

Scientific

THE DISPOSABLE NATURE: THE CASE OF ECOCIDE AND CORPORATE ACCOUNTABILITY

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ABSTRACT

According to the Rome Statute there are four core international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. However, there is another widespread crime which deserves the same amount of attention: the crime of ecocide. Ecocide is inextricably linked with corporate activity. This article looks into the widespread destruction of the natural environment, or ecocide, by corporations and researches if and how they can be held accountable under international law. It furthermore addresses if ecocide should be adopted as an International Crime.

Keywords: Ecocide; Corporate Crime; Environmental Law; Sustainability; International Law.

Introduction

According to the Rome Statute of the International Criminal Court (ICC) there are four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. However, there is another widespread crime which deserves the same amount of attention: the crime of ecocide. This article will shed light on the concept of ecocide and its definition. Ecocide is inextricably linked with corporate activity; think of the destruction of rainforests, the pollution of the sea and the rising amount of carbon dioxide in the air. Corporations contribute to all these factors. When thinking of ecocide, one often thinks only of companies that are active in the oil, mining, chemical, diamonds and gold industry – big, dirty and secretive companies which seem far away from the average individual; but this is not always the case. This article will illustrate different examples of corporate industries allegedly active in committing acts of ecocide.

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Why is ecocide important to discuss? In contemporary society ecocide committed by corporations is not viewed as an international crime. Then, if a corporation commits acts of ecocide how can the corporation as an entity be held accountable? How to stop corporate activity concerning ecocide? This article aims to show how corporations can currently be held accountable. Furthermore, this article will illustrate why ecocide should be an international crime. If ecocide does not stop, the effects could be drastic. Not only do animals, flora and fauna suffer, but often people are forced to leave their homeland and the air is polluted. The fight against ecocide is not just a fight for the nature-loving individuals. If the planet is dead, no economy is possible.

This article mainly addresses the question to how the adoption of ecocide as an international crime can affect corporate accountability. In order to help understand and answer this question, a number of other questions need to be answered: what is ecocide? How is ecocide linked to corporations? How can corporations be held accountable under current international law? Why should ecocide be considered an international crime?

These questions will be answered through a multidisciplinary literature study. Articles and books are used from the fields of law, psychology, biology, and even space engineering. The scope of the different fields and articles used is broad because ecocide and concepts surrounding ecocide cannot be addressed fully by looking at only one academic field. All the articles chosen, known or less known, are selected on the basis of which best fit the concepts discussed in this article. While literature studies and reviews often do not report something new or original, this article aims to provide a new and original insight using existing materials. The fields of ecocide and international corporate crimes are new and therefore leave room for experimental work. Whereas experimental work is important in this article, the main goal is to situate the study of ecocide and corporate accountability within the existing body of academic literature and to provide a clear context.

The purpose of this article is to demonstrate that the phenomena and regulation of ecocide is of international importance. Both the concept of ecocide and the concept of corporations linked to international law, are upcoming fields of research which deserve more attention. This article argues that by adopting ecocide as an international crime, corporate accountability will be affected and it offers the opportunity to spark debate on the possibilities to tackle these issues in a consistent and effective way.

I. Defining Ecocide

Ecocide is a term which will immediately bring grave images of destroyed landscapes to the mind. A massive oil leak in the sea, polluted grounds due to chemical waste, extinct flora and fauna, and air pollution are all examples of a potential ecocide. But what precisely is ecocide? In this sub-question a definition for the concept of ecocide will be discussed. Followed by a discussion of why ecocide is not considered an international crime according to the Rome Statute. Lastly the different types of ecocide will be outlined.

I.1 What is Ecocide?

The term ecocide is derived from the concept of genocide. Both ecocide and genocide could be viewed as crimes against peace, depending on the definition of peace. Ecocide entails the right to life of all the inhabitants of the Earth, including human beings, flora, and fauna, while genocide entails the right to life for human beings.¹ The definition of genocide is clearly stated under Article 6 in the Rome Statute of the ICC. The Rome Statute has defined crimes of genocide as any of the following acts:

‘Committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about
- its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group.’²

An important difference between genocide and ecocide is that genocide incorporates the concept of intent. Ecocide is often not intended, but is rather a crime of consequences. The crime of ecocide is not adopted in the Rome Statute as an international crime and does not have an internationally accepted definition. Several authors have proposed a number of definitions. Polly Higgins proposed a legal definition to the United Nations to be adopted into the Rome Statute.³ Her definition is as followed:

‘the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished’.⁴

This definition covers a large scale of the different types and aspects of ecocide. It is important to understand what all these concepts mean. The Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, or ENMOD, defines the concepts of widespread, long-lasting and severe in the context of environmental damage. ENMOD is an international treaty which aims to prohibit the use of environmental modification techniques, such as weather modification. According to the definitions provided by ENMOD, the concept of ‘widespread’

¹ M. Crook & D. Short, ‘Marx, Lemkin and the genocide-ecocide nexus’, *The International Journal of Human Rights* 2014-18 pp. 298-319.

² See article 6 of the Rome Statute of the International Criminal Court: www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf, page 3.

³ Polly Higgins. *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, London: Shephard- Walwyn Ltd, 2010.

⁴ *Ibid.*

entails an area of several hundred kilometres;⁵ 'long-lasting' encompasses a season or a period of a couple of months⁶, and 'severe' involves grave disorder or maltreatment to economic and natural resources, human life, and other resources.⁷

The next concept is human agency. While proposed definitions, such as Richter et al.⁸ failed to address who can commit ecocide, Higgins incorporates the 'who'-question by incorporating human agency.⁹ If incorporated into the Rome Statue, people who are in the position of superior responsibility could be held accountable by adding this concept to the definition of ecocide. As mentioned before, ecocide is not a crime of intent, and most heads of corporations or state do not set out to commit ecocide. Therefore, ecocide is a crime of strict liability which entails that the intent does not have to be proven to be charged with committing ecocide. Importantly, when talking about corporations, the distinction must be made between human agency and corporate agency. Corporations can only act vicariously.¹⁰ This means that corporations have a different set of legal and moral agents, and therefore have special conditions under which they can be held responsible or liable. Since multiple types of agencies can commit ecocide, 'other causes' is added to the definition. Other causes refer to ecocide that is not committed by humans but by natural causes, such as tsunamis.

The succeeding concept is the notion of 'peaceful enjoyment.' This term is often used in law and originates from civil law. The legal definition according to the legal dictionary is 'A covenant that promises that the grantee or tenant of an estate in real property will be able to possess the premises in peace, without disturbance by hostile claimants.'¹¹ Translating this to ecocide, peaceful enjoyment entails a human agency has the duty to safeguard that the right to peaceful enjoyment is not broken. The last concept is 'inhabitants.' Ecocide often does not only affect human beings and that is why the concept of 'inhabitants' entail all beings. This means that a case can be brought to court on behalf of other beings, such as flora and fauna, if they are affected by ecocide.¹²

This article uses the definition by Higgins,¹³ which entails all the important aspects

⁵ Sunshine Project, available at www.sunshine-project.org/enmod/art1.html

⁶ *Ibid.*

⁷ *Ibid.*

⁸ E.D. Richter, R. Blum, B Castleman, A. Frank & G.H. Stanton, 'Ecocide: A Crime Against Humanity?', *Hebrew University-Hadassah School of Public Health and Community Medicine*, Jerusalem, 2007.

⁹ E.D. Richter, R. Blum, B Castleman, A. Frank & G.H. Stanton, 'Ecocide: A Crime Against Humanity?', *Hebrew University-Hadassah School of Public Health and Community Medicine*, Jerusalem, 2007. & Higgins 2010

¹⁰ L. May, 'Vicarious Agency and Corporate Responsibility', *Philosophical Studies*, 1981-43 pp. 69-82.

¹¹ See <http://legal-dictionary.thefreedictionary.com/Quiet+enjoyment>, retrieved on 16-04-2013.

¹² The source of this entire paragraph is <http://eradicatingecocide.com/wp-content/uploads/2012/06/faqs-on-ecocide-law.pdf>

¹³ Polly Higgins. *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, London: Shephard- Walwyn Ltd, 2010.

of ecocide.¹⁴ Having a clear understanding of what ecocide is, it is important to understand why ecocide is not considered an international crime yet.

I.2 Why Ecocide is not considered an International Crime

The concept of ecocide has been around for decades. One of the first times the concept was used was to address the chemical warfare of the United States of America in Vietnam. As mentioned in the introduction, the Rome Statute has set out four core crimes which are considered international crimes. These four core crimes are described in Article 5 of the Rome Statute as the crime of genocide, war crimes, crimes against humanity and the crime of aggression.¹⁵ Ecocide has not been adopted as an international crime in the Rome Statute, but it was included in the draft version.

The Draft Code of Crimes Against the Peace and Security of Mankind, which included the draft Statute for the International Criminal Court, eventually became known as the Rome Statute. In this draft code ecocide was listed as an international crime, but somehow it did not make it to the final version. State parties¹⁶ argued that ecocide was already under the umbrella of Article 26 on the crime against the environment. The draft version of Article 26 stated:

‘An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...].’¹⁷

Interestingly, only three parties opposed (on record) the incorporation of ecocide in the statute, but overnight and without any record of why, the decision was made to remove it. According to Gauger et al.¹⁸ the then Chairman of the International Law Commission (ILC) single-handedly decided to remove the crime of ecocide without subjecting it to a poll. Eventually, the draft version of Article 26, which included environmental damage was put to vote, instead of ecocide as a crime. In the final version of the Rome Statute, crimes against the environment were only

¹⁴ *Ibid.*

¹⁵ Article 5.1 of the Rome Statute states: ‘The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression’. For more information about these specific crimes see Article 6 (genocide), Article 7 (crimes against humanity) and Article 8 (war crimes) of the Rome Statute. http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf p. 3-10.

