.[201] They do not follow the rules because they fear criminal prosecution but because of their personal moral convictions. If they were allowed to break the law, most people would refrain from doing it because they believe in what they have internalised to be right and wrong.[202] This, however, does not apply to corporations. They are not guided by moral beliefs but by being profitable. If law enforcement is poor or the costs for being sanctioned are lower than the benefits they might gain from the conduct, they are more likely to break the law because they are artificial entities created by law. For corporations, therefore, deterrence plays a major role. International criminal law therefore might be the adequate legal field to fill the legal vacuum that has allowed corporations to engage in harmful behaviour.

[198] Avital Mentovich and Moran Cerf, 'A Psychological Perspective on Punishing Corporate Entities' in Dominik Brodowski and others (eds), *Regulating Corporate Criminal Liability* (Springer International Publishing 2014) 34.
[199] ibid 35.
[200] Pereira, 'Chapter 2: The Role of the Criminal Law for the Protection of the Environment' (n 71) 64.
[201] Mentovich and Cerf (n 199) 36.
[202] ibid.

4. Possibilities for implementing corporate criminal liability into the Rome Statute

4.1. Amendment of article 25 paragraph 1 of the Rome Statute

David Scheffer proposes changes to the Statute by amending article 25 paragraph one to include "juridical persons" and the second sentence of article 127 to include jurisdiction over "juridical persons", as well.[203] However, he acknowledges that amending the Statute will require amending a complex fabric of provisions that interplay. Production of evidence, due process rights, the cooperation requirements unique to corporations and an improved catalogue of sanctions will need to be implemented.[204] He sees the required two-third majority of the State Parties to ratify the amendment according to article 121 paragraph 3 as a serious obstacle and proposes an "opt-in"-clause through an additional protocol but recognises that the protocol itself would have to pass the two-third majority as well and would be a result of a collective negotiation process.[205] He implies with this that those opposing the concept of corporate criminal liability would not vote in favour of the protocol and impede its implementation. The African Union chose a similar approach with the Malabo Protocol that would expand the African Court of Justice and Human Rights' jurisdiction to corporations according to its article 46C. To date the protocol has not been ratified by one single state.[206] A similar fate could fall to the additional protocol of the Rome Statute.

4.2. Is *mens rea* applicable to corporations?

The biggest hurdle in the implementation of corporate criminal liability might be the *mens rea*. There are the three possibilities of *mens rea*: knowledge and intent (in the narrower sense) as it is defined article 30 of the Rome Statute, recklessness or negligence.[207] Negligence means the person that is acting fails to meet the dual standard of care that they are responsible for. They did not adhere to the duty of care and caused harm that was foreseeable.[208] The standard is

[203] David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57 Harvard International Law Journal 38 <https://harvardilj.org/wp-content/uploads/sites/15/Scheffer_0615.pdf>.
[204] ibid 39.
[205] ibid.
[206] Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Dstruction of Our Planet* (2nd edn, Shepheard-Walwyn Ltd 2015) 68.
[207] Andrew Ashworth and Jeremy Horder, '5. Criminal Capacity, Mens Rea, and Fault', *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 24 <http://oxfordlawtrove.com/view/10.1093/he/9780199672684.001.0001/he-9780199672684> accessed 17 June 2022.
[208] Ori J Herstein, 'Responsibility in Negligence: Why the Duty of Care Is Not a Duty "To Try"' (2010) 23 Canadian Journal of Law & Jurisprudence 403, 403 f.

called dual duty of care because it consists of two elements - harming and caring - that result in liability when the person harmed "through carless conduct".[209] A person is reckless, when they are aware of the risk their behaviour bears and that the consequences might occur but reconciled themselves with the possibility that they might occur.[210] Strict liability, on the other hand, is not an element of mens rea because it does not entail an element of fault. It means, the person is liable regardless of the precautions it took and was not negligent, but the unwanted outcome occurred anyway.[211] Strict liability is already implemented in environmental protection legislation such as the liability provisions of ship owners in case of an oil spill in the International Convention on Civil Liability for Oil Pollution Damage from 1969.[212] Article 3 of the Convention establishes that the owner of the ship is responsible for the pollution damage that is caused by an oil spill, imposing liability on the private owners of the ship. The rationale behind the strict liability was that it was during the time when ships were not run with coal anymore, but with oil, which left a trail behind the ships and polluted the sea.[213] Similar provisions were included in the Nuclear Ships Convention in 1962.[214] Strict liability is therefore not alien to the international community when the environmental issue is pressing enough, and high common goods are at stake. Polly Higgins' proposal for the law of ecocide from 2010 was one of strict liability, as well.[215] She, too, pointed out how ecocide is usually not intended but a by-product of maximising profit, which happens intentionally. Ecocide is therefore a crime of consequence and not of special intent. She hoped that introducing a crime of strict liability will create change in an "upstream" direction by preventing environmental harm and not in a "downstream way" where the corporations are financially sanctioned after the harm has already occurred.[216] The mock trial of the UK Supreme Court, "Under Draft Ecocide Act", from 2011, assumed a crime of strict liability, as well.[217] However, the majority of scholars call for a crime with a *mens rea* of intention, recklessness included, and state that strict liability would set the threshold for the *mens rea* too low considering that criminal law is supposed to be a measure

[209] ibid 404.
[210] Stoitchkova (n 12) 98.
[211] Schwegler (n 96) 90.
[212] 1969 INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE (Adopted in Brussels, Belgium on 29 November 1969).
[213] Schwegler (n 96) 94.
[214] ibid.
[215] Higgins (n 207) 68.
[216] ibid XII.
[217] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 195.

of "last resort".[218] Although the Rome Statute defines the *mens rea* as intent and knowledge in its article 30 paragraph 1, it leaves room for other possibilities ("unless otherwise provided"). Scholars are divided how to interpret this provision.[219] While some argue that any legal source can provide another *mens rea* standard[220], the majority agrees that the different standard has to be provided by the core crimes of the Rome Statute[221]. Genocide, for example, entails a "relatively low" *actus reus* because it is built on the special intent (Art. 6) - the "intent to destroy" – a very high threshold for the *mens rea*. Crimes against humanity (Art. 7) on the other hand, includes recklessness, as well. However, it should raise concern that the OTP has been reluctant so far in prosecuting cases with recklessness.[222] In the case of ecocide the harm is almost never done intentionally but is a by-product of maximising profit. The persons involved do not necessarily want to pollute the river, for example, but did not want to bear the costs of maintaining the pipelines adequately. Therefore, they acted careless towards the pollution of the river since it is foreseeable that not maintaining pipelines could lead to leaks and oil spills that pollute the river. Establishing a mens rea of negligence for the cases of ecocide is narrower than strict liability but broad enough to encompass conduct that is typical in corporate settings.

4.3. Models of corporate criminal liability

4.3.1. Traditionalist approach

Since corporate criminal liability is gaining momentum and more and more states are implementing it, the question arising is, which model would be best fit for the ICC. In general, corporate criminal liability is implemented through the individualised model.[223] These traditional approaches transfer models from civil law to criminal law and are based on the idea that actions of one individual that comprise the corporation are attributed to the company, meaning the actions of one individual are able to trigger the liability of the corporation.[224] From this standpoint the different models of attribution then evolve.

