35 690 **Initiative paper from Representative Van Raan: 'Ecocide: The missing crime against peace'**

No. 2 **INITIATIVE PAPER**

'The rules of our world are laws, and they can be changed. Laws can restrict, or they can enable. What matters is what they serve. Many of the laws in our world serve property - they are based on ownership. But imagine a law that has a higher moral authority… a law that puts people and planet first. Imagine a law that starts from first do no harm, that stops this dangerous game and takes us to a place of safety….'

Polly Higgins, 2015

'We need to change the rules.'

Greta Thunberg, 2019

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Summary

Despite all our efforts, the future of our natural environments, habitats, and ecosystems does not look promising. Human activity has ensured that climate change continues to persist. Legal instruments are available to combat this unprecedented damage to the natural living environment, but these instruments have proven inadequate. With this paper, the initiator intends to set forth an innovative new legal concept.

This paper is a study into the possibilities of turning this unprecedented destruction of our natural environment into a criminal offence. In this regard, we will use the term *ecocide*, defined as the extensive damage to or destruction of ecosystems through human activity. Ecocide knows many forms: environmental disasters caused by the fossil fuel industry, deforestation, the emission of greenhouse gases through industrial activity, the dumping of hazardous waste in rivers, the pollution of the habitat of indigenous people, overfishing of the oceans, or the use of harmful pesticides. Ecocide can also play a role in the increased risk of the proliferation of zoonotic diseases. Ecocide is the superlative of a multitude of environmental issues where the extent of the damage is so great that the survival of all

inhabitants in a region, humans and animals alike, is at stake.

There is currently no international law that guarantees the conservation of the environment, biodiversity and ecosystems. The exploitation and the destruction of ecosystems can effectively continue without repercussions. The Centre for Crime Prevention and Safety (CCV) indicates that significant bottlenecks and shortcomings are also present in the Netherlands when dealing with environmental crime.

On an international scale, the United Nations and regional organisations, such as the European Union, struggle to draft and enforce environmental agreements, despite decades of negotiations. Binding treaties without enforcement mechanisms and non-binding agreements have proven unable to prevent ecocide. An international standard that would criminalise ecocide could bring change.

Therefore, the initiator argues for an international criminal law of ecocide. This law can ensure that people are held criminally accountable when their activities result in ecocide. Many legal experts see a law of ecocide as the necessary cornerstone for prevailing international environmental law, through which individuals could be directly prosecuted. However, this is not solely about punishing the wrongdoers: by implementing criminal consequences and responsibilities, the tendency to commit ecocide will be proactively discouraged. Making the destruction of ecosystems a criminal offence can help ensure that ecocide will no longer be consciously or unconsciously factored into policy decisions.

What are the appropriate channels for putting a halt to ecocide? There are many ways to do so, but the initiator believes that the International Criminal Court (ICC) and its Rome Statute are an excellent option for embedding the fight against ecocide in international criminal law. The Statute, which dates from 1998, was the founding treaty of the ICC in which four types of international crime were identified: genocide, crimes against humanity, war crimes, and crimes of aggression. Ecocide was also included in the original draft but fell by the wayside during the final rounds of negotiation. The role of the Netherlands is worth mentioning here.

The ICC, established in The Hague, complements national legislation, but is not a replacement of national courts and prosecutes only when a country cannot or refuses to do so. The Statute offers options for prosecuting ecocide under the existing crimes, but that has hitherto proven to be problematic. Amending the Statute to include ecocide could give the ICC jurisdiction over this type of crime. Various countries have requested that ecocide become established in both national and international law. France took the lead in the summer of 2020: President Emmanuel Macron vowed his commitment to the criminalisation of ecocide at an international level and promised to investigate how the concept could also be established in French law. The Belgian government subsequently promised in its coalition agreement to pursue global initiatives against ecocide and, during the annual meeting of the ICC, requested that the possibility of adding ecocide to the Rome Statute be investigated. In December, Finland also spoke out in favour of an international law of ecocide.

The Netherlands can contribute to this global movement by looking into how ecocide can also be established in national law. The initiator believes that the Netherlands can make a strong case for an amendment to the Rome Statute, obligate Dutch businesses to prevent ecocide, and increase access to justice for communities whose habitat is adversely affected.
The paper drawn up by the initiator outlines the arguments for an international law of ecocide. We will discuss the effectiveness and shortcomings of the current legislation on a national,

regional and international scale. We will then illustrate possible legal avenues for the prosecution of ecocide and discuss the most critical elements of ecocide law. Various case studies will be introduced, including the case of West Papua, a region that has been plagued by ecocide for decades. Finally, we will present our proposals on how the Netherlands can play a role in criminalising ecocide and protecting our living environment.

1. Introduction

'The green gold' was what avocados were promisingly known as, after an intensive marketing campaign from the agricultural sector led to an exponential growth in global demand.[1] In the United States, avocado consumption per capita grew from 500 grams in 1994 to 3.6 kilograms in 2018.[2] In Europe, avocado consumption increased fivefold over the last 20 years.[3] This growth initially came with the promise of prosperity, more jobs and a better life for the people living near avocado plantations. This included the people living in the hills of Petorca in Chile. What the local residents didn't see coming was that this renewed prosperity would primarily be reserved for owners of large-scale agricultural businesses. The residents in the region and the owners of small-scale plantations were mostly left with a significant water shortage resulting from the overexploitation of the thirsty avocado tree, which uses 2000 litres of water to produce only 1 kilo of avocados.[4] A study conducted by the Chilean water board revealed that at least 65 illegal underground pipelines were constructed that carried the water from the surrounding rivers to the avocado plantations.[5] This irrigation system caused the rivers – the primary source of water for the surrounding population – to dry out and adversely affect the ecosystem. The residents are now dependent on lorries that travel door to door to deliver restricted amounts of water, water that has been shown to contain faecal coliform bacteria.[6] Unemployment has increased as small-scale farmers were forced to stop growing crops due to the dire water shortage. And while the Chilean water board does fine companies that illegally extract water, this has little effect: the fines are calculated into the company overhead as excessive water use continues.