¹⁶ Yearbook of the ILC, 1986, Vol. I: Mr. Stephen C. McCaffrey (USA), pp.119–20, para.10; Mr Andreas Jacovides (Cyprus), p.121, para.28; Mr Ahmed Mahiou (Algeria), p.128, para.11; Mr Doudou Thiam (Senegal; Special Rapporteur on the draft Code), p.175, paras.17-18.

¹⁷ See Yearbook of the International Law Commission 1995 Volume II, part two, page 30. [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1995_v2_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1995_v2_p2_e.pdf)

¹⁸ Gauger, A., Rabatel-Fernel, M.P., Kulbicki, L., Short, D. & Higgind, P. (2012) ‘Ecocide is the missing 5th Crime Against Peace’, *Human Rights Consortium, School of Advanced Study, University of London*, 2012.

listed as war crimes and not as crimes against peace. Article 8(2)(b)(iv) on war crimes states:

‘Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.’¹⁹

In 2012 the International Conference on Environmental Crime: Current and Emerging Threats was held. The expert group, on the topic of ‘environmental crime in the current international legal framework: current flaws and possible steps ahead,’ concluded that there is a need for an international definition of environmental crime and that the existing and new laws, treaties and frameworks must work more efficiently in the fight against environmental crimes.²⁰

Thus, while one can potentially argue that ecocide can be considered a war crime, ecocide is not considered an international crime during peace. The international community, and with it international law, are taking steps to address environmental crimes, but this is just the beginning. Incorporating ecocide into international law entails that there is a solid understanding of what defines ecocide. Ecocide comes in many shapes and patterns. The next paragraph will focus on the different types of ecocide.

I.3 The Different Types of Ecocide

A definition of the concept of ecocide has been adopted in this article. The text above has made clear that ecocide does not occur only during times of war. Ecocide also takes place during times of peace. Think for example of a corporation dumping its waste in a nearby river. There are many more types of ecocide. This subsection will search the different types of ecocide and elaborate on them. Higgins, Short & South divided ecocide into five different categories: air pollution, water pollution, deforestation, the spoiling of the land, and crimes against non-human species.²¹ These five types will be discussed in the sequence as listed above.²²

1.3.1 Air Pollution

Air is fundamental to ensuring human life. When the air is contaminated, the effects

¹⁹ See Article 8 of the Rome Statute of the International Criminal Court: www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf, page 6.

²⁰ For the entire report and discussion of the International Conference Environmental Crime – Current and Emerging Threats visit www.unicri.it/topics/environmental/conference/Report_of_the_Conference.pdf

²¹ P. Higgins, D. Short & S. South, ‘Protecting the Planet: a Proposal for a Law of Ecocide’, *Crime, Law and Social Change* 2013-59-3, pp. 251 – 266.

²² It must be noted that this article does not allow an elaborate discussion of the five types of ecocide. For an elaborate discussion, please review *The Disposable Nature: The Case of Ecocide and Corporate Accountability* (Schwegler 2014): <http://www.ubvu.vu.nl/scripties/getpdf.cfm?facid=14&id=1410>

on different types of life can be significant. To have a clear understanding of what air pollution is, a list²³ of eight major air pollutants is provided, namely:

- 1) sulphur dioxide which is created through the burning of fossil oil and fuels,
- 2) nitrogen oxides which stems from the production of electricity and emission of vehicles,
- 3) TOMPS or toxic organic micro-pollutants, these are chemicals often used in vehicle emissions,
- 4) Fine particles such as nitrates dusts and sulphates caused by road traffic, amongst others.
- 5) Butadiene. Butadiene is released in the atmosphere through the industrial burning of synthetics and rubber. Also, butadiene is released in the air through vehicle emissions.
- 6) Carbon monoxide. Carbon monoxide is a toxic gas produced by petrol engines.
- 7) Heavy metals and lead. Producing these sources result in lots of vapour waste and smoke.
- 8) Volatile organic compounds, these react with sunlight causing a vapour which can travel for thousands of miles.²⁴

Air pollution results in extensive damage to and may even result in loss of ecosystems. Acid rain and other particles in the air affect the nutrition levels of soil, plants, trees, and water. It has the potential to diminish forests. The extent to which air pollution influences the inhabitants of the entire globe is potentially so large that it will significantly affect the peaceful enjoyment of living areas, causing diseases of even resulting in death and subsequently diminish the population of a given territory. Contaminated air and toxic air is liable for widespread death and injury.²⁵ For example, the World Health Organization (WHO) stated that in 2004 air pollution was accountable for 0.6 percent of global diseases and that it resulted in 1.2 million deaths.²⁶ The Indian Ocean Experiment (IOE) measured the range of air pollution from Southeast Asia and South Asia towards the Indian Ocean. The results showed that the emissions from South and Southeast Asia led to a significant degradation of air over an area larger than 10 square kilometres.²⁷ The study concluded that if this pace continues the air pollution will grow into a global

²³ R. Walter, 'Crime is in the Air: Air Pollution and Regulation in the UK', *Centre for Crime and Justice Studies* 2009-9, pp. 1-12.

²⁴ The 8 Pollutants list can be found in the article by Walters (2009) called 'Crime is in the air', p. 3.

²⁵ R. Walter, 'Crime is in the Air: Air Pollution and Regulation in the UK', *Centre for Crime and Justice Studies* 2009-9, pp. 1-12.

²⁶ See World Trade Organization (2009) Exposure to Air Pollution: A Major Public Health Concern at www.who.int/ipcs/features/air_pollution.pdf

²⁷ Lelieveld et al. 2001: 9. J. Lelieveld, P.J. Crutzen, V. Ramanathan, M.O. Andreae, C.A.M. Brenninkmeijer, T. Campos, G.R. Cass, R.R. Dickerson, H. Fischer, J.A. de Gouw, A. Hansel, A. Jefferson, D. Kley, A.T.J. de Laat, S. Lal, M.G. Lawrence, J.M. Lobert, O.L. Mayol-Bracero, A.P. Mitra, T. Novakov, S.J. Oltmans, K.A. Prather, T. Reiner, R. Rodhe, H.A. Scheeren, D. Sikka & J. Williams, 'The Indian Ocean Experiment: Widespread Air Pollution from South and Southeast Asia', *Science Magazine* 2001-291-5506, pp. 1031-1036.

plume.²⁸ Therefore, it can be concluded that air pollution fits the definition of ecocide.

1.3.2 Water Pollution

Just like air, clean water is a key component of life. Without water, there would be no ocean and rivers filled with fishes and other species. Without water, there would be no trees and plants. Without water, land animals would be extinct. Without water, there would be no human beings. The scale of water pollution is so widespread that it can kill millions of people or can cause numerous diseases such as cancer.²⁹ Gleick states that if the lack of safe drinking water remains as it is now, as many as 135 million people will perish from diseases caused by unsafe drinking water.³⁰ The magnitude of water pollution thus significantly affects the peaceful enjoyment of inhabitants of a given area. Extensive cultivation has led to high levels of nitrogen in groundwater, and a high level of nitrogen is linked to cancer.³¹ Not only are human beings affected by water pollution, but so are the flora and fauna. The widespread use of pesticides in the agricultural industry have depleted the number of fish, and polluted bodies of water.³² This leads to the damage and destruction of, and eventually the loss of ecosystems, all in all making water pollution fit the definition of ecocide drafted by Higgins.

1.3.3 Deforestation

Across the world trees in forests are logged, legally and illegally. The logging of forests not only significantly impacts the trees, it also has an impact on the animals, the humans, the environment and the climate. The deforestation not only leads to natural damage such as changing land characteristics (droughts, deterioration of soil, floods), but often also leads to social conflicts such as wars. Furthermore, a study by Greenpeace showed that the illegal logging of trees in Indonesia by corporations such as Asia Pulp & Paper has led to the extinction of two tiger species and has almost led to the extinction of another tree and tiger species.³³ As such, 96 percent of all the deforestation cases are linked to agricultural expansion.³⁴ In the last 20 years more than 100.000 hectares of tropical forest was destroyed due to the

²⁸ Lelieveld et al. 2001: 9

²⁹ K.P. Cantor, 'Drinking Water and Cancer', *Cancer Causes and Control* 1996-8, pp. 292-308.

³⁰ P.H. Gleick, (2002) 'Dirty Water: Estimated Deaths from Water-Related Diseases 2000 – 2020', *Pacific Institute for Studies in Development, Environment, and Security* 2002. URL: http://agecon.nmsu.edu/fward/age384/spring-2010/Dirty_Water_Peter_H%20Gleick_2002.pdf (retrieved 17-05-13).

³¹ K.P. Cantor, 'Drinking Water and Cancer', *Cancer Causes and Control* 1996-8, pp. 292-308.

³² B. Austin, 'The Effects of Pollution on Fish Health', *Journal of Applied Microbiology* 1998-85-S1, pp. 234S – 242S. & Wauchope 1978: 470 and R.D. Wauchope, 'The Pesticide Content of Surface Water draining from Agricultural Fields – a Review', *Journal of Environmental Quality* 1978-7-4, pp. 459-472.

³³ Greenpeace, 'How KFC is junking the jungle by driving rainforest destruction in Indonesia', 2012.