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[218] Greene (n 3) 32; Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 195.
[219] Finnin (n 158) 351.
[220] Roger S Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Criminal Law Forum 291, 321.
[221] Ammar Bustami and Marie-Christine Hecken, 'Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute' (2021) 11 Goettingen Journnal of International Law 145, 182.
[222] Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation' (n 18) 215.
[223] Engelhart (n 69) 58.
[224] Olivia Dixon, 'Chapter 12: Corporate Criminal Liability: The Influence of Corporate Culture', *Integrity, Risk and Accountability in Capital Markets : Regulating Culture* (Hart Publishing 2017) 2

4.3.1.1. Identification Theory aka "directing mind approach"

The identification theory is used synonymously with "directing mind approach" or "corporate organ theory". To be held liable, the corporate organ needs to identify with the corporation's goals and interests.[225] This model excludes the liability of lower ranking employees since a junior employee most likely will not identify with the corporation's interests beyond being its employee. Unlike other models that establish the *mens rea* for corporate entities the identification theory does not attribute the actions of the individual to the corporation, but it assimilates them to it, which bears the advantage that the mental element lies within the corporation itself.[226] It is a direct attribution of guilt because companies are made up of natural persons and the actions of the natural persons are what make the corporation commercially viable.[227] It activates a direct liability of the corporation because it sees the actions and the state of mind of the corporate organ as those of the corporation itself.[228] The idea behind it is that corporations act through natural persons and some of them are granted more power to lead the corporation and therefore reflect the will of the corporation.[229] The actions of the corporate organ are attributed to the corporation directly: the person acting is not speaking or acting for the company, but as the company.[230] This is particularly advantageous for the core international crimes as they all require a *mens rea*. However, the model needs evolving because it would constitute an overly wide-ranging liability of the corporation. It's narrowed down either objectively, like e.g., the natural person must act within the ventures of the corporation or subjectively, like e.g., in the interest of the corporation which exclude actions of the natural person that harm the corporation like theft or action that benefit the natural person only privately.[231] The acting individual must have a sufficiently high position in the corporation to justify the attribution of his *mens rea* to the corporation as they are acting as the corporation according to the identification theory.[232] That's why the theory is also called the "directing mind

<http://www.bloomsburycollections.com/book/integrity-risk-and-accountability-in-capital-markets-regulating-culture> accessed 4 July 2022.

[225] Wattad (n 21) 402.

[226] Cristina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 Washington University Global Studies Law Review 556 <https://journals.library.wustl.edu/globalstudies/article/650/galley/17485/view/>.

[227] Engelhart (n 69) 58.

[228] Wattad (n 21) 402.

[229] ibid.

[230] ibid.

[231] Engelhart (n 69) 58.

[232] Dixon (n 225) 3.

theory".[233] Pereira examines how the EU applied corporate criminal liability in its 2008 Directive on environmental crime by basing it on the Identification Theory that originated in the English jurisprudence, the 1972 Tesco Supermarket case where criminal liability was solidified.[234] Today, the theory is applied in civil tort laws of most Common Law countries.[235] It is also applied in article 6 paragraph of the directive. There, the person who takes decisions on behalf of the legal person or was granted the authority to exercise control, is legally responsible for the crime.[236] This approach is criticised by Coffee who finds it particularly difficult to base the liability of an entire corporation on the actions of one individual because in modern corporate structures decision-making processes are decentralised and the decisions that harm the environment are made in the middle and lower management ranks.[237] Consequently, the Identification Theory puts the threshold too high for corporate criminal liability. According to Coffee, decisions that lead to environmental offences are deliberately delegated to the lower ranks by chief executive officers precisely to escape liability – be it personal or for the entire corporation. When the theory was applied for the first time in the Tesco case, corporate impunity was not an issue, yet. Pereira disagrees with Coffee insofar as in certain industries, where environmentally sensitive services are offered like in waste management, decision-making processes are not decentralised but are still made on the higher corporate levels and environmental crimes are built on the negligence and omissions of the managers. Instead, he opts for holding all corporate officers accountable not only those who have the authority to exercise control, including the senior management for refraining to monitor those who exercise control effectively.[238] The commission eluded these complications by introducing corporate criminal liability in paragraph two. Art. 6 (2) regulates the cases where a lack of supervision leads to the commission of the crime, but which then benefits the corporation.[239] The second paragraph acknowledges how organisational deficits play a decisive role in the commission of crimes and adopts a more holistic approach to corporate criminal liability that assumes a direct

[233] Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4 Buffalo Criminal Law Review 641, 659.
[234] Pereira, 'Chapter 6: The Harmonisation of Substantive Environmental Criminal Law and Penalties' (n 72) 272.
[235] Dixon (n 225) 3.
[236] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] L328/28 14.
[237] Pereira, 'Chapter 6: The Harmonisation of Substantive Environmental Criminal Law and Penalties' (n 72) 272.
[238] ibid 273.
[239] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] L328/28.

and not derivative forms of attribution of *mens rea* that will be discussed further below. The advantage of liability according to the identification theory is that it aligns with article 25 paragraph 3 subparagraphs a and b of the Rome Statute.[240] The former establishes the criminal responsibility of those who commit crimes through another person and the latter of those who order the commission of a crime. In corporate structures, much like in the army, the commission of crimes is divided: the means rea usually lies with the high-level corporate officer, the "directing mind", while the *actus reus* is carried out by the employees who might not even be aware of the criminal implication of their actions. The control by the high-level corporate officer comes from the corporate's organisational structures. Both types of commission are therefore called "perpetration by means".[241] Furthermore, the theory aligns with the superior responsibility of article 28 Rome Statute that holds the superior responsible for the acts committed by subordinates., as well. Verrydt points out that both variations of liability are not identical but complementary: Art. 25 (a) or (b) is applicable when the high-ranking corporate officer acted, e.g., through coercion, and Art. 28 (b) when the corporate officer failed to prevent the commission of the crime.[242] She suggests holding the corporations liable through the perpetration by means according to Art. 25 (3) (a) and (b) and Art. 28 (b). Because the identification theory does not only attribute but assimilates the *mens rea* of the individual to the corporation which leaves only Art. 25 (1) to be altered to include legal persons. Slye, too, thinks that this approach would be in line with international criminal law until now: the focus lies on holding those that operate on the highest level of decision making accountable as opposed to the "foot soldier" who is merely executing orders.[243] However, he makes a nuanced distinction between Art. 28 (b) and the identification theory. The US Supreme Court ruled in this regard that the corporate officer can be held liable if he had the power to prevent the crime by applying the "highest standard of foresight and vigilance". Again, the wording reminds of Art. 28 (b). Here, however, the superior triggers the liability of the organisation itself. If corporate criminal liability were to be introduced into the Rome Statute, parallel to the liability of the superior in Art. 28 (b) when subordinates commit crimes, the superior could trigger the liability of the corporation as a legal entity, being in line with the rationale of Art. 28. Although superior liability according to Art. 28 (b) is similar to the acts of "the brain" approach in the US, it is

[240] Verrydt (n 30) 288.
[241] ibid.
[242] ibid.
[243] Slye (n 53) 966.

weaker.[244] The Supreme Court requests the "highest standard of foresight and vigilance" to prevent the crime while Art. 28 (b) holds the superior liable if he knew of and consciously disregarded information. This is different to Art. 28 (a), too, which defines the standard for the liability of military officers for when he "knew or should have known". The military commander is liable for negligence whereas for the mens rea of a non-military commander "wilful blindness" is necessary.[245] The rationale behind the difference between Art. 28 (a) and (b) is to capture the different dynamic in the superior-subordinate relationship. The threshold for non-military commanders is higher because in a military setting, the control the commander has on the subordinates is based in the structures of the institution and the chain of command is well established.[246] Whereas in settings outside of the military they are not a given and are likely less strict. Decentralisation of decision-making processes, complex division of labour and responsibility capture fit into the rationale of the higher threshold. However, it is exactly this rationale that leads to impunity of corporations for their harmful conduct because it is made many times more difficult to prove that the corporate officer knew of the criminal conduct and consciously disregarded it. Consequently, even though the Identification Theory might be especially practical to incorporate corporate criminal liability into the Rome Statute, it will be difficult to convict corporations and ultimately, not change much in relation to the current corporate impunity.