What is ecocide?

The cultivation of avocado in Petorca, Chile is a prime example of what is happening elsewhere worldwide. There are no international standards that can prevent the large-scale exploitation and destruction of ecosystems. In light of precisely this shortcoming, in 2010 the Scottish barrister, Polly Higgins, decided to submit a proposal to the United Nations Law Commission to recognise ecocide as the fifth crime against peace.[7]

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[1] Eos Tracé, n.d. Consulted via: https://eostrace.be/artikelen/hoe-marketing-de-eens-zo-saaie-avocado-immens-populair-maakte

[2] Carman, H. F. (2019). The Story Behind Avocado's Rise to Prominence in the United States. *ARE Update (22)5.* 9-11.

[3] Stable, 30 January 2020. Consulted via: https://stableprice.com/soaring-avocado-consumption-increasing-price-volatility/

[4] The Guardian, 17 May 2018. Consulted via: https://www.theguardian.com/environment/2018/may/17/chilean-villagers-claim-british-appetite-for-avocados-is-draining-region-dry

[5] Reuters, 3 June 2019. Consulted via: https://www.reuters.com/article/us-water-chile-environment/as-sales-boom-chiles-green-gold-is-blamed-for-water-shortages-idUSKCN1T41AL

[6] The Guardian, 17 May 2018. Consulted via: https://www.theguardian.com/environment/2018/may/17/chilean-villagers-claim-british-appetite-for-avocados-is-draining-region-dry

[7] The term 'crimes against peace' comes from the development phase of the Rome Statute, when this was still referred to as the 'draft Code of Crimes Against the Peace and Security of Mankind.' With this term, Higgins was referring to the four international crimes which form the basis of the Statute, but there is no consensus on the current use of this term among legal experts.

The term ecocide is so recent that its precise definition is still subject to extensive debate. An international panel of experts is currently exploring the legal definition of ecocide.[8] Higgins defines ecocide as the extensive loss, damage or destruction of ecosystems of a given territory such that the peaceful enjoyment of the inhabitants has been or will be severely diminished.[9] Ecocide differs from other environmental crimes and pollution because of its irreversible nature. Ecocide involves extensive damage, destruction or loss of an ecosystem to such an extent that it can no longer recover. Therefore, within this definition, the sustainable use of the natural environment or natural resources within the carrying capacity of an ecosystem cannot be seen as ecocide.

Ecocide can be direct and indirect: a person can come into direct contact with nature and cause structural damage until the ecosystem can no longer recover. However, ecocide occurs primarily indirectly – think of climate change or extensive pollution – where ecocide becomes a consequence of economic or other activity. Ecocide and the resulting impact takes many forms: disasters caused by the fossil fuel industry, the emission of greenhouse gases through industrial activity, the dumping of hazardous substances in rivers, deforestation for commercial gain, the pollution of the habitat of indigenous people, overfishing of the oceans, or the use of harmful pesticides. Ecocide can therefore be seen as the superlative of the various known environmental issues, where the extent of the damage is so great that the survival of all inhabitants in the area, humans and animals alike, is at stake.

Ecocide can also lead to extensive emotional and cultural damage, especially in communities where their way of life is inextricably linked with the afflicted ecosystem. We see this clearly with the indigenous Sami tribe in northern Scandinavia. The Sami have been living off the land and through reindeer herding for generations. The land they live on forms the basis for their culture, identity and economy. Still, their habitat is threatened by mining corporations and the Swedish and Norwegian governments that issue permits to these corporations. Large tracts of land are rendered uninhabitable by resource extraction, the dumping of hazardous waste in the fjords, and the construction of new railways straight through animal migration routes. The local community falls ill, the land is destroyed, and the reindeer migration routes are adversely impacted.

The threat facing the Sami shows that ecocide does not always have to result from illegal activity. It can also result from activities that are facilitated or encouraged by governments through contracts and the issuance of permits. That is why defining and being aware of ecocide is of such importance. If people are not consciously aware of something, they cannot act against it. There is no doubt that governments share the responsibility for drawing up conditions and frameworks in which companies are allowed to work, in the same way that they bear the responsibility for legislation regarding other issues that affect our security, such as construction safety and traffic laws. Large-scale destruction of the living environment can be a consequence of governments who, either deliberately or unwittingly, neglect to consider the negative consequences of a particular economic or other activity that results in that activity exceeding the ecosystem's carrying capacity, particularly when the business activities concerned are not held accountable by national and global governance for exceeding this carrying capacity. For example, tax exemptions for fossil fuels can contribute to disruptive

[8] https://www.stopecocide.earth/expert-drafting-panel
[9] Ibid.

climate change.[10] But extensive destruction of the living environment can also result from companies that violate a country's laws. Governments are not always able to efficiently enforce legislation, particularly in countries that lack a strong rule of law. Moreover, companies factor potential financial penalties arising from the large-scale destruction of the living environment into their risks; these penalties are often a fraction of the potential profit. Which forms of extensive destruction of the environment fall under the term ecocide is subject to debate.

Legal shortcomings

There is currently no international law that guarantees protection of the environment, biodiversity and ecosystems. The conservation of nature and the environment is only minimally enforced at a national level. The Centre for Crime Prevention and Safety (CCV) indicates that significant bottlenecks and shortcomings are also present in the Netherlands when dealing with environmental crime.[11] On an international scale, the United Nations and regional organisations, such as the EU, struggle to draft and enforce environmental agreements, despite decades of negotiations. Binding treaties without enforcement mechanisms and non-committal agreements have proven unable to prevent ecocide. An international standard that would ban ecocide could bring change.