³⁴ Entire paragraph: H.J. Geist & E.F. Lambin, 'Proximate Causes and Underlying Driving Forces of Tropical Deforestation', *American Institute of Biological Sciences* 2002-52-2, pp. 143-150.

cultivation of coca.³⁵ According to Del Olmo the drug cultivation in South America not only leads to deforestation, but also to erosion, contamination of water and destruction of genetic flora and fauna.³⁶ People and animals exposed to the chemicals used in drug cultivation may possibly suffer from irritations, burns and chronic bronchitis amongst other symptoms. Drug cultivation is fought through drug eradication, commonly known as the U.S. 'War on Drugs'. The U.S. government insist that the drug plants are eradicated by chemicals distributed through aerial spraying. The herbicides used by the U.S. not only eradicated the drug plantations, but also other plants and trees.³⁷ The underlying factor of deforestation can be subscribed to several factors; economical, institutional, technological, cultural and demographical factors.³⁸ Not only do all these underlying factors alone influence deforestation, but often these factors are intertwined. The underlying factors interact with each other, illustrating that deforestation is not as clear-cut as often thought. Numerous factors contribute to and intensify deforestation.

1.3.4 The Spoiling of Land

Land provides food. Land provides life. When land is used too intensively or when land is polluted, the soil can become infertile, meaning that nothing will be able to grow. According to Eswaran et al. eleven percent of the global land surface can be used to grow crops.³⁹ This means that today this eleven percent must feed about 7.5 billion people, however the number of people is still growing. There are numerous factors that play a role in land degradation and the spoiling of the land such as bad land management, dumping waste and deforestation. Some of these factors will lead to erosion and sometimes even desertification (when a landscape turns into a desert-like area). Land degradation and the spoiling of the land are widespread and severely affect the peaceful enjoyment of the entire world, by all its inhabitants.

According to the table pictured below, the total physical degradation of land in 1994 is estimated at 0.83 million square kilometres (fig. 1). To put this number into perspective: 0.83 km² is about the size of Namibia, twice the size of Paraguay and about 22 times bigger than the Netherlands.

³⁵ R. Del Olmo, 'The Ecological Impact of Illicit Drug Cultivation and Crop Eradication Programs in Latin America', *Theoretical Criminology* 1998-2-2, pp. 269-278.

³⁶ *Ibid.*

³⁷ Del Olmo 1998: 273

³⁸ Geist & Lambin 2002: 146

³⁹ H. Eswaran, R. Lal, & P.F. Reich, 'Land degradation: an overview', in *Responses to Land Degradation, Agroforestry Systems* 2001-55-8, at <http://soils.usda.gov/use/worldsoils/papers/land-degradation-overview.html> (retrieved 18 - 05 - 13).

Type	Light	Moderate	Strong + Extreme	Total
Water erosion	3.43	5.27	2.24	10.94
Wind erosion	2.69	2.54	0.26	5.49
Chemical degradation	0.93	1.03	0.43	2.39
Physical degradation	0.44	0.27	0.12	0.83
Total	7.49	9.11	3.05	19.65

1. Land degradation estimated on global extent (in million km²) in 1994.
Source:
<http://soils.usda.gov/use/worldsoils/papers/land-degradation-overview.html>

Figure 1

1.3.5 Crimes against Non-Human Species

Human beings have been hunting animals for as long as humans exist. Centuries ago, killing, capturing, and hunting of animals was needed for survival and often for status attainment. Nowadays the hunting of animals is often no longer needed and is often prohibited by local, regional or international laws. Crimes against non-human species or the illegal taking of wildlife is considered to be poaching.⁴⁰ Killing animals with a prohibited gun, without a license, or killing an animal out of season can all be considered activities of poaching. The hunting, capturing or killing of animals in areas such as national parks or zoos is also considered poaching.

What are the reasons for poaching? In some cultures, people believe that parts of animals have medicinal values. Cavaliere states that animals are not always harmed when used as sources for medicinal materials, but regularly it does require the death of an animal.⁴¹ The decline of animals living in the wild is so high that people have opened up farms to be able to supply the demand. This illustrates that the effect of the medicinal use on the existence and survival of animals in the wild, is widespread. Another reason for poaching is the belief that some (parts of) animals have religious values. The use of endangered animals for religious purposes is widespread. Often (parts of) rare animals are seen as important in religion, such as the skin of the leopard. Using these animals for religious purposes contributes to the decline of a species and disrupts their peaceful enjoyment. A third reason for poaching is illegal hunting for bush meat. Bush meat is the meat of wild animals which is attained by hunting them in the wild, resulting in a negative effect on wildlife resources.⁴² The hunting of bush meat is the single most physically widespread method of resource abstraction.⁴³ To demonstrate the scale of poaching; it is estimated that in the

⁴⁰ For the entire definition of poaching see

<http://animalrights.about.com/od/wildlife/g/What-Is-Poaching.htm>

⁴¹ C. Cavaliere, 'Medicinal Use of Threatened Animal Species and the Search for Botanical Alternatives', *HerbalGram The Journal of the American Botanical Council*, 2010-86, pp. 34-49.

⁴² See <http://www.bushmeatcrisisafrica.com/7-bushmeat/1-what-is-bushmeat.html>

⁴³ C.A. Peres, & J. Terborgh, 'Amazonian Nature-Reserves: an Analysis of the Defensibility Status of Existing Conservation Units and Design Criteria for the Future', *Conservation Biology*, 1995-9, pp. 34-46.

United States alone 200 million dollars is earned each year from poaching.⁴⁴ Even in traditional societies which make use of basic hunting skills, the production is usually exceeded. This shows that the effect of untraditional hunting may be even more significant, resulting in an eventual extinction of species. This makes the hunting of bush meat an effect which severely diminishes the peaceful enjoyment by the inhabitants. When the hunting of bush meat is combined with habitat loss, such as deforestation, it is likely that due to disappearances of local flora and fauna, eventually global extinction of the species will occur.⁴⁵ This fits in the definition of ecocide by Higgins⁴⁶ as extensive damage to, destruction of and eventually the loss of ecosystems. The use of animals for medicinal values and religious values is so widespread, that many of the wanted species are starting to disappear from their natural habitat. This sets a domino effect into motion, disrupting the circle of life and eventually the ecosystems.

As stated in the introduction, this article does not only focus on the concept of ecocide, but will try to link this to corporations. The next section will try to do so, using the different types of ecocide as discussed in this first section.

II. Corporations and Ecocide

The next step to take after defining ecocide is to discuss the actors who can commit ecocide. Actors of ecocide are governments, corporations, and other entities such as criminals. In this article, the focus is on corporate activity linked to ecocide.

2.1 How is Ecocide Linked to Corporations?

Corporations play a significant role in the social and economic development of various countries. They create employment, livelihood, and trading opportunities. But the effects the corporations have is not always positive. Often corporations disregard human and environmental aspects in their operations. Multinational corporations have a large amount of power. Corporations have difficulties setting limits because they seek profits through commodity manufacturing: the more they produce, the more profit they earn.⁴⁷ This section will demonstrate how the different types of ecocide discussed in the previous section are intertwined with corporate activities.

When thinking of corporate air pollution, one often thinks of large factories with tall chimneys where smoke is coming out continuously. These factories usually burn their waste and biomass residues. A study by the Political Economy Research Institute of the University of Massachusetts Amherst revealed a top 100 air pollution-index focusing on transnational companies and the effect they have on the

⁴⁴R.S. Musgrave & M.A. Stein, *State wildlife Laws Handbook*, Rockville: Government Institutes Inc 1993.

⁴⁵ J.E. Fa, C.A. Peres, J. Meeuwig, 'Bushmeat Exploitation in Tropical Forests: An Intercontinental Comparison', *Conservation Biology* 2002-16-1, pp. 232-237

⁴⁶ Polly Higgins. *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, London: Shephard- Walwyn Ltd, 2010.

⁴⁷ R. Verzola, 'Industry, Efficiency and Corporations', *Human Ecology Review* 2004-6-2, pp. 121-125.

air in the United States.⁴⁸ The index illustrates that air pollution by corporations is indeed not linked to one industry.⁴⁹ Large factories with tall chimneys are not the only corporate contribution to air pollution. Other products manufactured by numerous industries also play a factor; the production of vehicles is linked to air pollution, uncontrolled burning of forests and agriculture is linked to deforestation, and cosmetic and industrial sprays produced on a mass scale also contribute to the pollution of the air. Finally, and perhaps the most destructive, is the production of toxic gasses, rockets and nuclear weapons. As mentioned before, toxic gasses and emissions of corporate chimneys can come into contact with water, affecting all living beings which make use of the water. But the gasses and emissions of corporations are not the only aspects which contribute to the next type of ecocide; water pollution.