4.3.1.2. Corporate vicarious liability

Corporate vicarious liability is based on the Latin principle "qui facit per alium facit per se", which means that whoever does the act through another, does the act him- or herself.[247] It is a concept originating in criminal jurisprudence and a form of indirect responsibility: the employee of a corporation commits a crime while acting within the limits of their competences.[248] Unlike the identification theory it does not assimilate the *mens rea* of the individual to the corporation but attributes it. The attribution happens in two steps. In the beginning, in civil tort cases, first it was assessed if the individual fulfilled the *actus reus* and *mens rea* of the crime and in a second step their conduct was copied and attributed to the superior so that whatever the superior did "through" the employee, legally, they did

[244] ibid 967.
[245] Stoitchkova (n 12) 87.
[246] ibid 90.
[247] Wattad (n 21) 402.
[248] Dixon (n 225) 4.

themselves.[249] Later, the courts applied this concept to the relationship between the employee and the corporation as the "employer", to serve as deterrence for the employees and sanction the corporation itself, with the U.S. Supreme Court calling this expansion "in the interest of public policy".[250] This model, however, limits the corporate criminal liability to crimes that do not have a *mens rea* requirement.[251] It would only applicable if the drafters agree that the crime of ecocide is a crime of strict liability. For the reasons mentioned above, however, the crime of ecocide should at least encompass negligence as a mens rea requirement, especially since the other core crimes require *mens rea*. Therefore, corporate vicarious liability is not suited for the Rome Statute.

4.3.1.3. Doctrine of respondeat superior

Because of the narrow field of application of the Identification Theory, U.S. courts developed the concept further for cases of civil tort law into the general doctrine of respondeat superior.[252] Today, with only slight differences it is similarly applied in the US and Canada. The act of one employee is attributed to the corporation.[253] According to the 1909 judgement of the US Supreme Court the corporation is liable if the employee acts within their scope of employment and to the benefit the corporation.[254] Scholars believed at that time that because the superiors could make employees perform in a way that benefits them, it is only fair for them to bear the consequences of the employees' actions.[255] Furthermore, to equate the actions of the employee and the superior would set inceptives for the superior to adequately exercise control over their employees.[256] However, the question arising is whether the corporation is liable if the person acts outside of their authority or does not follow internal policies when committing the crime. In Canada, the corporation cannot exonerate itself by pointing to an internal policy that prohibits the action that the employee committed. It is handled similarly in the US where the corporation can be found liable even if there are internal policies prohibiting the action. The rationale behind

[249] Lederman (n 234) 652.
[250] ibid 653.
[251] Wattad (n 21) 402.
[252] Lederman (n 234) 654.
[253] Slye (n 53) 964.
[254] New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496 (1909)
[255] Robert Luskin, 'Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification' (2020) 57 AMERICAN CRIMINAL LAW REVIEW 309 <https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-2-caring-about-corporate-due-care-why-criminal-respondeat-superior-liability-outreaches-its-justification.pdf>.
[256] ibid.

this is to prevent corporations from escaping liability by setting up policies but not following up to make sure the policies are enforced[257], in other words, to set incentives to ensure that certain behaviours are not only prohibited on paper. Instead, it should have clear structures in place that "prevent, or detect and punish" said behaviours.[258] However, there are voices that say that this doctrine is not hitting the target: it has caused a prosecution bias towards smaller companies with less than 50 employees because it is simply impossible to detect *mens rea* and *actus reus* in one person when companies are huge – the decision making and execution structures there are too complex to prove it in one person.[259] The corporate veil makes it difficult for the prosecutor to "pierce it" and find the "real" perpetrator behind the crime. But it is exactly there where the societal harm lies, not in the small company where one employee is the "bad apple". Criminal law is according to the "ultima ratio" principle the last resort of the state and the idea of prosecuting the entire corporation because the prosecutor has trouble finding the perpetrator within might seem too solution-oriented to justify the application of criminal law at first glance. However, the difficulty to get through to the perpetrator is not in the nature of corporations, but it is the corporation's choice to organise itself in a way that hampers the tracing of decision-making and chains of action. The corporation benefits from these complex structures and is protected by the veil and it is therefore fair to make it bear the consequences. Additionally, if only smaller companies are held liable because the prosecution of corporations is impeded, the commission of ecocide will not be prosecuted adequately. Therefore, the doctrine of respondeat superior is not suitable for the Rome Statue, either.

4.3.1.4. Aggregation model

The aggregation model is very close to the vicarious liability theory and as it attributes the actions of the individual to the corporation, as well.[260] It is a derivative form of liability. It differs from vicarious liability insofar as it broader: the *actus reus* and *mens rea* do not have to lie within the same person but it is sufficient if one individual commits the act, and another had the required *mens rea*.[261] Alternatively, if the *mens rea* does not lie within one individual but more individuals together possess, e.g., the required knowledge, than their elements of the *mens*

[257] Slye (n 53) 964.
[258] ibid.
[259] Stoitchkova (n 12) 112.
[260] Verrydt (n 30) 287.
[261] ibid 290.

rea are ”aggregated” and they make up the elements of the crime collectively.[262] This form of liability captures the wrong-doing when each of the acts are not sufficient to trigger culpability and would otherwise go unpunished.[263] The idea behind it is that a corporation is more than just the sum of the individuals that make it up.[264] Furthermore, in bigger corporations where decision-making is split between multiple actors and different departments and actions are small-cut and divided among several employees it is more difficult to establish the *actus reus* and *mens rea* in one person. The combination of the individual contribution is supposed to mirror the organisational failure within the corporation.[265] However, this approach has been criticised for establishing the culpability of a corporation too prematurely. Small mishaps might lead to the commission of a crime because “innocent states of mind” were combined to “produce a guilty state of mind”.[266] In these cases the culpability of the corporation seems constructed the other way around. What the aggregation of the acts and mental state of the individuals intends to capture is the “wilful blindness” that is created in corporate structures where one individual claims to not have known about certain elements of the crime but is suspected to have known or wilfully have turned a blind eye to.[267] The actual conduct and the mental state might in some cases not be connected to each other. The theory is grounded in the assumption that the corporation is more than the mere sum of its individuals and has an existence of its own, yet it is reduced to the combination of the actions and mental state of the individuals comprising it without deeming it necessary to add an additional element that mirrors its separate existence. What it does not capture is, if the corporation consciously constructed a chain of action and decision-making that impedes the sharing of information and encourages the employees to turn a blind eye.[268] This is especially the case when ecocide is committed because mostly the harmful conduct is only a by-product of cutting expenses and maximising profit while disregarding what effect these business practices have on the environment. Therefore, Stoitchkova suggests utilising the aggregation concept in combination with organisational theories, that will be discussed further below, because she believes the aggregation of the

[262] Dixon (n 225) 4.
[263] Stoitchkova (n 12) 114.
[264] Slye (n 53) 962.
[265] Stoitchkova (n 12) 113.
[266] Dixon (n 225) 5.
[267] Lederman (n 234) 671.
[268] ibid 671 f.