International ecocide law[12] can ensure that people are criminally held accountable when their activities result in ecocide, whether through direct action or the facilitation of such activities. Many legal experts see international ecocide law as the necessary cornerstone for prevailing international environmental law, through which individuals could be directly prosecuted. However, this is not solely about punishing the wrongdoers: by implementing criminal consequences and responsibilities, the tendency to commit ecocide will be proactively discouraged. Making the destruction of ecosystems a criminal offence can ensure that ecocide will no longer be factored into policy decisions.

The demand for ecocide law grows

Polly Higgins passed away in 2019, but she has left behind a great legacy. Her campaign to put ecocide on the agenda has led to a worldwide appeal to add ecocide to the Rome Statute of 1998, the International Criminal Court's founding charter. In that charter, the four most serious crimes of concern to the international community are established: genocide, crimes against humanity, war crimes and crimes of aggression. This appeal is not the first: as early as 1972, the Swedish Prime Minister, Olof Palme, urgently called for a greater international focus on ecocide. In the first drafts of the Rome Statute, ecocide was included as a crime against peace, but this was ultimately removed.[13]

In recent years, this appeal has resurfaced. In December 2019, Vanuatu and the Maldives – island states in the Pacific and the Indian Oceans – called for a serious consideration of introducing the crime of ecocide in the Rome Statute during the ICC Assembly of States

[10] RTL Nieuws, 17 October 2018. Consulted via: https://www.rtlnieuws.nl/economie/artikel/4453946/vliegen-belasting-vliegtickets-duurder-2-miljard?redirect_from=rtlz

[11] Centrum voor Criminaliteitspreventie en Veiligheid. (2019). CCV verkent knelpunten in de aanpak van milieucriminaliteit. Consulted via: https://hetccv.nl/nieuws/ccv-verkent-knelpunten-in-de-aanpak-van-milieucriminaliteit/

[12] Strictly speaking, the term 'ecocide law' relates to national laws, and this concerns an international ban on ecocide. In the interests of readability, the term 'ecocide law' will be used in this paper.

[13]The role the Netherlands played in this process is explained further in the appendix.

Parties.[14] Pope Francis also appealed to the international community to recognise ecocide as the fifth crime against peace and pressed for churches to include 'sins against ecology' in their teaching of the catechism.[15] In June 2020, French President Emmanuel Macron, on the recommendation of the French Citizens Convention for Climate, vowed his commitment to the criminalisation of ecocide at an international level and promised to investigate how the concept could also be established in French law.[16] A month later, the Belgian green party Ecolo also gave voice to these calls to action, by submitting a proposal for the introduction of ecocide into the Rome Statute and national law.[17] Following this proposal, the Belgian government stated in its coalition agreement that it would 'investigate and pursue diplomatic initiatives to curb the crime of ecocide, the intentional destruction of ecological systems.'[18] In July, Greta Thunberg, together with three other climate activists, wrote an open letter calling on EU leaders to plead for the recognition of ecocide as an international crime. The letter was signed by thousands of activists, scientists, artists and citizens.[19] In August, Paul McCartney spoke out in support of the Stop Ecocide campaign.[20] In November, at the request of Swedish Members of Parliament of the ruling government, a panel of top international legal experts was created to confer about the legal definition of ecocide. The panel is chaired by international judge Florence Mumba and the international lawyer Philippe Sands QC. In December, the Finnish Minister of Foreign Affairs joined the campaign for the criminalisation of ecocide on behalf of the Finnish government. In that same month, during the Assembly of States Parties, Belgium was the first European country to call on the assembly to 'examine the possibility of introducing crimes known as "ecocide" into the Rome Statute.'[21]

In 2020, both civil society and the international community showed that a constructive discussion about the crime of ecocide is both desirable and necessary. In the Netherlands, we see progress in the Urgenda case's ruling, which is now cited worldwide as a crucial stepping stone for building an effective climate and environmental standards system. The Supreme Court of the Netherlands ruled in favour of the statement that the government failed to sufficiently protect current and future generations with its current climate policy.[22] That time is of the essence, is also confirmed in the IPBES (*Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*) report published in 2019 that states that our natural environment and the health of ecosystems around the world is deteriorating at an unprecedented rate, and that this will have significant consequences for all of the Earth's inhabitants.[23] A legal standard at the level of an International Criminal Court as an additional

[14] Statement by H.E. John H. Licht, Ambassador of the Republic of Vanuatu to the European Union, 2 December 2019. Consulted via: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf
[15] Address of his holiness Pope Francis to participants at the world congress of the international association of penal law, 15 November 2019. Consulted via: http://www.vatican.va/content/francesco/en/speeches/2019/november/documents/papa-francesco_20191115_diritto-penale.html
[16] NRC, 6 June 2020. Consulted via: https://www.nrc.nl/nieuws/2020/06/29/groene-golf-overspoelt-franse-steden-maar-premier-philippe-wint-in-le-havre-a4004378
[17] Stop Ecocide, 17 July 2020. Consulted via: https://www.stopecocide.nl/persberichten-overzicht/belgische-groene-partijen-introduceren-wetsvoorstel-om-van-ecocide-misdaad-te-maken
[18] Coalition agreement, 30 September 2020, p. 91. Consulted via: https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf
[19] https://climateemergencyeu.org/
[20] https://www.facebook.com/PaulMcCartney/posts/10159014952408313
[21] https://twitter.com/StopEcocideNL/status/1340961863992000518
[22] HR 20 December 2019, ECLI:NL:HR:2019:2006.
[23] IPBES (2019). Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. Consulted via: https://ipbes.net/sites/default/files/2020-02/ipbes_global_assessment_report_summary_for_policymakers_en.pdf

instrument can make protecting the Earth and the conservation of our natural environment and damaged ecosystems possible. It is important to note that the International Criminal Court will complement national legal systems and not replace them. It will only prosecute crimes when states are unable or unwilling to do so themselves. It is time to bring this debate to the political stage in the Netherlands.