An example of water pollution is the large industrial farms which produce products such as eggs, milk, and meat for large scale human consumption. Besides questioning whether these farms are sustainable and ethical, farms can also cause environmental damage. A city of 360,000 inhabitants creates as much of faecal waste as a single industrial farm.⁵⁰ The faecal waste is often stored in lagoons. When the faecal waste starts to decompose, numerous capricious chemicals arise, such as carbon dioxide, ammonia and sulphide.⁵¹ Not only does the waste contain chemicals but also pharmaceuticals products such as insecticides and disinfectants. The chemicals affect the large number of workers working on the farms, and are pathogens, also polluting nearby rivers, lakes and underground water basins. The damage and extent can be so widespread that it significantly impacts a large area. Faecal waste and pharmaceutical products from industrial farms near the Mississippi River have caused a 13,000 km² oxygen-depleted zone, due to seeping of the waste into the river.⁵²

Deforestation is linked to the timber, paper and pulp industries. The wood of the trees is used for – and distributed to – numerous other industries. For the agricultural industry, sacks and seed packets are made, and for businesses products are made ranging from wallpapers to vinyl floor covering. The wood is also used to produce products for the money, finance and security sector. The timber, pulp and paper industries deliver products to make money, cheque books and postal orders. They provide products to make fascia boards for cars, envelopes, paper tissues, kitchen towels, school books, board games, food packaging labels, identity cards, filters, passports and many more products. The logging of trees can result in loss of, destruction of, or extensive damage to the natural ecosystems. This significantly

⁴⁸ Top 5 Corporate Air Polluters in the U.S.A. see <http://www.peri.umass.edu/toxicair2012/>

⁴⁹ The German corporation Bayer Group is a pharmaceutical and chemical company. General Electric Co is a corporation active in electronics, technology and in-service groups. Precision Castparts develops metal fabrications and industrial goods. Koch Industries is involved in many core industries such as pulp and paper, chemicals, energy and petroleum. Lastly, SPX Corp is a manufacturing firm. They produce ventilation equipment, pumps, power systems and more.

⁵⁰ M. Ritchie, 'The High Price of Cheap Food,' in *It's Legal but it Ain't Right: Harmful Social Consequences of Legal Industries*, Ann Arbor: University of Michigan Press 2004, 178 – 193.

⁵¹ N. Passas, N, 'Lawful but Awful: Legal Corporate Crimes', *The Journal of Socio-Economics* 2005-34, pp. 771-786.

⁵² *Ibid.*

affects the environment. The logging of trees in the swamp forest of Southeast Asia for example, has led to the (near) extinction of several trees, plants and animals. It is thus clear that there is a destruction of the natural habitat of flora and fauna. According to Greenpeace, an area the size of Wales is destroyed every year in Indonesia alone and it is estimated that if this pace continues, the forests in Borneo and Sumatra will completely be destroyed in a couple of years.⁵³ The timber industry is not only active in Asia, but also on other continents. One of the most well-known cases is South America with its Amazon rainforest. Countless articles have been written about the effect corporations have on the environment of the Amazon and its flora and fauna. But not only does deforestation affect the flora and fauna, people living in and around the forest are often also affected. It must be stated that people can be affected in both negative and positive way. The corporations bring jobs and create a better infrastructure, but on the other side force people to leave their homes and significantly change their environment. In conclusion, the corporate activity in forests results in a potentially widespread and severe permanent ecological destruction. Due to the logging of the forests, all the flora and fauna will disappear, significantly transforming the environment.

A well-known example of the spoiling of the land is oil spills and leaks. The heavy oil spills in Nigeria have sparked intense debates in the past. Oil companies have filled the country with pipelines which are often decades old and badly maintained. Leaks in the pipelines and the dumping of waste have resulted in land and water pollution which is so severe that agriculture, forestry, and fishing is no longer possible in huge areas.⁵⁴ In the period 1982-1992 an amount of 1.6 million gallons of oil spilled in the Nigerian delta alone, which led to large acres of spoiled and unworkable land due to leaks.⁵⁵ The prawn industry is also a significant example of land spoiling. Interestingly, while the Nigerian oil industry has received and still is receiving a lot of attention from non-governmental organisations and academic literature, the shrimp industry has received little attention even though the shrimp industry is in many ways parallel with the oil industry. There are not enough prawns and shrimps in the sea to sustain the demand for prawns in the West, as there is not enough oil to fulfil the demand. Because there is a high demand, farmers switch from agriculture to farming prawns. To be able to farm prawns the farmers must flood their land with salty sea water. The farmers are no longer self-sufficient and local communities and communal lands are displaced.⁵⁶ The prawns are sold at low prices because there are many prawn farms. The corporations have a strict and aggressive regime, repressing protests in a grave way. According to Green and Ward the policies of the corporations and their repressing strategies often negatively impact the fishermen.⁵⁷ Many prawn farmers struggle to make a profit, but they cannot switch back to agriculture farming. As often occurs with the oil industry, land is destroyed in the shrimp industry; in the shrimp industry, the use of salt water destroys the land. When the water is drained, the soil is so infertile that nothing will

⁵³ Greenpeace 2012.

⁵⁴ J.P. Eaton, J.P. 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', *Boston University International Law Journal*, 1997-15: 261-307.

⁵⁵ Eaton 1997: 268

⁵⁶ P. Green, & T. Ward, *State Crime: Governments, Violence and Corruption*. London: Pluto Press 2004.

⁵⁷ Green & Ward 2004

grow. The prawns and shrimps are fed plankton. The plankton, shrimps, and prawns are stimulated to grow by giving them chemical fertilizers and antibiotics. The resulting waste is dumped into surrounding ecosystems which again affects the flora, fauna and human beings, possibly resulting in health problems.⁵⁸

All the types of ecocide and corporate activity mentioned above in some way or another affect non-human species. Breathing polluted air affects the well-being of species. The fish living in polluted water may become sick or poisonous to other animals that eat them (this is the case in Nigeria). Animals and plants that drink polluted water also are affected. Deforestation and spoiling of the land rob many animals and plants of their natural habitat and play an important role in decline and possible extinction. Corporations respond to the demand for traditional Chinese medicine which often entails parts of animals. The high demand of traditional Chinese medicine has led to a sharp decline of animals living in the wild. Due to this fact, corporations opened animal farms with often terrible living conditions for the animals.

The examples of corporate activity linked to types of ecocide are just a few of many. There are perhaps uncountable ways in which corporations are involved in different types of ecocide. It seems that everything is intertwined and that it is not in the core interest of corporations to conduct research into side-effects.

III. Why and How of Ecocide as an International Crime

International crimes are atrocities which are considered the most serious to the concern of the international community. Perpetrators of these crimes can be held criminally accountable on an international level. The Rome Statute of the International Criminal Court distinguishes four international crimes, namely: genocide, crimes against humanity, war crimes and crimes of aggression.⁵⁹ One of the key elements of these international crimes is that they must be widespread or of a large-scaled commission. Is it important to be able to hold corporations and other entities accountable for committing or contributing to ecocide? What could potentially happen if ecocide will not be addressed in the near and distant future? Why should we care? Furthermore, the Rome Statute can only hold persons accountable and, perhaps more importantly, the Rome Statute generally only applies to its signatories, thus how can corporations be held accountable on an international level?

This article has tried to show the devastating and potentially global effects ecocide can have on every living being, ranging from a big whale in the sea to a blade of grass. Does this mean that it is therefore important that ecocide is addressed and responsibility and accountability for this crime is created? The first paragraph of this section will try to answer the question why ecocide should be considered an international crime. The second paragraph will link the concepts of corporate

⁵⁸ See http://www.mongabay.com/environmental_degradation_shrimp.htm for the section about shrimp and prawn farming, unless stated otherwise.

⁵⁹ See articles 6-8 of the Rome Statute of the International Criminal Court: www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf, p. 3-5.

liability and corporate crime. After this question is discussed, the following paragraph will focus on the remaining million-dollar question: how?

It seems impractical to prohibit corporate activities which are economically beneficial. An idea to address unwanted corporate actions is the use of law of information, emphasising the prevention of ecocide by open communication.⁶⁰ This idea was created by the International Law Commission's First Special Rapporteur on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, Quentin-Baxter. Quentin-Baxter believes that using the law of information or soft duty law, which includes negotiation and cooperation, helps create preventive measures, designed to protect the environment from potentially damaging corporate activities. The idea is ambitious but fails to take into account that there must be a balance of interests and commonly shared expectations in order for this system to work. Also preventing incidents by soft law does not necessarily result in the wanted effect. By elevating the consequences of ecocide activities from soft law to an international criminal level, plausibility is strengthened. Abbott & Snidal argue that one of the values of adding hard law, or criminal law in this case, is that it involves normative considerations.⁶¹ Abbott & Snidal continue by stating that incorporating something into hard law provides actors with means to create normative values.⁶² Hard law builds upon soft law and strengthens it. While in some cases soft law provides a solid outcome, ecocide needs the extra step which hard law provides. Criminal law, in the broad sense, can be viewed as a tool to make a moral statement or to achieve a proposition.⁶³ The symbolic and moral power of criminal law is often underestimated.⁶⁴ Criminal law can be used to develop social responsibilities and help victims. In the case of corporate ecocide, the victims, flora, fauna and peoples, are unaware of who precisely causes the harm. When a law on corporate ecocide is established, these victims are given a voice.

The massive scale of the destruction by ecocide, which often results in the irreversible transformation of the natural environment, makes it a potential international crime. Past and contemporary incidents of acts of environmental destruction that could be labelled ecocide are evident, and future incidents are very likely. The consequences of ecocide are widespread and could potentially affect living beings and the natural environment. Having ecocide listed as an international crime, anthropogenic environmental degradation and damage is recognised. When making an international law for ecocide one must be careful with using the concept of intent. Ecocide has specific features which call for alertness. Corporations do not set out to destroy the environment, but the destruction is more a side-effect or collateral damage. Corporations must not be given a legal exit to state that they did not know or that they did not intended to commit ecocide. The definition of ecocide

⁶⁰ Quentin-Baxter, Third Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, 1982 11 Y.B. Int'l L. Comm'n, pt. 1, para. 20, at 56.