elements of the crime to be decisive to establish culpability in the context of organisational failures.[269]

4.3.2. Contemporary approaches

The traditionalist approach has been increasingly criticised by scholars who believe that the model is not suitable to sanction the wrongdoing adequately because it disregards the role corporate policies and "culture" have on the natural person that is acting.[270] Furthermore, where the models were implemented in domestic legislations, they have not shown the deterrence effect that they were intended to unfold. Although the US has a long tradition of attributing the actions of low-tier employees to the corporation, as well, through the respondeat superior doctrine, it has not seen a decrease in corporate crimes.[271] That is why, there has been a gradual "conceptual paradigm shift" where each corporation is attributed a personality that is separate from the individuals comprising it and determines the "collective will" of the corporation.[272] The new approaches aim to distinguish corporate wrongdoing in the "procedures, systems and culture" of the corporation.[273] Because these holistic approaches are so recent, they still need conceptualizing and being translated into law, however might be pivotal for establishing the *mens rea* that is specific to corporations in more adequate ways. In the following, these models will be introduced, assessed if they are suitable to capture corporate conduct for cases of ecocide and possibilities to implement the findings will be suggested.

One of the reasons why the prosecution of corporate conduct is hampered is that intention is therefore "overpersonalised".[274] Even when the criminal conduct can be traced back to the corporation's policies or the corporate culture, the conduct will more likely will be dismissed as the behaviour of an individual who showed bad character traits. While the company is made up of individuals who possess good and bad character traits, those individuals are more likely to make bad decisions when they can hand over the responsibility to the corporation and are protected by the corporate veil.[275] In their private lives, these individuals would have not made

[269] Stoitchkova (n 12) 115.
[270] Tiedemann (n 77) 16.
[271] Engelhart (n 69) 60.
[272] Dixon (n 225) 3.
[273] Alice Belcher, 'Imagining How A Company Thinks: What Is Corporate Culture?' (2006) 11 Deakin Law Review 4 <https://doi.org/10.21153/dlr2006vol11no2art234>.
[274] Mentovich and Cerf (n 199) 39.
[275] ibid 40.

the same decisions. Additionally, making decisions in a solidified group dynamic does not necessarily allow conclusions to be drawn about the character traits of the individuals. These findings show that when individuals make decisions for the corporation, there is more to it than just personal morals. Therefore, establishing structures and policies within corporations that leave no doubt that harmful conduct is not tolerated will impact the "group mind"[276] when decisions are made. Slye, e.g., draws a parallel between the mental element of natural persons that commit crimes and the internal corporate organisational processes and policies[277]. According to him, this form of liability can be approached from two angles. Either the policies and structures within the corporation cause the criminal conduct insofar as there is a causal link between the processes and policies, and the conduct, or they display how they did not and were not capable of preventing the conduct. The rationale behind this is to increase the collective accountability for the acts of one member of the organisation. The US has already implemented this form of liability in some security laws demanding corporation to set up a system of internal accounting controls to ensure transparency and accuracy of the accounting procedures of the corporation.[278] Newer approaches base the conduct in corporate policies and "culture" and include the aggregation approach theory that takes into consideration that corporate structures and decision-making channels have grown increasingly complex by allowing the *actus reus* and *mens rea* to fall on two or more persons.[279] One person alone has not realised all the elements or the crime, but two or more persons together have.[280] Slye, too, observed that the mere aggregation of the elements of a crime does not capture the dynamic that is created in group settings.[281] When groups make decisions it is not simply by adding the decisions of the individuals together but through a process of finding consensus by negotiating and making compromises. The decision-making process has a strong influence on the final decision therefore it is inaccurate to assume that the actions and mental state of the collective is the mere sum of those of the individuals.[282] This is similar to Schwegler's approach who divides the *mens rea* into two modes of liability.[283] She starts off with the classical model, when the *actus reus* and the mens are united within the same person but points out that establishing this mode

[276] ibid 37.
[277] Slye (n 53) 967.
[278] ibid 968.
[279] Stahn (n 29) 96.
[280] Slye (n 53) 968.
[281] ibid 963.
[282] ibid.
[283] Schwegler (n 96) 90.

of liability has the disadvantage that information sharing is interrupted. Either the acting employee will hesitate to share information with others, especially their superior, because of the risk of being held criminally accountable, or the superior will order the employees to carry out activities while withholding the fact that they are participating in criminal conduct. Therefore, an aggregation of the elements of the crime is necessary. She established it under the second mode of liability - the collective liability - where multiple employees knew about the offence and carried it out. Corporations are then held liable for their policies and procedures as a *mens rea* of negligence grounded in the "carelessness" of the corporation towards the commission of the crime. She, too, is concerned about including intent in the crime of ecocide, as it would put the threshold too high. The intention of corporations lies in maximising profit and not committing ecocide, ecocide is only a side effect when following that goal. She draws parallels to the 2008 report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes and links it to corporate criminal liability. According to her model, corporations are liable for committing ecocide when they were aware that their actions will lead to ecocide and calls the *mens rea* "conditional intent".[284] While "conditional intent" might be better suited for the *mens rea* as it is defined in Art. 30 of the Rome Statute than negligence, she remains unclear on how negligence around the organisational policies of the corporation play into the conditional intent and does not further elaborate on the threshold for "awareness" as awareness can range from knowledge to "wilful blindness". Even though Schwegler acknowledges that corporations are more than the mere sum of the individuals and that the elements of the crime lie within multiple actors within that corporations, her approach to establish the mens rea does not seem suitable for the Rome Statute. Another possible approach is proposed by Celia Wells who broadens the concept of aggregation by not strictly applying the elements of the crime to the respective corporate actors involved and assessing if these actions and knowledge or intention sum up to the crime, but rather if the actions of and the information accessible among the actors make the corporation itself reckless.[285] She, too acknowledges the role the organisation of the corporation plays when corporations engage in criminal conduct. However, is seems that her approach departs from the aggregation altogether and what remains for holding corporations criminally accountable is solely their organisation and the fact that a crime was committed without an element that causally links both. When it

[284] ibid 91.
[285] Slye (n 53) 968.

comes to the commission of international crimes more tangible elements are needed to establish corporate criminal liability. Stoitchkova, on the other hand, remains with the classical understanding of aggregation and believes it could be used as a tool after an organisational deficit has been made out to be the source of the crime.[286] This way culpability would be rooted in the corporation itself and not be a derivate of the culpability of one of the individuals that are part of it. For, according to the reactive and preventive fault doctrines, organisational failures are a result of shortcomings when exercising due diligence like adequately monitoring and assessing the risk of potential harmful conduct.[287] However, she finds that a breach of due diligence alone is not sufficient to trigger the culpability for international crimes.[288] Most of the crimes require a *mens rea* of intent or knowledge, but the preventive fault, as well as the reactive fault model, lower the threshold of *mens rea* and only take into account negligence – not in relation to the commission of the crime, but in relation to supervision of the employees that committed the crime. While it does potentially demonstrate a "wilful blindness" of the corporation, first and foremost the corporation is guilty for not being organised well instead of for the crime itself. Hereafter, the culpability could be based on refraining from implementing certain policies that aim to prevent harmful conduct, like establishing a corporate system and nourishing a "culture" that does not tolerate the commission of crimes. This approach is called "corporate ethos" and takes into account the specific dynamic that is created when individuals come together to work towards a common goal. "Ethos" is used synonymously with "personality" and is unique to every corporation as is it cultivated within, from the dynamic the individuals that comprise it create when they work towards common goals.[289] While the corporate ethos influences the decision-making process of the individuals that make up the corporation in a way that lays the breeding ground for crimes to be committed, the other way around, too, the individuals make up the ethos. They are interdependent. This way, the culpability is not based on an omission to supervise but when the corporate organisation and structures encourage employees implicitly to engage in illegal conduct.[290] The employees that violates the law only sustain an "ethos" that is there regardless of them and supported them in