How the paper is structured

This paper aims to outline the arguments for an international criminal law of ecocide. The following chapter will discuss the shortcomings of the current legislation on a national, regional and international scale. Chapter 3 will illustrate the possible legal avenues for the prosecution of ecocide and discuss the most critical elements of ecocide law. Chapter 4 will present the case study of West Papua, a region that has been plagued by ecocide for decades. This case will illustrate how a law of ecocide can provide a solution where all other legal options have failed. Finally, we will present our proposals on how the Netherlands can play a role in criminalising ecocide and protecting our living environment. The appendix to this paper outlines earlier attempts and the repeated appeals that have taken place since the 1970s to recognise ecocide as a crime.

2. The (in)effectiveness of current legislation

This chapter discusses the characteristics of environmental law at a national, regional and international level and illustrates how these shortcomings manifest themselves in practice, using the Ecuadorian charges against Chevron-Texaco as an example.

I National level

The (in)effectiveness of national ecocide law

During the 1950s, the Soviet Union executed a central economic planning policy that, with hindsight, turned out to be disastrous for people and the environment. Large nature reserves and ecosystems were irreversibly damaged as a result. To give an example, the Aral Sea was once the fourth-largest lake in the world. [24] However, the Soviet Union decided to divert the lake's water supply to irrigate cotton fields in Kazakhstan, Turkmenistan and Uzbekistan. The irrigation projects were highly inefficient because the irrigation channels were not insulated. As a result, most of the water seeped back into the ground, and only one out of every twenty litres ended up being put to effective use. Today, the lake has shrunk to a mere 10 per cent of its original size, and its impact is visible throughout the entire region. Villages that used to thrive on fishing are now separated from the shore by a desolate hundred-kilometre salty desert. The drying up of the Aral Sea and other ecocidal incidents, such as Chernobyl, resulted in many former Soviet countries adopting ecocide as a criminal offence in their national laws in the late 90s.[25]

Although a few countries have incorporated ecocide into their penal code, the effectiveness of these laws is dependent on their enforcement, the presence of an independent judiciary and respect for the rule of law. Countries that score highly in terms of corruption and low on the

[24] Trouw, 15 March 1997. Consulted via: https://www.trouw.nl/nieuws/vissers-aralmeer-zien-geschiedenis-voor-hun-ogen-verdampen~b5160929/
[25] Georgia, Armenia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia and Tajikistan; https://ecocidelaw.com/the-law/existing-ecocide-laws/

scale of the rule of law, struggle to take legal action against ecocide despite the fact that it is established law.[26] In such countries, the authorities often turn a blind eye to ecocidal activities, and prosecution rarely occurs. A clear illustration of this was seen in Kyrgyzstan where the state-owned power company imported 9000 metric tonnes of radioactive coal in 2012. The radioactive coal was delivered to 15 schools and kindergartens to be used as an energy supply. The radiation level of the coal was 26 times above the limit. The incident gave rise to strong public indignation: seven government officials were arrested for collusion, the CEO of the state-owned power company was sued for ecocide, and the Minister of Energy and Industry was charged with corruption.[27] Nonetheless, the public prosecutor dropped all charges. We see a similar case in Ukraine: on 8 June 2015, a fire broke out at an oil depot belonging to the Ukrainian oil company BRSM-Nafta.[28] High concentrations of poisonous substances were released, and six people died. When the Ukrainian intelligence services filed charges against the co-owner of BRSM and the public prosecutor, who was charged with obscuring BRSM's illegal activities, the intelligence director was fired shortly after that, and the charges were dropped. As long as no international judiciary exists with authority to intervene, there is little incentive to respect local ecocide laws.

Civil law versus criminal law

Although few countries have incorporated ecocide into their national laws, most countries have laws to protect the environment. However, environmental laws are often based on civil law, where companies may be forced to pay fines and compensate for any damages incurred. Experience shows that fines do not necessarily reduce these illegal activities because they are seen as an externality that can be calculated into their expenses, paid if and when the violation is discovered. Civil penalties are almost always aimed at corporations rather than individuals, which means that offenders cannot be prosecuted under criminal law, and the violation of laws continues to be profitable. Moreover, the communities most adversely affected by ecocide are vulnerable parties that do not always have the means to take the polluter to court themselves. On the other hand, in criminal law, the state is responsible for the prosecution of such offences.

An example of a conservation law with criminal sanctions is the Lacey Act in the US. This federal law considers it a crime to import fish, wildlife and plants that have been caught in violation of the laws of their country of origin.[29] The penalties for violation of the Lacey Act are high and include jail sentences.[30] In 2012, on the basis of this law, an American judge ordered Hout Bay Fishing Industries to pay restitution of 54.9 million dollars to the South African government for the illegal poaching of rock lobsters.[31] In 2016, Lumber Liquidators was charged with the highest sentence ever awarded based on this law, a sentence of 13 million dollars in punitive damages, seizure of property and community service for the illegal

[26] Rule of Law Index, 2020. Consulted via: https://worldjusticeproject.org/rule-of-law-index/global/2020/Criminal%20Justice/table
[27] The Telegraph, 10 February 2012. Consulted via: https://www.telegraph.co.uk/news/worldnews/asia/kyrgyzstan/9071329/Radioactive-coal-sent-to-schools-in-Kyrgyzstan.html
[28] The Jamestown Foundation, 22 July 2020. Consulted via: https://jamestown.org/program/scandal-in-the-ukrainian-security-service-last-breath-of-the-old-political-system/
[29] African Conservation Foundation, 19 June 2013. Consulted via: https://africanconservation.org/south-african-fisheries-win-major-victory-against-lobster-poaching-syndicate/
[30] Lacey Act (16 U.S.C. §§ 3371-3378). Consulted via: https://www.fws.gov/le/pdffiles/Lacey.pdf
[31] Pew, 20 August 2012. Consulted via: https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2012/08/20/pew-applauds-largest-ever-us-court-ordered-restitution-in-history-of-the-lacey-act

trade in wood.[32] Thus, criminal law can undoubtedly lead to effective penalties at a national level. However, even in countries with an established rule of law, there is no guarantee that it will protect the environment in the absence of international standards: governments can, after all, choose to minimise legislation in this area to give companies room to serve its economic interests. In countries where even the rule of law is not adequately developed, the chance that ecosystems will be protected is even smaller.