⁶¹ K.W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', *International Organization* 2000:54-3, pp. 421-456.

⁶² *Ibid.*

⁶³ C. Wells, *Corporations and Criminal Responsibility*, New York: Oxford University Press 2001.

⁶⁴ *Ibid.*

by Higgins⁶⁵ misses the concepts of penalty and culpability. To have an all-round understanding of ecocide and corporate conduct these concepts need to be addressed.

III.1 The Purpose of Criminalising Ecocide

By incorporating ecocide as an international crime, the preventive duty to stop potential acts of ecocide is created for corporations. In an ideal world, this will consequently result in less greenhouse gasses and thus it will have vast repercussions on climate change, as discussed in section I. In an ideal world, by making the persons, and not the corporation, pay for the crime of ecocide, the destruction can be stopped. In an ideal world, it should not be about the corporate polluter who must pay when or if he is caught, but about the corporation which does not pollute. But the world in which we live in is far from ideal and corporations do not necessarily act the way we want them to act, not even when new laws are adopted.

III.1.1 General theories on punishment and sanctions

Most people remember the fear as a child of being punished for something you were not supposed to do. The grown-ups punished you with the aim to prevent you from doing the same thing again in the future by instilling fear. You do not want to be punished again. In criminal law punishments are set; something is not punishable if it is not set in law. This concept is called *nulla poena sine lege*. Another characteristic of criminal law is that it is closely intertwined with ethics, trying to establish the bare minimum of norms and values. Thus, the punishment must be generally accepted. The point of criminal law therefore is not to shift boundaries, but to maintain core norms and values. In the contemporary multicultural and pluralistic society, it is important that no groups are offended by the punishments as set in law, but this is very difficult to establish.

There are three overarching theories on the point of punishments and sanctions, namely the relative theories, the absolute theories, and the association theories.⁶⁶ Translating this to corporate crime and ecocide, corporations can be sanctioned in different ways and with different outcomes. The relative theories would focus on a successful punishment, one which prevents corporate ecocide from happening again. The special prevention focusses on a single corporation, trying to establish change so that that specific corporation will not commit acts of ecocide in the future. The general prevention will assess the entire corporate community, including all corporations from every possible industry. The general prevention will try to change the global corporate mind-set by creating and strengthening mutual norms on ecocide. The absolute theories will make the corporations suffer for committing ecocide and does not focus on preventing the corporation from committing ecocide in the future. When dealing with corporations, it is best to combine aspects from both the relative and the absolute theories. No corporations are the same and thus every ecocidal act from a different corporation needs to be treated individually. This means that a combination of theories is essential for addressing the crime of ecocide.

⁶⁵ Polly Higgins. *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, London: Shephard- Walwyn Ltd, 2010.

⁶⁶ J.J.M. Van Dijk, H.I. Sagel- Grande & L.G. Toornvliet, L.G. *Actuele Criminologie*. The Hague: Sdu Uitgevers 2006.

The effect of punishment may work differently on corporations than on individuals.⁶⁷ The effect of the punishment may even differ between corporations. Something which thus also needs to be considered, is culture. People act and think in certain ways as products of social institutions and particular cultures. The structure of punishment is reflected through changes in culture. This is one of the reasons why creating corporate responsibility is difficult; whereas people are used to punishing individuals, people are not yet used to punishing corporations. When sanctioning corporations, Wells gives two types of sanctions, namely: financial and non-financial sanctions.⁶⁸ Financial sanctions need to be carefully considered. The sanction imposed needs to be high enough to have an impact on the business and its profits, but not as high as to financially impact all its employees. The only instance in which the sanction should be excessively high is when the environmental damage is so severe that the corresponding punishment for such an action would entail closing down the corporation as well. Wells rightly argues that the financial sanction given to a corporation must be linked to the corporate finances, this way corporations can be sanctioned more effectively.⁶⁹ A critique on the financial sanctions is that they do not bring about actual change in the corporate mind-set. The financial sanction does not necessarily bring about reformation of the corporation. Financial sanctions illustrate that corporations can entail in wrongdoings, as long as they are willing to pay the price. Instead, sanctions should show that corporate wrongdoings are socially intolerable. Perhaps non-financial sanctions can offer an outcome. It seems logical that since criminal acts of corporations vary in size and nature, so does the punishment. Corporations can, for example, be incapacitated by being forced to closure. In some countries, such as the United States and Canada, probation is used. This means that corporations are restricted from acting in specific ways.⁷⁰ Probation can be potentially very effective, making corporations restructure their decision-making processes. To make the probation even more effective, adverse publicity can be used for corporations which are sensitive to their brand-image.

III.1.2 Sanctions and Effectiveness

The previous section provided an introduction on the theories on punishment. This section will highlight how effective the punishments and sanctions are. To measure the efficiency of a sanction, one must consider the social settings, the types of punishments, the personalities of the offenders and victims, the relation between the victims and the offenders and the types of crimes committed.

According to the absolute theories, punishments or sanctions are necessarily effective if it is assumed that guilt and injustice must be sanctioned through ways of restriction of freedom and thus by afflicting sorrow in some kind of way. By adding sorrow through restriction of freedom, the act of the offenders and his or her guilt is cleared. Norms are (re-)established and the sanction can contribute to a feeling of reparation for the victims. When following the line of thought of the absolute theories, adding sorrow will result in almost immediate relief and this makes

⁶⁷ C. Wells, *Corporations and Criminal Responsibility*, New York: Oxford University Press 2001.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

punishments or sanctions always effective. But it is not that easy. Other aspects must be taken into account. For example, looking at special prevention, the psychology of the offender plays an important role in the effectiveness of the sanction. The offender must be able to process information. This means that to make the sanction effective, the offenders must be capable of understanding the relationship between his or her behaviour and the sanction; if the offenders can process this, then it can influence their behaviour positively. Not all people are the same. Some people are more impulsive or extroverted than others. Different people understand sanctions in different ways. While sanctions will be effective for some people, for others it will not be effective. A very important aspect of the effectiveness of sanctions is the connection between the offender and the society. If the offender has not internalised the norms and beliefs of the society, it is likely that the offender will not live up to these standards. The social setting of offenders also plays an important role. If the social setting of the offender is poor, the sanction will have no real effect. When looking at the general prevention and the effectiveness of sanctions, three aspects arise: there must be a sufficient degree of understanding and knowledge about the norms and values of the target groups, making something legally punishable is not enough; society as a whole must disapprove of the acts and the potential risk of being caught must be high enough.⁷¹ According to Van Dijk et al. often the reaction of the environment of the offender outweighs the actual sanction and sanctions are most effective with non-emotional crimes such as speeding.⁷²

III.2 Corporate Crime and Corporate Liability

Large multinational corporations commit crimes. Already in 1949 Sutherland stated that corporate crimes are too often ignored while the societal damage is often far more severe than ordinary crimes.⁷³ Leaders of corporations usually act from self-interest and realize that being labelled as a criminal will be bad for their image.⁷⁴ Corporate criminals usually do not fit the mainstream concept of offenders. They do not lack self-control.

Holding corporations responsible for crimes committed, such as ecocide, is very difficult on an international level. Van Dijk et al. assert that states are often reluctant to try corporations because it can potentially bring bad publicity.⁷⁵ Furthermore, it is often difficult to prove exactly what corporations did wrong and who is to blame. Due to lack of evidence, corporations can be acquitted and demand huge financial damage claims. Another problem is that when a corporation is accused of criminal acts, the social interest stagnates or declines. Clients lose their trust, investors lose interest and the corporation may become bankrupt. Innocent people will lose their jobs and other companies will lose a business associate. Both Van den Heuvel and Van de Bunt agree that when dealing with corporate criminality, the focus should not depend on the effectiveness of sanctions but on establishing clear sets of norms

⁷¹ Van Dijk et al. 2006: 225.

⁷² Van Dijk et al. 2006.

⁷³ E.H. Sutherland, *White Collar Crime*. New York: Dryden Press 1949.

⁷⁴ *Ibid.*

⁷⁵ Van Dijk et al. 2006.

in every industry.⁷⁶ If the entrepreneurial society disapproves of environmental pollution, Van Dijk et al. state that corporations will be less likely to pollute.⁷⁷ Informal social control can thus be very effective and, according to Braithwaite, even more effective than sanctioning.⁷⁸

Davids and Braithwaite, and Geis give strategies on how corporate crimes such as ecocide can be controlled and prevented.⁷⁹ The first strategy focuses on the internalisation: through a top down approach where good management ensures the responsible conduct of the corporation. The second focuses on individuals on a psychological and moral level, trying to raise individual awareness and standards: rehabilitation. The third strategy tries to withdraw collective crime by social engineering: public disgrace. The last theories try to show that the punishments or sanctions given, do actually really hurt: deterrence. This is where international law comes into play. Following the line of thought of the absolute theories, the offenders within a corporation should pay for the costs of their wrongdoings. Becker (1968) argues that this should lead to optimum prevention and forces the offenders to internalise the costs of their acts.⁸⁰ Prevention is increased by creating liability for the corporation. The corporation knows that if it does wrong, the corporate assets are potentially at risk. This can stimulate the corporation into internalising the total costs before doing wrong.⁸¹ If the corporation fears the costs of wrongdoing, it could try not to get involved in wrong doings and should monitor its employees more effectively. Individuals do not always react rationally, while corporations usually do.⁸² By incorporating corporate liability, it is thus more likely that the corporation would think and act rationally. Spontaneous events of corporate crime, driven by emotions, are rare.⁸³ This means, importantly, that the chance to be caught is more significant to corporations than the severity of the punishment.