[286] Stoitchkova (n 12) 115.
[287] Dixon (n 225) 6 f.
[288] Stoitchkova (n 12) 117.
[289] Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 MINNESOTA LAW REVIEW 91, 1099.
[290] Stoitchkova (n 12) 117.

their decision to do that.[291] The "ethos" then can be interpreted as *mens rea*.[292] The corporate ethos approach is criticised for not being specific enough and not clarifying which level of culpability it presupposes – if negligence is enough, or knowledge is necessary or the middle ground of recklessness is more adequate.[293] Nevertheless, it implements all the modern-day findings about the dynamics in corporations and points to the corporate "culture" as the root cause for harmful corporate conduct that needs to be further conceptualised like how to frame the emergence of sub-cultures[294] and how the ethos will be determined and translated into legal standards that trigger culpability[295]. Belcher, e.g., suggests drawing conclusions about the corporate "culture" by looking into notes and minutes that have been taken in meetings.[296] Another approach would be to divide the responsibility for how corporate "culture" is formed. While higher-ranking corporate officials influence the employees and therefore have an impact on which behaviour is deemed acceptable within the corporation and which is not[297] and are responsible for the implementation of policies and monitoring if these policies are adhered to, employees bear a share of responsibilities for the internal control which starts with holding themselves accountable and assessing their own behaviour.[298] Simultaneously, the higher-ranking officers with supervisory and decision-making functions should regularly assess if it is communicated adequately to the employees, what kind of behaviour is expected of them and where the boundaries lie that limit their freedom to act.[299] Further measures include policies about risk-taking, having a regularly updated compliance program in place that ensures that every individual is aware of the relevant regulations and laws, education and training of the employees and setting incentives for good compliance.[300] When there is awareness about what constitutes a good corporate "climate" it facilitates the process of conceptualising it into standards of law because if some of the aspects are missing, it implies that the "culture" was poor when the harmful conduct was committed and provides for possible reparation orders by the court. Tiedemann, too, believes it is outdated to base corporate criminal liability on the actions of the individuals of the corporation only, because it is not representative of modern

[291] Bucy (n 290) 1183.
[292] Dixon (n 225) 7.
[293] ibid 8.
[294] Belcher (n 274) 12.
[295] Dixon (n 225) 8.
[296] Belcher (n 274) 8.
[297] ibid 13.
[298] ibid 16.
[299] ibid.
[300] ibid 18.

corporate structures.[301] These are becoming increasingly complex and are different in each industry or even within the same industry depending on the size of the corporation. To pierce the corporate veil effectively and reach the core of the wrongdoing, mid- and lower-level employees need to be included, as well. In the US, England, Spain and Czech Republic they have combined the individualised theories and the holistic approach by establishing a dual culpability: criminal conduct of corporate organs and high-level officers who have decision-making authority is attributed directly to the corporation while criminal conduct of mid- and lower-ranking employees is attributed to the former for neglecting their oversight and organisational duties – and indirectly to the corporation itself. Sweden and Switzerland chose a different model namely an autonomous culpability of the corporation for organisational deficiencies that were causally linked to the criminal conduct. The culpability is presumed, and the corporation then has to deliver evidence that it has taken all the necessary precautions to prevent crimes from being committed by its employees like implementing a "compliance program", "corporate codes of conduct" or "corporate codes of ethics".[302] The corporations therefore are granted the right to exculpate themselves. These two approaches differ in how guilt is applied to the corporation. One attributes the guilt of the individual persons that make up the corporation to the corporation and the other establishes an independent culpability of the corporation. Tiedemann, however, finds a commonality in both models which he calls "social guilt "as opposed to the traditional concepts of legal or moral guilt. Both models sanction the averting from the legal and normative rule of conduct based on the framework of negligence liability.[303] The traditional concept of mens rea is tailored to human beings because criminal law evolved during a time when corporations had not yet become to the powerful entities that they are today. Basing corporate criminal liability on the classical understanding of mens rea alone by applying it on one of the individuals that make up the corporation. However, an autonomous culpability might not be the best solution for the crime of ecocide. While assuming the guilt of the corporations with the possibility of exculpation could prove very efficient to contain financial crimes, to be convicted for one of the core crimes of the Rome Statute, the culpability needs to be accurately established. To capture the group dynamic that creates the breeding ground for the commission of crimes in corporate settings and simultaneously attach it to a specific offence to justify why the behaviour is sanctioned through criminal law a

[301] Tiedemann (n 77) 16.
[302] ibid.
[303] ibid 17.

combination of organisational theories and the aggregation model would sanction the wrongdoing adequately.

4.4. After the conviction

4.4.1. Sanctions

The only sanction in the Rome Statute that is applicable to legal entities is monetary fines according to article 77 (2) (a) or a forfeiture of proceeds, property and assets derived from the crime. Monetary fines, however, might not serve as sufficient deterrence as the fines can easily be incorporated in the corporations' prior cost-benefit analysis. Imposing a fixed fine in relation to the harm committed might put big corporations in an unjust advantageous position as their financial capacities exceed the deterrence effect of the fine. On the other hand, calculating the fine in relation to the corporate turnover, assets or other economic measures causes skewed results as the sanction for committing the same crime will vary significantly.[304] Another option would be to tie the fine to the economic gains the corporation gained out committing ecocide. However, if the activity did not bring the expected economic gain the fine will be relatively low, even though the damage that has been done in the meantime is irreversible and has a massive impact on the ecosystem. The sanction catalogue of the statue therefore needs to be modified if corporations are to be included. Possible alternatives to monetary fines could be operational restraints, probations, negative publicity and -the equivalent to life-sentence – the dissolution of the corporation.[305] Operational restraints would temporarily or even permanently ban the corporation from certain activities or from carrying out business in certain countries or regions.[306]Another sanction could be setting corporations on probation, meaning monitoring their activities. This could be either done by the court or through an agency, e.g., on where the corporation is domiciled, or organisation like the UN High Commissioner for Human Rights, jointly by non-governmental organisations or a combination of both.[307] More controversial are equipping victims with so called equity awards. They are awarded ownership of the corporation in some shape or form like shares with a twofold effect: the victim is awarded those rights without making an investment which causes a financial loss but also it the victim's economic well-being to the company's financial well-being. However, the victim might find it offensive

[304] Slye (n 53) 970.
[305] Schwegler (n 96) 87 f.
[306] Slye (n 53) 971.
[307] ibid.

to be part of a corporation that brought so much pain and possibly was involved in crimes against humanity. On the other hand, if a corporation is involved in the commission of a crime. Another option would be to exclude the corporation from entitlement or public benefits but for this cooperation of the state the corporation is domiciled, or the host state is necessary as public procurement falls in their hands.