One example of an ecocide case in criminal law is currently taking place in Guatemala. In 2015, the government established an environmental law court authorised to try ecocide claims.[33] In an indictment of the palm oil company Reforestadora Palma de Peten SA (RESPA), the court ordered the corporation to cease all activities at one of REPSA's palm oil plantations. The reason for this was REPSA's dumping of hazardous palm oil residues into the Passion River, which led to an enormous decline in the fish population. The ruling proved to be ineffective: RESPA refused to cooperate and continued its activities in the region until it was charged in 2018 with systematic tax fraud, after which several multinationals ended their partnership with REPSA.[34] In other words: in the absence of international law and enforcement mechanisms, REPSA could only be stopped by the market itself. Market regulation is not an instrument on which the continued existence of an ecosystem should be dependent.

II Regional level

Efforts to formulate environmental law are also made at a regional level. For example, in 2008, the European Union drafted a directive for combating environmental crime.[35] The aim of this directive was to harmonise the penalties for environmental crimes within the EU member states. The directive establishes goals that need to be pursued by all EU member states, in which each member state is given the freedom to adjust its national legislation to achieve this goal. A directive differs from a regulation, where a binding legal standard is established which is then adopted within the entire EU.[36] Unfortunately, ten years after this directive was drawn up, the EU still struggles to monitor violations and harmonise the highly variable penalties its member states adopt.[37] Indicative of this EU policy's failure is the fact that as of 2020, the majority of the violations of this directive are found to be in the fields of the environment, energy, and climate.[38] The legitimate discretionary authority of the member states can reduce reinforcement and effectiveness of regional regulations. However, limiting this authority is at odds with member states' democratic control and autonomous decision-making authority.[39] Therefore, efforts conducted at a national and regional level must continue to run parallel to the development of ecocide regulation on an international scale, particularly in light of its complementary function. The International Criminal Court is meant

[32] The United States Department of Justice, 1 February 2016. Consulted via: https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental
[33] Friends of the Earth, 25 July 2018. Consulted via: https://foe-us.medium.com/three-years-since-the-ecocide-in-the-r%C3%ADo-pasi%C3%B3n-guatemala-communities-still-struggle-for-justice-10c43393c510
[34] Friends of the Earth, 1 February 2018. Consulted via: https://medium.com/@foe_us/guatemalan-palm-oil-supplier-repsa-caught-up-in-corruption-and-bribery-scandal-bc5234be384d
[35] Directive 2008/99/EC, 19 November 2008. Consulted via: http://data.europa.eu/eli/dir/2008/99/oj
[36] https://europa.eu/european-union/law/legal-acts_nl
[37] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1930-Environmental-Crime-Directive-Evaluation/public-consultation
[38] https://ec.europa.eu/commission/presscorner/detail/en/inf_20_202
[39] Azman, K.D. (2011). The Problem of "Democratic Deficit" in the European Union. International Journal of Humanities and Social Science 1(5). 242-250.

to complement national legal systems and not act as a replacement. It will only prosecute crimes when states are unable or unwilling to do so themselves.

III International level

International agreements and soft law

Current agreements made on an international scale, such as the Paris Accord, the UN Global Compact and the Sustainable Development Goals, are also insufficient to prevent ecocide. International climate agreements are mostly made voluntarily through soft law[40] and do not contain any mechanisms for enforcing these agreements. Soft law refers to legal instruments that cannot or are hard to enforce through legal means but have a regulating effect to a certain extent. Examples from the field are resolutions and declarations accepted by the UN General Assembly and the many European Union codes of conduct and directives.

Soft law has been leading for the development of international environmental law since the UN Conference on the Human Environment, the first large multilateral environmental conference held in Stockholm in 1972. Despite its non-binding character, soft law nonetheless plays an essential role in the normative development of international environmental standards by establishing knowledge, mirroring consensus, and encouraging countries to develop their own environmental laws. However, because of its non-binding nature, soft law can do no more than provide suggestions for national laws and only contribute to future policy development if states are prepared to do so. As long as inflicting harm to the environment is not seen as a severe crime under criminal law, soft law can seldom create concrete legal obligations to protect habitats.

One exception is when soft law is considered an obligation by a country's citizens. This can have consequences for governments who, pressured by public opinion, may feel obligated to carry out legislation based on soft law. When ultimately, corporations and courts repeatedly refer to soft law, they can be converted into jurisprudence. The Urgenda Foundation, a foundation established in 2010 that strives to 'accelerate sustainability' in the Netherlands, took the national government to court, demanding the decreased emission of greenhouse gasses. The court ruled in 2015 that the government does have a legal obligation to reduce the Dutch emissions levels at a faster rate than it was currently doing. This ruling was upheld and confirmed by the Court of Appeals in 2018 and the Supreme Court in 2019. As a result, the government was obligated to execute the courts' joint ruling to reduce Dutch greenhouse gas emissions by 25 per cent compared to the baseline measured in 1990 by the end of 2020. The Netherlands had committed itself on a European Union level to lower Dutch greenhouse gas emissions by 20 per cent. The courts ruled that, based on the European Convention on Human Rights, the Dutch Government had a concrete and binding legal obligation to provide 'sufficient and adequate measures' to protect the lives of Dutch residents and the safety of their living environment against the dangers of climate change. The courts also observed that the consensus in political and scientific circles – at an international, European and Dutch level – was that a 25 per cent reduction in gas emissions by 2020 was the minimum that should be considered 'sufficient and adequate' for countries like the Netherlands. According to the courts, this international political consensus stemmed primarily from the 'soft law' established within the UN Framework Convention on Climate Change, to which the Netherlands has always subscribed. Thus, the 25-per-cent-goal became an example of how international soft

[40] The Guardian, 7 June 2012. Consulted via: https://www.theguardian.com/environment/blog/2012/jun/07/earth-treaties-environmental-agreements

law has led to concrete national legal obligations following a court ruling. That is why the Urgenda case is considered revolutionary: never before has a court ordered a national government to honour international environmental agreements that are not (as of yet) considered legally binding. If an international law under criminal law had existed, an ongoing legal battle at a local level to achieve international goals would have been unnecessary.