Three concepts are important when discussing corporate liability, namely the concepts of negligence, *mens rea*, and strict liability. Negligence imposes standards of liability on corporations when they fail to meet the standards of dual care, meaning reasonable processes and reasonable behaviours.⁸⁴ Negligence entails that a corporation failed to fulfil its duty and caused harm and suffering, due to carelessness. The concept of strict liability is relatively straightforward. In this case,

⁷⁶ G. Van den Heuvel, G. *Onderhandelen of straffen? Over organisatiecriminaliteit en overheidscontrole*. Arnhem: Gouda Quint 1993. & H.G. Van de Bunt, H.G., *Organisatiecriminaliteit: rede uitgesproken bij de aanvaarding van de ambt van bijzonder hoogleraar*. Arnhem: Gouda Quint 1993.

⁷⁷ Van Dijk et al. 2006.

⁷⁸ J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry*. London: Routledge and Kegan Paul 1984.

⁷⁹ L. Davids, L. 'Penology and Corporate Crime', *Journal of Criminal Law and Criminology* 1968-58-4, pp. 524-531 and J. Braithwaite, & G. Geis, 'On Theory and Action for Corporate Crime Control', *Crime & Delinquency* 1982-28, pp. 292-314.

⁸⁰ G.S. Becker, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy* 1968-76, pp. 169, 190-193.

⁸¹ V.S. Khanna, 'Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?', *American Criminal Law Review* 2000-37-4, pp. 1239-1283.

⁸² *Ibid.*

⁸³ S. Simpson, N. Leeper Piquero & R. Paternoster, 'Rationality and Corporate Offending Decisions' in Piquero A, Tibbetts SG (eds.) *Rational choice and Criminal Behavior: Recent Research and Future Challenges*. New York: Routledge 2002.

⁸⁴ S. Shavell, 'Strict Liability Versus Negligence', *Journal of Legal Studies* 1980-9-1, pp. 1-25.

a corporation can be held liable even if it was not negligent and thus undertook all suitable precautions. The *mens rea* incorporates the recklessness, knowledge and intent of a corporation. The concept of *mens rea* is quite difficult to prove because *mens rea* implies that a corporation has a state of mind, while corporations do not have that per se. Also, *mens rea* can be divided into three forms of liability.⁸⁵ The first form is when one single actor or employee of a corporation possesses both the *mens rea* and the *actus reus* of an offense, regardless of the position of the offender within the corporation. A problem with this form is that information sharing could stagnate. When an employee knows he or she can be held liable for the offence, this person will be less likely to share the information with others. An employee will be less likely to tell his superiors about the offence, but it can also work vice versa. A superior can order his or her employee to do something, knowing that this is an offence, but withholding this information from the employee. The second form of *mens rea* is the collective one; multiple employees knew about and undertook an offence. The third form imposes liability on corporate policies and procedures. The third form is negligence which addresses the inattention of the corporation. These forms illustrate that there is no clear overarching answer to what the general *mens rea* of a corporation is when dealing with international crimes. The *mens rea* or intent is difficult to prove when discussing corporations. One can argue that a specific intent is needed to commit ecocide and corporations usually do not possess this intent. Thus, there are two questions which need to be answered: can corporations possess intent? And if so, do corporations have the intent to commit acts of ecocide?

The predominant intent of corporations is to minimise loss. Corporations thus possess intent, but often corporations do not intend to commit acts of ecocide. As stated above, the main intent of corporations is often to minimise loss; committing acts of ecocide usually is just a side effect of the main intention of loss minimisation. Incorporating the specific intent for corporate ecocide would make the threshold too high. Using the crime of genocide as an example, the specific intent needs to be proven to fulfil the standards of the concept of genocide. Given that almost no corporation sets out to commit acts of genocide or ecocide, it seems that they walk free, for they lack the specific intent requirement. Recent case law of the International Criminal Tribunal for Rwanda (or ICTR) established that the specific intent, in one case, to commit genocide can be effectively inferred through contextual elements.⁸⁶ This means that corporations can be charged for complicity. To be able to charge for complicity, knowledge of the act needs to be established and not the specific intent.⁸⁷ The report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes (2008) lists three points which must be met. The first is contribution or causation and is about whether the conduct of the corporation facilitated, exacerbated or enabled the wrongdoing. The second is foreseeability & knowledge. This point is about whether the corporations knew or should have known about the wrongdoings. The last point is proximity. Proximity looks at whether the corporation was close to the principal perpetrator of victims. Proximity focusses on durations, geographical proximity, relationships and the intensity and frequency of the interactions. In this way, complicity is inextricably

⁸⁵ Khanna 2000

⁸⁶ See Huisman & van Sliedregt 2010; See also *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment 523 (Sept. 2, 1998).

⁸⁷ S. Sullivan, S., 'Has the Prosecution Made the Case?', *Foreign Policy In Focus* 2005, available at: http://fpif.org/has_the_prosecution_made_the_case/ (retrieved 02-04-13).

linked with *mens rea*. Both concepts focus on knowledge and recklessness. Translating this into corporate ecocide, corporations can be held accountable for being aware of the fact that acts of the corporation resulted in ecocide. This test of foresightedness is called conditional intent.⁸⁸

III.2.1 The Purpose of a Law on Ecocide

Law can create ideological settings and mind-sets for corporations. By incorporating something into law a legal doctrine is created which makes certain concepts fundamentally unquestionable and indisputable.⁸⁹ Law can thus act as a prevailing expansive standard in which ideologies are set and spread. This characteristic is especially important when addressing ecocide. While law can also create obedience by creating fear for legal punishments and sanctions, this does not necessarily change corporate ways. If a corporation does not care about the possible legal sanctions when committing ecocide, criminalising ecocide will not be very effective. Gordon addresses perhaps the more important characteristic of law by stating that the power of law lies within its ability to sway or motivate people that the world, as described in law, is the only realistic world.⁹⁰ This creates a distinction between right and wrong and normal and non-normal. Law can thus have the ability to establish social change. Gavigan argues that this is strengthened by the fact that by recognising the law, one recognises the meanings and codes of law and this strengthens one's place in power relations and in social orders.⁹¹ In other words, the legal discourse gives social meaning to actors.

When linking the power of law to establishing social change to ecocide, one can state that criminalising ecocide relies heavily upon the symbolic potential of law in stimulating common considerations about the nature of corporate ecocide. It is about the way in which various forms of social behaviour are categorised by the legal system and not about the instrumental efficiency of the actual sanctions. By treating ecocide as a regulatory issue instead of a genuine crime, the legal system reinforces the ideology that dealing with issues such as corporate environmental damage is something autonomous which corporations can resolve privately, outside of the context of criminal law. One of the principal roles of law is to create a political culture that motivates societies to accept the inescapability of the law and its legitimacy. Law gains its symbolic power status and mass psychological power from the common belief that law tries to create a utopian image of political democracy which gives the law a kind of authoritarian status. Gabel and Harris argue that in this way popular consciousness can be created.⁹² Mares argues that making ecocide illegal will not work successfully, if no fundamental social change is established.⁹³

⁸⁸ W. Huisman & E. van Sliedregt, E. 'Rogue Traders', *Journal of International Criminal Justice*, 2010-8, pp. 803-828.

⁸⁹ N.C. Sargent, 'Law, Ideology, and Social Change: An Analysis of the Role of Law in the Construction of Corporate Crime', *The Journal of Human Justice*, 1990-1-2, pp. 97-116.

⁹⁰ S.A.M. Gavigan, 'Law, Gender and Ideology', In Anne Bayevsky, (ed.) *Legal Theory Meets Legal Practice*, Edmonton: Academic Publishing 1988, pp. 283-295.

⁹¹ *Ibid.*

⁹² P. Gabel, P. & P. Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', *New York Review of Law and Social Change* 1983, 11: 369- 412.

⁹³ D. Mares, 'Criminalizing Ecological Harm: Crimes against Carrying Capacity and the Criminalization of Eco-Sinners', *Critical Criminology* 2010, 18: 279-293.

Social organisation is fragile and law serves as a reminder of that; protection and human security is needed. Peršak also states that legality is not enough.⁹⁴ When legitimacy is viewed as a moral right of proper behaviour and aims, a law uses its authority to coerce people to comply and regulate their behaviour. The criminalisation of ecocide needs to be directed through principals, this way moral values are insured.

By making ecocide an international crime, it would become recognised that ecocide is a crime of serious gravity. Public awareness about ecocide will be created and shaped, and grave environmental harm will stop being perceived as acceptable. By incorporating ecocide as an international crime, the concept gets a higher symbolic status. Ecocide is recognised as being at least as severe as genocide, war crimes, and crimes against humanity. These crimes are commonly viewed as the most serious crimes and if ecocide is incorporated, the way ecocide is viewed may change significantly. Adopting ecocide as an international crime will not cause all corporations to stop committing ecocide, as the adoption of genocide as an international crime has not stopped the occurrence of genocide. The most important and significant aspect is that an international mind-set is created in which committing ecocide is viewed as so severe and horrible that it is immediately depreciated. The purpose of incorporating ecocide as an international crime is that it will end impunity.

III.2.2 Who is to Blame?