4.4.2. Reparations

Reparation orders are of great importance in the restoration of justice as they firstly make the offenders repair the harm they have caused and secondly allow the court to hold the offenders accountable for the wrongs they have committed.[308] In the reparation order in the cases of Lubanga and Ntaganda the judges went even as far as calling the reparation process not only as imperative for the restoration of justice but also for the success of the court.[309] They might be able to fill the gaps that are found in the catalogue of sanctions because they can easily be tailored to the specific cases of ecocide and environmental litigation has become increasingly creative in ordering effective reparations. The reparation regime of the ICC consists in form of a trust fund that is being set up for the victims where the offender must pay into according to article 79 paragraph 2 of the Rome Statute. The Rome Statute and Rules of Procedure do not define the term harm but according to article 75 the judges can develop reparation principles. In the reparation order in the case of Lubanga the judges defined harm as "material, physical and psychological".[310] According to Rule 85 paragraph b of the Rules of Procedure, the victim does not necessarily have to be a natural person but can be a legal person, as well. However, reparations cannot be awarded to nature and animals which poses a problem when reparations have to be made in case ecocide was committed. The victim of ecocide is nature itself. Still, the effects of the destruction of ecosystems can impact communities who, e.g., relied on the river for water and food or lived in the forest. In these cases, the victims can be financially compensated for the loss of their livelihood. Another option would be to provide access to clean water. The funds could be used for reforestation or projects for re-establishing the biodiversity that was lost because of the commission of ecocide. Examples of how this could be implemented can be taken from regional courts. The Inter-American Court of Human Rights

[308] *The Prosecutor v. Bosco Ntaganda (Reparation Order)* (n 174) 5; *The Prosecutor v Thomas Lubanga Dyilo (Reparation Order)* (ICC-01/04-01/06-3129-AnxA) 1.
[309] *The Prosecutor v. Bosco Ntaganda (Reparation Order)* (n 174) 5; *The Prosecutor v. Thomas Lubanga Dyilo (Reparation Order)* (n 309) 1.
[310] *The Prosecutor v. Thomas Lubanga Dyilo (Reparation Order)* (n 309) 3.

ordered the reforestation in Ecuador for the Kichwa Indigenous community in Ecuador. The ICC itself has ordered reparations before that aimed at restoring the environment after the end of the conflict with the Lord Resistance Army in Uganda like beekeeping training and tree planning.

The tools that are in the Rome Statute might be sufficient to provide reparations in case ecocide is committed. Reparations would be awarded through the judgments or through the assistance mandate of the Trust Fund for Victims[311] which leave enough flexibility to adjust the reparations to each case. Killean goes as far as naming three mechanism that she deems as suitable and interlinked: "'eco-sensitive' reparations, reparations that explicitly respond to environmentally destruction and environmentally transformative reparations". 'Eco-sensitive' reparation is a concept derived from the conflict-sensitive reparations that the TFV is already practicing and means the impact assessment of the reparations on the environment beforehand, the monitoring and subsequent evaluation of the measures on the environment and lastly awarding reparations that aim at possibly bringing about sustainable change. The TFV has already, without the introduction of the crime of ecocide, showed willingness to adopt an environmentally conscious approach in its 2014-2015 strategic Plan where one of its Programming Guiding Principles was to "assess, mitigate, and evaluate the impact the programs will have on the environment and how they are related to socio-economic, cultural and human health factors, as well.[312] Concretely, when the TFV is ordered to implement collective symbolic reparations, it could set up projects that encompass natural area restoration and conservation for example.[313] Additionally, programs that are not only the implementation of symbolic reparation but ought to repair material harm, could also be designed in a way that connects restoring the environment and livelihoods of the victims when e.g., arranging vocational training and training for activities that generate income. In 2012 one of the reparation arrangements the ICC determined through the assistance mandate of the TFV, was training for beekeeping, sustainable agricultural techniques, and tree-planting as a form of reparation.[314]

[311] Rachel Killean, 'IMAGINING FUTURE REPARATIONS FOR ENVIRONMENTAL DESTRUCTION' in Emma Palmer and others (eds), *Futures of International Criminal Justice* (Routledge 2021) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701678>.
[312] ibid 6.
[313] ibid 7.
[314] Jennifer McCleary-Sills and Stella Mukasa, 'External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions'

The aim was to secure the livelihood of the people affected by the conflict with the Lord Resistance Army. These assistance programs are usually long-term which helps in ensuring that they are implemented in a sustainable way. Eco-sensitivity means that when awarding reparations for one of the core crimes, the Court will take into consideration the harm that has been done to the environment and order actions that repair that harm. When a person is found guilty of ecocide, they are convicted precisely for the destruction of the environment which consequently means that the reparations are not eco-sensitive but put the reparation of the environment at the centre. However, the eco-sensitivity of some reparation orders shows that the concept of repairing the damage done to the environment is not foreign to the Court and proves a good starting point for the implementation of ecocide. To grant reparations that directly respond to the environmental harm can seem problematic at first since reparations are ordered to the victim. Rule 85 of the Rules and Procedures of the ICC defines the victims as natural or legal persons that were harmed by the perpetrator. This rule mirrors the anthropocentrism of the four core crimes.[315] As long as the environmental damage is the harm that a person has suffered the court can order its reparation. The environmental harm needs to be the damage the victim experienced, in other words, there needs to be a victim nexus. The Court cannot order the perpetrator to repair the damage precisely because the damage exists. The Inter-American Court of Human Rights (IACtHR) has shown willingness to grant reparations generously when they involve human rights of indigenous people.[316] In 2012, for example, ordered reforestations and removal of waste programs on the territory of the Kichwa people in the dispute with the government of Ecuador that had granted concessions to an oil company on their territory.[317] However, if the court specifically ordered the restitution of the environment and not only reparations for the damages that the people experienced it would acknowledge the interrelatedness and interdependence between the environment and the people living there.[318] In the following it will be examined if the environmental harm as such can be subject of a reparation order of the ICC.

(International Center for Research on Women (ICRW) 2013) 32 <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>.

[315] Killean (n 312) 10.

[316] ibid 12.

[317] *PUEBLO INDÍGENA KICHWA DE SARAYAKU VS ECUADOR (Judgment)* (IACtHR) 79 f.

[318] Killean (n 312) 14.

4.4.2.1. The international community as the victim

When no concrete victim in the form of a person- be it natural or legal - can be traced, the international community as a whole could serve as the victim of the crime. In the case of Al-Mahdi the judges determined humankind as the victim of the destruction of the cultural heritage of Timbuktu in paragraph 53 of the reparation order.[319] This is parallel to the environmental harm in the case of ecocide as it affects humankind as a whole, especially since ecocide is the large-scale destruction of the environment. In the Al-Madi case humankind is to be represented by UNESCO according to paragraph 107 of the reparation order. With ecocide it could be similar, with the role of the representative going to environmental institutions like UNEP.[320]

4.4.2.2. Nature itself as the victim

Another option to detach the reparation orders from human rights could be to grant legal status to nature itself. This would then establish coherence with the ecocentrism of the crime of ecocide, as well. The giving rights to nature movement is gaining momentum. One of the first nations to cement the rights of nature in its constitution was Ecuador in 2008 and already, there is jurisdiction on rivers 'standing their grounds'.[321] Other countries like Bolivia, Colombia and New Zealand have followed suit in granting nature legal personhood in some way or another.[322] The rationale behind the concept is to subjectify nature and improve how we relate to our environment. Nature is a voiceless victim, meaning, if human rights are not involved, it is difficult to assert rights of its own as shown in the example above. If for example a river is polluted in the best-case scenario there are environmental laws in place that aim at holding the polluters accountable. These are typically of civil or administrative nature and their legal pursuit dependents on the authorities becoming active which again depends on their resources, personnel and how much importance they give to environmental protection. An environmentally conscious individual or collective that wants to file a complaint is left powerless because the harm is not personal. Granting legal personhood to nature would give individuals or organisations the power to file a complaint before court in the name of nature. In