Nonetheless, international treaties that use the soft law approach have not proven very effective. No sanctions have been put in place for non-compliance with agreements or signing but not ratifying a treaty, a practice where countries often make an ostentatious show of signing treaties at international conferences only to quietly go back to business as usual.[41] The demands within these agreements are usually subject to interpretation and lose their force through a certain degree of non-obligation: the Paris Accord, for example, expects states to publicise their progress on attaining national goals but does not obligate them to actually achieve these goals. Compliance is entirely dependent on the idea that countries would not want to lose face in front of the entire world. The Earth's liveability under the current system is therefore dependent on peer pressure, and that has – so far – proven insufficient. A combination of hard and soft law measures that are implemented parallel and complementary to each other is probably the most effective approach.

Environmental inequality

One of the reasons why many environmental agreements are ineffective is because other agreements are made regarding trade and the economy that are in conflict with environmental goals and consequently take precedent over these goals, despite our dependency on a healthy living environment. In particular, the trade agendas that intentionally expose ecologically rich but economically developing countries to multinational economic activity seem to contribute to ecocide. This is also evident in so-called arbitration mechanisms such as the Investor-State Dispute Settlement (ISDS) or the Investment Court System (ICS). Based on these arbitration mechanisms, corporations can file charges against a state when their economic interests are adversely affected.

The idea of Earth as a commodity is a mindset that forms the foundation of almost all environmental law since the 1970s.[42] One example of this is the Kyoto Protocol from 1997 when the emissions trading scheme (ETS) was established. This scheme is based on the idea that buying the 'right' to emit greenhouse gases creates a cost-effective incentive for companies to look for climate-friendly alternatives. Indigenous communities that take care of the natural environment, often through centuries-old cultural practices, can be compensated through the ETS system for their contribution to the conservation of the natural environment. There is, however, criticism of the ETS system. Naomi Klein, the Canadian author, for example, states that this system renders conservation projects inherently ineffective because, for every tonne of carbon dioxide that is extracted from the atmosphere through the planting of trees, a corporation on the other side of the world is able to pump another tonne into the air.[43] The social geographer Bram Büscher argues that this mechanism causes trees, meadows and mountains to lose their intrinsic geographic significance and become virtual goods in the

[41] Ibid.
[42] Studies have shown that economic interests have taken precedent in the various historical phases in the development of international environmental law. See also: Weiss, E.B. (2011). The Evolution of International Environmental Law. Georgetown University Law Center.
[43] Klein, N. (2014). This Changes Everything: capitalism vs. the climate, p. 218-224.

international market, which seldom leads to a shift in benefits and losses on a global scale.[44] Moreover, despite the compensation that the system theoretically offers to indigenous communities, the reality is that it contributes to the violation of their rights. In countries such as Ecuador and Papua New-Guinea, recruiters actively seek out areas under the guise of environmental conservation that – after having chased away the local inhabitants – end up being used as sources of carbon credit instead. [45]

The economist Thomas Piketty cites the imbalance in the current system's benefits and costs in his most recent book *Capital and Ideology*.[46] He argues that inequality and global warming go hand in hand, in part because the world's wealthiest are responsible for a disproportionate share of global CO_2 emissions, whilst the poor are hit hardest by the consequences of global warming. He states that there is an urgent need to balance the books on this environmental inequality, both in terms of inflicted and incurred damages. Instead of calling only the countries that emit large quantities of CO_2 to account, Piketty believes that the importing countries should also be held to account; it is the demand for goods that encourages CO_2 emissions. For example, Dutch CO_2 emissions have remained stable between 1990 and 2017 despite economic growth, mostly due to the 'export' of manufacturing to China and the transfer of the associated CO_2 emissions.[47] When we link emissions levels to consumption levels, we see that the wealthiest 10 per cent of the world's population is responsible for 50 per cent of the world's CO_2 emissions.[48] In terms of consumption, North America is responsible for 17 per cent of worldwide CO_2 emissions, while the population represents 5 per cent of the world's population. Africa, representing 16 per cent of the world's population, is responsible for a mere 4 per cent.[49] Despite its small contribution to CO_2 emissions, Africa suffers disproportionately from its consequences such as rising temperatures and sea levels.

This skewed distribution can be considered unjust. Polly Higgins viewed this inequality as 'eco-colonialism'. She argued that the present-day acquisition of large land areas for the exploitation of resources by international corporations[50] is not very different from the historical colonial conquest of land for commercial gain. Current practices are – like they were back then – aimed at generating a profit by exploiting resources in other people's living environment, without taking sufficient responsibility for the short and long-term implications for that area's population. Often these acquisitions come paired with long-term contracts with the state, in which the government legitimises the unlawful behaviour of corporations.[51] And today – as was the case back then – those who profit from this system refuse to recognise that their activities can have adverse consequences, and the outrage does not arise until much later.