International criminal law is modelled around individuals, however: a corporation is not an individual person. There are two key concepts on the criminal liability of corporations.⁹⁵ The first is the imputation theory which holds the corporation responsible, on any hierarchical level, for the acts and intent of its personnel - this often excludes criminal acts by personnel for their own benefit. The second key theory is the identification theory. This theory states that a corporation can be held liable for actions by actors, which are carried out on behalf of the corporation. Thus, a third key and favourable theory, beside the imputation and identification theories, argues that corporate intent can be created by imposing a corporate ethos or personality.⁹⁶ To try corporations on an international level they need to be seen as individuals.⁹⁷ While corporations miss certain features people have, such as feelings, corporations still can be viewed as persons.⁹⁸ According to them, the discussion about whether or not corporations can be viewed as a 'person' is ontological. To be viewed as a person, an entity must have certain features.⁹⁹ One can choose to focus on biological features which rules out corporations, but when choosing other favoured features, it is possible that corporations can be viewed as persons. Wells

⁹⁴ N. Peršak, *Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts*, New York: Springer-Verlag, 2007.

⁹⁵ S. Walt, & W.S. Laufer, 'Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions', *American Journal of Criminal Law* 1991-18-3, pp. 263-287.

⁹⁶ D.O. Friedrichs, D.O. *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Cengage Learning 2010.

⁹⁷ S. Walt, & W.S. Laufer, 'Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions', *American Journal of Criminal Law* 1991-18-3, pp. 263-287.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

agrees and states that if one wants to hold corporations criminally accountable, it should not be based on linguistic arguments, but on normative ones.¹⁰⁰ One should not hold on to the dualist conception of human action, for it is misleading. Neither individuals nor corporations act according to models premised in criminal law. In this sense, corporations are not viewed as a collection of individuals but as an individual. When a corporation is viewed in this way, it is possible to incorporate culpability in international criminal law.

It is predominantly the organisational existence the corporations that foster deviant behaviour, not natural persons.¹⁰¹ A corporate culture is created, which can translate into criminal environments. When individuals are separated from the corporation they no longer have the same incentive to engage in destructive doings.¹⁰² Even if individuals would have the same incentives when separated from the corporation, they usually do not have the resources to commit the wrongdoing. By focusing on and indicting individuals within a corporation, the true nature of corporate participation in international criminalities, such as ecocide, is not effectively captured, nor is the organisational wrongdoing effectively addressed. It is also very difficult to point out which single person is to blame within a corporation. Often the *actus reus* and the *mens rea* are divided among different pools of people.

Corporate crime emerges through collective acts. Therefore, corporate criminal acts cannot be separated from the institutional framework in which it happened. Corporations need to be viewed on a holistic level, seeing that corporations have a separate existence.¹⁰³ The contemporary view must shift its perception into one which focusses on the, often hidden, mental state of the corporation. *Culpa*, or in other words guilt, has an important role when assessing corporations and international criminal law. Often when corporations commit ecocide, they do not necessarily do this entirely consciously, but they do often have some kind of awareness. When *culpa* comes into play, corporations breach a duty when they commit ecocidal acts.¹⁰⁴

The main point is that there is a kind of corporate persona. The next step is to look at whether and how this is incorporated into international law. Is this already incorporated in international law? How can corporations actually be held accountable under current international law? The next section will elaborate on these questions.

IV. Corporate Accountability Under Current International Law

The previous section showed that, at the national level, it is difficult to hold corporations responsible for their actions. This section will show whether it is possible to hold corporations responsible at an international level, and if so, how.

¹⁰⁰ C. Wells, *Corporations and Criminal Responsibility*, New York: Oxford University Press 2001.

¹⁰¹ D.E. Stoitchkova, Towards Corporate Liability in International Criminal Law. *Intersentia School of Human Rights* 2010, p. 38.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

Since ecocide is not considered an international crime under the Rome Statute, corporations cannot be held accountable for committing ecocide under international law. While some countries do have laws regarding ecocide, international law does not address this. Does this mean that corporations walk free and cannot be held accountable for their acts?

According to the website *Eradicating Ecocide* by Polly Higgins, there are ten countries which have laws that make ecocide during peace time a crime. These countries, which interestingly are all (ex)-communist countries, are the Republic of Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine and Vietnam. Incorporating ecocide as a crime is one thing, but effectively making use of these laws is another thing. Making laws effective depends on numerous factors, such as respect for the laws and how the laws are enforced. Interestingly, most of the countries which have a law that criminalises ecocide during peace times also have a low level of respect for the rule of law and a high level of corruption.¹⁰⁵

The primary response of the international community to acts of ecocide was slow and not very effective.¹⁰⁶ It all started with oil.¹⁰⁷ Oil was being used for ships instead of coal. These ships left oil spill on the surface of the sea. The matter did not receive much attention for a while, but a convention was drafted in which states could establish 50-mile zones, where oil discharge could be severely restricted. This 1954 convention is known as the International Convention for the Prevention of Pollution of the Sea by Oil. The seas are obviously much larger than 50 miles, thus the largest parts of the seas were still unprotected. Subsequently, in 1962 the zones were extended to 100 miles, and in 1969 amendments were created which aimed to protect the entire ocean. However, these conventions do not address accountability or compensation for damages made to the environment. The Convention on Civil Liability for Oil Pollution or CLC was drafted, which placed liability on the private owners of the ships. This took place during the Cold War era in which the threat for a nuclear disaster was enormous. Ships also transported nuclear materials, where the potential ecocidal damage was greater than an oil spill. Therefore, the Nuclear Ships Convention was drafted, making the operators liable, even when a natural disaster takes place which results in loss of nuclear materials. These conventions only focus on pollution of the seas, but what about the other areas which can be severely affected by ecocide?

As mentioned before, CITES (the Convention of International Trade in Endangered Species of Wild Fauna and Flora) aims to protect wildlife flora and fauna by regulating the international trade in certain species. CITES is a part of the International Union for Conservation of Nature and Natural Resources (IUCN), prompted by the General Assembly. Members of CITES are states. The Convention has made three categories, namely Appendix I, Appendix II and Appendix III. Article 2 of CITES states the Fundamental Principles:

¹⁰⁵ The source for this entire paragraph on existing national laws on ecocide is: <http://eradicatingecocide.com/overview/existing-ecocide-laws/>

¹⁰⁶ L.A. Teclaff, 'Beyond Restoration – The Case of Ecocide', *Natural Resources Journal* 1994-34, pp. 933-956.

¹⁰⁷ *Ibid.*

‘1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

- (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and
- (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.’

Under CITES, corporations cannot be held accountable for their acts, but the countries in which the corporations are active have the obligation to stop violations. As article VIII (1) states:

‘1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

- (a) to penalize trade in, or possession of, such specimens, or both; and
- (b) to provide for the confiscation or return to the State of export of such specimens.’¹⁰⁸

This means that countries in which corporations are illegally active and which are members of CITES, have the responsibility to take measures to stop corporations, that are for example, logging illegal wood, polluting water or destroying land and thus often contributing to the near extinction of species. Indonesia has done this by illegalizing trade in Ramin, a rare tree species, in 2001, but this has not brought the wanted effect. Corporations continued logging the trees. Therefore, corporations can be held accountable by these state parties and be penalised by states. The responsibility lies in the hand of the states, but if they fail to meet this responsibility, nothing much can be done. There is no global police agency which can legally sanction states or corporations, due to the international principal of complementarity. There are guidelines such as the United Nations Global Compact and the OECD Guidelines for Multinational Enterprises, which focus on corporations, but both are on a voluntary basis. The Global Compact requests

¹⁰⁸ For the entire article VIII see <http://www.cites.org/eng/disc/text.php#VIII>

corporations to support and embrace a set of essential principles in the field of the environment, human rights and anti-corruption. The OECD Guidelines for Multinational Enterprises consist of governments making recommendations to multinational enterprises. The OECD Guidelines also offer principles which are non-binding.¹⁰⁹ Another organisation is the International Labour Organization (ILO), which tries to improve social and environmental protection, but again does not have any binding principles.¹¹⁰ Since the principles set out by these three organizations are not legally binding and do not necessarily set out to ensure corporate accountability, corporations have no obligation to follow them. It must be stated that though the principles are not binding, these organisations do offer a medium for scrutinising corporate conduct.¹¹¹

Does this mean that corporations are able to commit such crimes without reprisal? Not necessarily. Non-governmental organisations such as Greenpeace investigate acts committed by corporations and distribute their findings to the global community. This has some effect. Companies such as P&G, K-Mart, Hasbro, McDonald's, ING, Adidas, Detmold Packaging, Woolworths, Staples, Tchibo, Kraft, Mattel, Xerox, Unilever, Bi-Lo, Lego, Cartamundi, Kroger, Collins Debden, Delhaize, and Metcash have all ended purchases from a large pulp and paper corporation active in illegal logging of near extinct trees, or introduced policies of sustainability which rule out corporations.¹¹² The withdrawal of these companies has resulted in a promise by the pulp and paper corporation that it will stop illegal logging.¹¹³ Another company famous for their genetically modified organisms (or in short GMO), which in the eyes of many people symbolises ecocide because the cultivation of GMO affects non-GMO flora and fauna, is Monsanto. According to the company website, Monsanto is a sustainable agricultural company that supports and empowers farmers by delivering agricultural products, such as seed brand in crops like oilseeds, fruits, corn, cotton, and other vegetables.¹¹⁴ According to others, such as Shiva, Monsanto commits crimes against farmers and crimes against nature. Due to Monsanto's practices, millions of people are being pushed out of their lands, it has been reported that numerous farmers commit suicide because they cannot afford to acquit the substantial debts accrued from buying expensive chemicals and seeds, while the chemicals, instead of controlling weeds and pests, are creating super resistant weeds and pests.¹¹⁵ As a result of this, pollinators and soil organisms are dying too, and food and water which people and animals rely on becomes polluted, consequently leading to diseases and in certain cases death. Monsanto's actions are

¹⁰⁹ For more information about the UN Global Compact and the OECD Guidelines see: The UN Global Compact and the OECD Guidelines for Multinational Enterprises: complementarities and distinctive contributions (2005)

¹¹⁰ For more information about ILO visit <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm>

¹¹¹ W. Kaleck & M. Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges', *Journal of International Criminal Justice* 2010-8, pp. 699-724.