[319] *THE PROSECUTOR v AHMAD AL FAQI AL MAHDI (Reparation Order)* (ICC-01/12-01/15) 21.
[320] Fin-Jasper Langmack, 'Repairing Ecocide: A Worthwhile Challenge to the ICC Reparation System' (*Völkerrechtsblog*, 8 July 2021) <https://voelkerrechtsblog.org/repairing-ecocide/>.
[321] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7 Resources 7 <http://www.mdpi.com/2079-9276/7/1/13> accessed 17 June 2022.
[322] Claudia Tam, 'Should Nature Be Given Legal Rights?' (*Earth.Org*, 22 October 2020) <https://earth.org/should-nature-have-legal-rights/>.

other words, the idea behind granting rights to nature is to give it a "seat at the table" where its genuine needs would be represented as opposed nature as an extension of human interests.[323] The concept of being represented by another person in court is not new. A corporation is represented by the natural person behind it and children are represented by their primary caretakers until they reach adulthood.[324] Similarly, nature would act through its legal representative, as well. The idea of subjectifying nature, while new as a legal concept, has been intrinsic in the culture of many indigenous peoples all over the world. Because of their interdependence with their surrounding environment, they have internalised an ecocentric worldview ad it is estimated that they protect around 80% of the planet's biodiversity.[325] If nature has legal personhood, it could claim having suffered harm because of the commission of ecocide and ask for reparations as a legal person. However, since the doctrine of granting rights to nature is new and in many ways a paradigm shift, the legal details have not been developed, yet. Scholars are still debating if nature is to be considered a legal person or if granting rights to nature would break the binary system of natural and legal persons and introduce a legal personhood 'sui generis'.[326] Additionally, what is striking is that the majority of the rulings so far have granted rights of rivers and only a small fracture of the cases involves other ecosystems. Ecosystems need to "apply" for their rights before courts and it is up to the domestic jurisdiction to grant them these rights or not. It is therefore debatable if giving nature a "seat at the table" will protect its interests in an ecocentric manner since it is represented by human beings who pick the ecosystems and how they pick them might be intrinsically anthropocentric. The judges at the ICC would have to make sure the environment that was affected by ecocide was granted rights of its own. This makes it incredibly difficult for to create a consistent jurisprudence. Lastly, Killean proposed the inclusion of transformative reparations, a concept taken from providing survivors of sexual violence with a comprehensive set of reparations instead of compensation only and provide them with the tools to be able to return to a life in dignity. Transformative reparation is derived from transformative justice, a concept that tries to go beyond the classical tools of transitional justice by taking into consideration the local agency

[323] Oliver A Houck and Center for Environmental Philosophy, The University of North Texas, 'Noah's Second Voyage: The Rights of Nature As Law' (2017) 31 TULANE ENVIRONMENTAL LAW JOURNAL 50, 35.
[324] Cano Pecharroman (n 322) 4.
[325] Gleb RAYGORODETSKY, 'Indigenous Peoples Defend Earth's Biodiversity—but They're in Danger' [2018] *National Geographic* <https://www.nationalgeographic.com/environment/article/can-indigenous-land-stewardship-protect-biodiversity->.
[326] Cano Pecharroman (n 322) 3.

and capacities, emphasizing the process rather than an outcome that was defined in the beginning and confronting the unjust and intersecting structures of power that lead to discrimination.[327] Parallel to this concept, reparations should provide with a similar remedy and have to be implemented on three levels, namely individual, institutional and structural which are interconnected.[328] After a conflict, groups that were already marginalized prior to the conflict are likely to go back to that state of marginalization. Being granted compensation only will not lift them out of the social fringe that systemic structures have interwoven them in. Reparations therefore should be tailored to providing assistance in breaking these structures and creating a more just society.[329] This is related to post-conflict scenarios and even though ecocide can be and has been committed during conflict, operation agent orange in Vietnam e.g., it is a crime that is committed mostly in peace time. It is also true, that when ecocide is committed human rights are infringed upon and those human rights go beyond just the right to a healthy environment *per se*, like, e.g., right to health, education, housing, water etc. It's an aspect of climate justice that those who live more sustainable lives and contribute least to global warming are those that are *de facto* more affected by it and pay the price for industrialization and development even though they were denied "a piece of the cake". Those affected mostly live in the global south. However, the concept of ecocide is that it is an ecocentric as opposed to anthropocentric crime. This does not mean that that the harm human-beings suffer is excluded, but it is included in the harm towards nature itself as they are seen as part of nature. Therefore, this needs to be mirrored in the regulations of reparations. In analogy to the idea that transformative reparations are supposed to contribute to lifting marginalized people out of the marginalization they were experiencing pre-conflict, therefore change the *status quo*, reparations awarded in case of ecocide could aim at changing the hegemonial attitude human-beings have towards the environment. It is this attitude of being on top of the chain of life that leads carelessly extracting natural resources and disturbing ecosystems irreversibly without taking into consideration that the planet has to remain inhabitable for the people living in the area and more broadly, for future generations, as well. Although a lot can be achieved with the payment of compensation, awarding reparations that contribute to changing the attitude towards ecocentrism or at least sustainability when conducting business activities would challenge the

[327] Killean (n 312) 14.
[328] Rashida Manjoo, 'Introduction: Reflections on the Concept and Implementation of Transformative Reparations' (2017) 21 The International Journal of Human Rights 1193, 1197.
[329] Killean (n 312) 14.

status quo. It is one thing to hope for a deterrence effect out of fear of being prosecuted for ecocide and suffering a reputational damage of an extent that will crash profit and possibly the corporation's value on the market, and another to change the attitudes insofar as to challenge the underlying structures that cause ecocide. Transformative reparations could be regular educational training for the management of corporations about how far advanced the climate crisis is and link it to the operating concession or ordering the corporation to invest a certain percentage of their budget in transforming their business operations like investing in more advanced technology or in research to find sustainable alternatives, including the relevant stakeholders, especially the inhabitants of the area where the business operations will be conducted, into the business plan and providing the employees with specific training that relates to the region the business activities will take place to sensitize them to the traditions, customs and vulnerability of the people living there. However, the concept of transformative reparations has been criticized before as unrealistic and burdening the ICC with a task that it cannot shoulder.[330] To achieve the desired transformation a more collective effort is necessary where the inclusion of the state is imperative. Even though reparation means can involve different actors they are still awarded because one person – be it natural or legal – was convicted by the ICC. To challenge the *status quo*, the measures need to be part of a larger policy-driven campaign, co-funded by the state and enjoy the monitoring mechanisms of the state.[331] Although the TFV does not monitor the implementation of the reparation orders alone, but receives assistance from numerous local and international organizations, it can only sanction the convicted person in case it fails to comply with the orders. The ICC is limited in its resources and needs to be incorporated in a larger course of action to bring the transformation that it desires[332], as only the state has the authority to establish adequate sanctions on a larger scale. Rob White proposes a concept of reparative justice in a punitive context and makes it clear that it should not be confused with restorative justice. Restorative justice is a concept of "harm reparation, social restoration, community harmony, and problem-solving".[333] It is distinct from classical retributive justice insofar as the latter uses punishment as deterrence for the future commission of crimes while the former focuses on establishing peaceful relations by involving the perpetrator, the victim and the community as a whole in the process of restitution, reparation