Case study: Ecuador v. Chevron-Texaco[52]

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[44] Ibid, p. 224.
[45] Ibid.
[46] Piketty, T. (2020). Capital and Ideology.
[47] Centraal Bureau Statistiek (Statistics Netherlands), 9 October 2018. Consulted via: https://www.cbs.nl/nl-nl/nieuws/2018/37/co2-uitstoot-in-2017-gelijk-aan-die-in-1990
[48] Oxfam, 2 December 2015. Consulted via: https://www-cdn.oxfam.org/s3fs-public/file_attachments/mb-extreme-carbon-inequality-021215-en.pdf
[49] https://ourworldindata.org/global-inequalities-co2-consumption
[50] Examples are the acquisition of land by Shell in the Niger delta, Freeport, and BP in West Papua and the extraction of shale gas on indigenous First Nations territory in Canada.
[51] Higgins, P. (2016). Eradicating Ecocide, Chapter 5.
[52] Open Democracy, 27 March 2019. Consulted via: https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/

That eco-colonisation continues to go unpunished is probably expressed most succinctly in the case of Ecuador versus Chevron-Texaco, one of the most notorious court cases environmental law has seen to date. In Ecuador and Peru's rainforests lies the Lago Agrio oil concession, where between 1964 and 1992 the American Texaco Petroleum Company exploited the oil reserves together with the state-owned PetroEcuador corporation. After the departure of Texaco, the enormous scale of oil pollution in the Amazon region became evident. In 1993, 30,000 residents joined forces and created the *El Frente de Defensa de la Amazonia* (ADC) action group. They filed charges against Texaco in an American court, claiming that the oil company had dumped more than 100 billion litres of hazardous waste and crude oil in the Amazon rainforest during its operations, resulting in damage to the environment and the health of the area's residents. They demanded that Texaco clean up the polluted and destroyed area and provide care to the inhabitants afflicted by the oil pollution. This claim marked the beginning of a long battle for ecological justice. The American judge ruled the case inadmissible on the grounds that the claim had to be judged by an Ecuadorian judge, a decision made with the agreement of the by then merged Chevron-Texaco oil corporation.
After the American legal dismissal, the ADC brought the case to an Ecuadorian judge in 2003. After a protracted and turbulent process coupled with Chevron's alleged lobbying with the American government to end trade relations with Ecuador, the judge ruled in 2011 that Chevron-Texaco was responsible for the pollution. Chevron was sentenced to pay 8.6 billion dollars in damages and clean-up costs, which could amount to up to 18 billion dollars if Chevron continued to refuse to issue a public apology. In 2012, this decision was confirmed by the Ecuadorian Supreme Court.

However, the battle was not won yet. Ecuador was unable to carry out the sentence because Chevron-Texaco no longer had assets in Ecuador which the court could seize if the corporation refused to pay the fine voluntarily. Chevron continued to insist that Texaco had cleaned up its part of the pollution before leaving Ecuador. Chevron also defended its case by referring to a settlement made between Texaco and the Ecuadorian state in 1998 where Texaco was discharged of any further responsibility. It was not until years after Texaco's departure that it became apparent that nothing had been cleaned up, but that the pollution had been camouflaged at best: a report from an expert assigned by the Ecuadorian court showed that the waste was piled up on top of the polluted oil wells.[53] Meanwhile, Chevron-Texaco sought to take matters further through the ISDS (investor-state dispute settlement) clause in a trade agreement between Ecuador and the US dating from 1991. This clause stated that corporations could file charges against a state before a separate arbitration committee if trade agreements had been violated. Chevron-Texaco filed a lawsuit with the Permanent Court of Arbitration in The Hague. In 2018, the court found that Ecuador was bound to keep to the earlier settlement from 1998 in which Texaco claimed to have cleaned up the pollution. The Ecuadorian verdict was overruled, and Ecuador was sentenced to pay 96 million dollars to Chevron-Texaco in compensation for the damages incurred by the corporation. For the residents of Lago Agrio, justice has never seemed more distant than it does in 2018.

3. The legal framework for ecocide law

The establishment of ecocide in international law can be the necessary cornerstone required to protect and conserve ecology across the globe. Criminal prosecution can ensure that the

[53] Cabrera, R. (2004). Informe Sumario del Examen Pericial. Translation consulted via: https://amazonwatch.org/documents/ecuador-press-kit/chevrons-top-ten-lies-long.pdf

consequences of ecocide are in proportion to the damage inflicted.[54] This chapter discusses the perspectives that the Rome Statute offers in its current form and the most important legal elements for an international law of ecocide.

Avenues of prosecution

In 2016, the ICC prosecutor publicised a policy paper announcing a renewed focus on environmental crime. The ICC would focus in particular on environmental crime, the illegal exploitation of natural resources and the illegal confiscation of land, also known as land grabbing.[55] Despite this resolve to increase focus on environmental crime, legal experts argued that without a proper legal framework, the legal problems concerning the definition and prosecution of environmental crime would continue to exist.[56] Legal experts saw particular barriers for the burden of proof of a crime, establishing a causal relationship, and the lack of legal instruments to determine the degree of corporate liability.[57]
Nonetheless, the policy paper introduced alternative ways for the prosecution of large-scale environmental crimes, including ecocide. The underlying actions against the other crimes named in the Statute can also indirectly contribute to ecocide jurisdiction. For example, under Article 8 of the Statute, it is a war crime within the scope of international armed conflict to, *'intentionally launch an attack in the knowledge that such attack will cause... 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.'* Article 8 is not all-encompassing because it only concerns ecocide crimes committed in times of war. However, ecocide is not only a consequence of conflict. In many cases, it can be the cause of conflict: [58] environmental damage and the excessive exploitation of natural resources increase the risk of armed conflict and trigger an increase in climate refugees.[59] For example, the UN Security Council calls the illegal exploitation of natural resources one of the core mechanisms behind the many internal conflicts in the Democratic Republic of the Congo.[60] Moreover, Article 8 focuses explicitly on *international* armed conflict – that is to say between two or more states[61] – which means that ecocide crimes committed during an internal conflict are not eligible for prosecution. Finally, the article requires a proportionality test: when the military benefit gained by committing ecocide is sufficiently great, the action is justifiable and therefore not punishable under Article 8.[62]