¹¹² Greenpeace 2012: 13

¹¹³ E. Bellman, Asia Pulp & Paper Bars Suppliers from Cutting Forests, *Wall Street Journal* 05-02-2013.

¹¹⁴ <http://www.monsanto.com/whoweare/pages/default.aspx> (retrieved 14-05-17)

¹¹⁵ V. Shiva, 'Ending a Century of Ecocide and Genocide, Seeding Earth Democracy Putting Monsanto on Trial Is Only The Beginning of What The World's People Must Do To Regain Control of Their Food Systems', *Indigenous Policy Journal* 2016-27-3.

a crime against nature because by creating GMO's, Monsanto is violating the self-renewing and self-organising capacity of seeds;¹¹⁶ Furthermore, by making GMO's, Monsanto is spreading genetic pollution and pushing out bio-diversity. Shiva even goes so far by calling Monsanto a member of the 'Poison Cartel.'¹¹⁷

Why is this story about Monsanto relevant? Most people have heard of Monsanto and their alleged atrocities, but it seems that Monsanto is so powerful that nothing can be done about it. In October 2016, the international civil society initiative called the Monsanto Tribunal took place. This revolutionary tribunal aimed to synthesise and summarise existing violations and crimes for which these corporations are facing legal charges and to expand the scope of criminal activity by adding ecocide as a crime. The Tribunal does not have investigative powers, but is of symbolic value and its opinion and conclusions are purely of advisory nature. The opinions and conclusions are completely independent and based on legal considerations grounded in international humanitarian law and international human rights law. The Tribunals' renowned judges delivered a legal opinion, after hearing testimonies of victims, following procedures of the International Court of Justice on the 18th of April 2017, in The Hague, The Netherlands.

At the Tribunal, the judges investigated six questions and gave their final conclusions. The first four questions concerned the right to a healthy environment, the right to food, the right to health, and the right to information. According to the Tribunal, the engagement of Monsanto in certain practices have negatively impacted all four rights. In the fifth question, the judges furthermore concluded that if the crime of ecocide is added in international law, then Monsanto could be prosecuted for its alleged complicity in war crimes,¹¹⁸ by providing Agent Orange, as defined in Article 8 (2) of the Statute of the International Criminal Court (ICC), as the reported facts would fall within the jurisdiction of the ICC.¹¹⁹ The last question asked if the activities of Monsanto could constitute a crime of ecocide, whereas ecocide was defined: 'as causing serious damage or destroying the environment, so as to significantly and durably alter the global commons or ecosystem services upon which certain human groups rely.'¹²⁰ The judges state that there is still a remaining gap between environmental protection and the legal commitments of the states. Additionally, they assessed that international law should be clear and precisely assert the protection of the environment and the crime of

¹¹⁶ *Ibid.*

¹¹⁷ V. Shiva, 'Ending a Century of Ecocide an Genocide, Seeding Earth Democracy Putting Monsanto on Trial Is Only The Beginning of What The World's People Must Do To Regain Control of Their Food Systems', *Indigenous Policy Journal* 2016-27-3.

¹¹⁸ 'Between 1962 and 1973, more than 70 million liters of Agent Orange (containing dioxin) were sprayed on approximately 2.6 million hectares of land. This defoliating chemical has caused serious harm to health in the Vietnamese civilian population. And the harm caused to American, New Zealand, Australian and Korean veterans has lead to court cases and to the recognition of Monsanto's responsibility, among others.' For more information see Summary of the Advisory Opinion of the International Monsanto Tribunal (2017) at http://www.monsanto-tribunal.org/upload/asset_cache/1016160509.pdf (retrieved 15-05-17).

¹¹⁹ See Article 8(2) of the Rome Statute.

¹²⁰ Summary of the Advisory Opinion of the International Monsanto Tribunal (2017) at http://www.monsanto-tribunal.org/upload/asset_cache/1016160509.pdf (retrieved 15-05-17).

ecocide. If the crime of ecocide were to be recognised under international law, the activities of Monsanto could possibly constitute a crime of ecocide.

The Tribunals' conclusion ends with a call for two urgent actions. The first urgent action is to proclaim the priority of international environmental and human rights law. The Tribunal warns for a pitfall; if United Nation bodies fail to take actions, key questions, such as crimes of ecocide, will be resolved outside the UN framework in private tribunals. Investment-related clauses of free-trade agreements, bilateral investment treaties, as well as legal rules in the World Trade Organization are set in place to protect the rights of investors, often undermining the capacity of states to preserve practices, laws and policies shielding environmental and human rights. Secondly, the judges urgently called for the need to hold non-state actors responsible within the framework of international human rights law. In the view of the Tribunal, in case of infringement of fundamental rights, it must be considered that multinational enterprises as subjects could be sued. The judges evidently recognise and criticise a severe gap between international trade and investment law, and environmental law and international human rights. Encouragement is given for authoritative entities to shield the efficiency of international environmental law and human rights law against the behaviour of multinational corporations.

International law is taking steps towards accountability for corporations, but is not there yet. Until international law fully incorporates corporate accountability, other actors such as states and non-governmental organisations can play a significant role in changing the ways in which corporations act. For most corporations, their reputation is of utmost importance. If their customers do not like what they hear about them, they could go to another supplier. To have a profitable corporation, customers are needed. The power of reputation to address accountability therefore should not be underestimated. In some cases, corporate reputation is highly related to ethical branding. According to Fan, there are three crucial objectives for corporations that explain why corporations are sensitive to ethical branding, namely: to elevate entry barricades, making it more difficult for new corporations to enter and thus fending off possible threats, to control the market by eliminating or reducing the competition, or to increase the loyalty of customers.¹²¹ Ethical branding is becoming so important that it even has an award ceremony.¹²² These awards go to corporations which are considered the most responsible in different categories. Corporations who win these awards can use this newly achieved status to distinguish themselves from others in the same industry. Also scrutinising by organisations such as ILO, OECD, and Global Compact help the ethical branding.

Thus, while international legal corporate accountability is still in the developing process, other frameworks offer assistance in enhancing a sense of corporate accountability. For ambitious corporations, reputation and ethical branding is extremely important and thus can be used to enforce action, but not all corporations are sensitive to ethical branding. Central in the ethics of corporations is to minimize loss. The side effect of this ethic can result in ecocide. A framework needs to be established in which ecocide results in a higher loss for the corporation, instead of a

¹²¹ Fan, Y. (2005) 'Ethical branding and corporate reputation', *Corporate Communications: An International Journal*, 2005-10-4, pp. 341-350.

¹²² For more information on the Ethical Corporation Responsible Business Awards see: <http://events.ethicalcorp.com/awards/>.

minimised loss. In this way corporations which are not sensitive to name branding are also affected. It is difficult to hold corporations legally accountable for committing ecocide under international law, but the corporations could be forced to answer to their actions, for when they do not, their loss will be higher. Committing acts of ecocide needs to be made unattractive.

Conclusion

In conclusion, this article argues that ecocide should be considered an international crime because of its severity, magnitude, potentially lasting effect, and the effect it has on many aspects of lives of different species. Corporations are indivisibly linked with ecocide. For corporations, it is about minimising loss and if that means they have to commit ecocide, they will often do so. Corporations do not set out to commit acts of ecocide and therefore lack intent. This does not mean that corporations should not be held accountable. International criminal law can be used as a tool to deal with corporate ecocide. Adopting ecocide as an international crime can affect corporate accountability as it offers the opportunity to spark debate on the possibilities to tackle these issues in a consistent and effective way.

To come to a final answer of the research question, this article heavily depended on academic scholars of numerous fields and information provided by non-academics, such as non-governmental organisations websites or sites of corporations. Although the article relied on numerous secondary sources such as NGO reports, and governmental and corporate websites, in order to strengthen its findings, it also made ample use of academic sources. Where non-academic data was used, this article always tried to use independent and original sources. This article focused on literature research, however to form a complete understanding of ecocide and corporate accountability, empirical research is needed. In this field, little empirical research has been conducted. In future research, it would be interesting to combine literature and empirical research on corporations and ecocide by, for example, looking at if the assumptions about corporate behaviour towards a law on ecocide are applicable. This article has illustrated the importance of different scholarly fields working together to tackle problems such as ecocide. Therefore, it is important that in future research, different academic fields work together.

A possible answer to the answer to the main question is that corporation actions are strictly linked to making profits and minimising losses. And when these issues represent the most important objective of a corporation, committing ecocide will be viewed as a side-effect necessary to achieve a goal. Much more research can be done on all the past, contemporary, and future corporations which engage in corporate acts of ecocide. Perhaps it is interesting in the future to research if there is common ground between the corporations which commit acts of ecocide. Clearly the case of ecocide and corporate accountability is not yet solved, but I hope this article will create some awareness and insight around the subject. Further research on the subject can focus more on how to create an international law that can hold corporations accountable for acts of ecocide in detail. Different disciplines should work together toward this goal to help save the environment.