[330] ibid 18.
[331] ibid 16; Manjoo (n 329) 1197.
[332] Killean (n 312) 16.
[333] Rob White, 'Reparative Justice, Environmental Crime and Penalties for the Powerful' (2017) 67 Crime, Law and Social Change 117, 117.

and reconciliation.[334] While the objective of both concepts is to repair the damage, restorative justice does so through a consensus of the parties involved whereas reparative justice can be pressed upon the perpetrator by judgment. Restorative justice has been used previously to repair the harm committed to the environment, as well. The result of the meeting of the parties involved is an agreement of how the offender will repair the damage[335] and consequently includes the offenders admitting their role in the environmental damage and taking responsibility for their actions[336] In Akaroa, New Zealand, for example, a company contaminated a stream, killing fish that belonged to a protected traditional food species.[337] Additionally, the stream was used by Māori tribe, rūnanga, to gather water. After the prosecutor had begun investigating, the company admitted responsibility and asked for a restorative justice process and a meeting among all the parties concerned and the parties came to an agreement.[338] Critics fear that this will lead to impunity as the offenders committed crimes that should be addressed by the state.[339] However, criminal and restorative justice are not mutually exclusive, they can be applied side by side and the judge can, e.g., decide to lower the sentence. Besides, the process of restorative justice only starts, if all parties agree to it.[340] Reparative justice, on the other hand, is a substantial extension of mere financial penalties that are simply implemented in the yearly accounting of the corporation and are tailored to the corporation, the offence and what is specifically needed to repair the damage.[341] The New South Wales Land and Environment Court of Australia e.g., is avant-gardist in sanctioning corporations that have violated environmental law.[342] The sanctions the court generally applies are legally of civil, administrative and criminal nature but especially in the criminal jurisdiction it has shown creative way to increase the deterrence effect and order actions that go beyond paying a fine, cleaning up the waste or paying a compensation to those who were harmed by the action.[343] In 2010 the National Parks and Wildlife Amendment Act widened the list of possible sanctions.

[334] ibid 129.
[335] Brian Preston, 'The Use of Restorative Justice for Environmental Crime' (2011) 136 Criminal Law Journal 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822>.
[336] ibid 3.
[337] Brian Jenkins, 'Environmental Restorative Justice: Canterbury Cases', *IAIA18 Conference Proceedings | Environmental Justice in Societies in Transition* (2018) 4 <https://conferences.iaia.org/2018/final-papers/Jenkins,%20Bryan%20-%20Environmental%20Restorative%20Justice.pdf>.
[338] Jenkins (n 338).
[339] Earth Restorative Justice, 'Restorative Justice: A Suitable Response to Environmental Crime?' (2018) Nr. 21, 22 Eco-Instigator <https://earthrestorativejustice.org/articles/rj-and-environmental-crime>.
[340] ibid.
[341] White (n 334) 118.
[342] ibid.
[343] ibid 120.

Among the measures possible are orders to carry out specific projects for the restauration of the environment for the public benefit, pay a designated amount to the Environmental Trust, a fund established to be used for environmental restoration and projects, make the perpetrator, employees and contractors included, attend training or a course etc. The sanctions are divided into those that aim restauration and those that punish or deter. Among the possible restoration orders are paying for the investigation costs or for the so-called monetary benefit where the sum equals the monetary benefit the corporation obtained from the offence or ordering the perpetrator to carry out regular environmental audits. The punishing side entails, beyond the payment of fines, attending environmental services or publishing details of the offence in the newspaper.[344] What has been ordered by the court so far include fines to be paid into the Fund, ordering a corporation to do community service, carrying out environmental projects[345] and publish the offence in the newspapers with the court determining the exact wording of the publication[346]. In the case against Rinaldo (Nino) Lani from 2012 the court determined that the perpetrator had shown an especially contemptuous attitude towards environmental protection law and ordered heavier sanctions than it normally would have. The corporation had damaged the habitat of an endangered species of squirrel gliders. The fine was paid into the Fund with the aim to map and study the population to improve its protection.[347] In addition, the perpetrator had to consult a bush generator an ecologist and an expert with special knowledge of squirrel gliders and establish a remediation plan that was precisely specified in the order.[348] According to White, the Court's flexible approach translates the monetary fines into impactful projects which directs "money (…) into consolidated revenue".[349] Because it is complicated sanction corporations adequately that will deter them from future commission of crimes, since unlike natural persons, they do not have to fear being incarcerated and having to give up their personal freedom, the reparation orders of the ICC might compensate the deficit. The reparation order not only compensates the victims for the harm they suffered because of the corporate conduct but allow for the restoration of the environment itself and make room for the "reparation" of the internal structures of corporation that enabled the commission of the crime.

[344] ibid 122.
[345] ibid 124.
[346] ibid 125.
[347] ibid 126.
[348] ibid.
[349] ibid 129.

5. Conclusion

The Rome Statute does contain provisions that can be used to prosecute corporate conduct by holding corporate officers accountable. However, these tools only hold the individual perpetrators accountable and do not sanction the collective decision-making that are formed through a "group-mind" and the underlying corporate "culture" that is the breeding ground for decisions that lead to grave violation of human rights and the destruction of our environment. Therefore, the assumption that holding the shareholders and top-tier managers personally accountable through criminal prosecution is not very promising. It will be difficult to pinpoint the required elements of the crime in one person because corporate structures are increasingly decentralised and sometimes divided into subsidiaries and protected by the corporate veil which will complicate investigations of the Prosecutor and hamper evidence-finding. Further, considering that the ICC is considered the highest of bodies to prosecute criminal conduct that focuses on the gravest of crimes humankind can experience, it needs to capture the wrongdoing adequately. Prosecuting only individual corporate officers will not sanction the collective element and the underlying structures that develop when multiple individuals unite and work towards a common goal. Even if the shareholders and top-tier managers significantly contribute to the structures, this research has shown that legal entities develop a personality that is distinctive to the sum of the individuals that make up the corporation. Oftentimes, these individuals would have made different decisions in a different setting. This raises the question if leaving it up to the corporate officers to shoulder the criminal prosecution and conviction is just. This research proposed a dual approach, where the Prosecutor can hold the corporate officer, as well as the corporation accountable. This way the corporate officers will get convicted if their contribution to the crime was significant enough and meets the threshold for culpability according to the Statute. Simultaneously, the additional wrongdoing that is imminent to the legal entity and its organization does not get lost and the question of "fault" is distributed justly. Moreover, the *mens rea* that is required in the Rome Statute, does not capture the nature of corporate criminal conduct. When corporations make decisions that impact the environment negatively, the intention is not directed towards harming the environment *per se* but only the remaining competitive in the market, maximizing profit and cutting costs. The harm is the result but not the objective of the corporate criminal activity. This research found that introducing negligence for the crime of ecocide would capture the nature of corporate criminal conduct more adequately. In general, the traditional concept of mens rea might not be

suitable to capture the “mental element” of the corporation and needs to be rethought to include not only the mental element towards the actual criminal conduct but the underlying structures, policies and “culture” that enabled the commission of the crime. In other words, the absence of policies and codes of conduct that actively discourage harmful behaviour and encourage adequate risk assessment might be an indicator that the *mens rea* of the crime was met. This research comes to the conclusion that not only the conviction itself but the subsequent sanctions, especially the reparation orders, might significantly contribute to effective deterrence. By drawing from concepts from transitional justice and incorporating a creative and more holistic approach to repairing the damage done, businesses might be sensitised towards the fragility of our environment, the grave long-term implications of our climate crisis and that sustainability will pay off in the long run, even for them.

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