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[54]It is important to include the temporal aspects of environmental pollution (how emergent properties change through the disruption of ecosystems).
[55] Office of the Prosecutor (2016). Policy Paper on Case Selection and Prioritisation. Consulted via: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf
[56] https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/39189-can-criminal-courts-help-save-the-environment.html
[57] Ibid.
[58] One point to note here is that the relationship is not unambiguously causal in nature. See also the debates between Homer Dixon and Kaplan on the one side, and Peluso and Watts in the 1990s/'00s:
Kaplan, R. (1994). The Coming Anarchy. *The Atlantic*. Consulted via: https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/
Peluso, N.L., Watts, M.R. (2001). Violent Environments.
[59] Gillett, M. (2013). Environmental Damage and International Criminal Law. *Sustainable Development, International Criminal Justice, and Treaty Implementation)*. 73-99.
[60] S/RES/1457, 2003. Consulted via: https://undocs.org/S/RES/1457(2003)
[61] Rome Statute of the International Criminal Court, 17 July 1988, (Art. 8(2)(b)(iv)).
[62]For more information about the applicability of Article 8, see the following work from Steven Freeland:
Freeland, S. (2017). Addressing the Intentional Destruction of the Environment During Warfare Under the Rome Statute of the International Criminal Court. Netherlands International Law Review 64(2). 343-347.

Article 7 of the Statute regarding crimes against humanity offers greater flexibility because it recognises a broader range of criminal actions when these actions form part of a widespread or systematic attack on a civilian population. In the form of the destruction of natural resources or the environment that a community is dependent upon, ecocide could potentially lead to the forced relocation of the affected community. This is punishable under Article 7 as the 'deportation or forcible transfer of population.'[63] When environmental damage adversely restricts access to food and safe drinking water, one can speak of 'intentionally causing great suffering, or serious injury to body or to mental or physical health.'[64] If such destruction is 'calculated to bring about the destruction of part of a population', this can indicate the crime of 'extermination'.[65] Article 6 on genocide could also play a role here if a genocidal intention can be proven.[66] During pre-trials against Omar Al-Bashir[67], the ICC prosecutor accused him of genocide because he was believed to have destroyed natural resources and means of survival in Darfur.[68] During the conflict in Sudan in 2003, Al-Bashir was believed to have given the order to pollute water pumps and wells, the sources of drinking water on which the local population was dependent. The judges did not take these accusations into consideration for further prosecution, because they did not believe it plausible that such contamination was the primary goal of the attack. Nonetheless, the judges recognised that there were certainly grounds for the accusation.[69]

In theory, the Rome Statute contains clauses that could be implemented in the fight against ecocide. The reason why this has not been carried through in practice is explained by the human rights lawyer Richard Rogers.[70]According to Rogers, the crimes currently referred to in the Statute are anthropocentric: they put mankind centre stage and regulate behaviour that causes human suffering.[71] For example, one of the requirements for crimes against humanity under Article 7 is that it has to be directed against a 'civilian population'. Of the 11 actions that fall under Article 7 as crimes against humanity, not one of them refers directly to the destruction of the natural environment. This makes it difficult to prove ecocide under Article 7. One consideration that could be made is to amend the Statute so that ecocide is added to the actions that fall under crimes against humanity. With a direct reference to the destruction of the natural environment, Article 7 may be a more effective instrument in the fight against ecocide. The appendix discusses at length earlier attempts to insert a direct reference. However, given the anthropocentric nature of this article, the option to introduce ecocide as a whole new crime into the Statute merits serious consideration.

Mens Rea

[63] Rome Statute of the International Criminal Court, 17 July 1988, (Art. 7(1)(d)).
[64] Ibid, (Art. 7(1)(k)).
[65] Ibid, (Art. 7(2)(b)).
[66] Ibid, (Art. 6(c)).
[67]Omar Hasan Ahmad al-Bashir is a former Sudanese military leader and a former president of Sudan. He was called to appear at the International Criminal Court on suspicion of five charges of crimes against humanity, two charges of war crime and three charges of genocide, allegedly committed in Darfur. His first arrest warrant was issued in 2008, but he has still not been extradited by Sudan.
[68] United Nations Environment Programme (2009). Protecting the Environment During Armed Conflict, p. 31. Consulted via: https://postconflict.unep.ch/publications/int_law.pdf
[69] Ibid, p. 33.
[70] https://www.linkedin.com/in/richard-j-rogers-231b88111
[71] Rogers, 1 June 2020. Consulted via: http://opiniojuris.org/2020/06/01/icl-and-environmental-protection-symposium-the-environmental-crisis-cases-for-particular-consideration-at-the-icc/

For all the stipulations currently outlined in the Rome Statute, *mens rea* must be proven. *Mens rea* refers to the mental aspect, or the state of mind, required for a person to commit a crime.[72] For *mens rea* to apply, the perpetrator must have acted with criminal intent and have known that their action would probably lead to harmful consequences. The general rule is that someone who acts without *mens rea* cannot be held accountable under criminal law. Exceptions to this rule are crimes to which strict liability applies.

In Anglo-Saxon law, various types of *mens rea* are used to determine the sentence: purpose, knowledge, recklessness and negligence. The Rome Statute uses different definitions and Article 30 states the following regarding the mental element:[73]

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
a. In relation to conduct, that person means to engage in the conduct;
b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

The definition in the Statute demands proof that the perpetrator intended to commit the crime and had knowledge, or should have had knowledge, of the consequences of the crime.[74] Part of the reason for this is that ecocide is seldom carried out with the intent to destroy the environment, as is the case in an oil spill, for example. Some claim that ecocide should be a crime to which strict criminal liability applies, for which *mens rea* should not be made a condition.[75] In the 1970s, during the first attempts to make ecocide a criminal offence, there was also extensive discussion about whether intent had to be established before one could term it a criminal offence. This debate is described further in the appendix. Today, jurisprudence exists in which the International Criminal Court rules that if the perpetrator is aware of the risk that his or her actions or negligence could lead to a crime, a condition also known as recklessness, there are sufficient grounds for establishing liability.[76] Thus, a precedent has been set in which recklessness is also considered a form of *mens rea.* When a international law of ecocide is established, the issues around *mens rea* will need to be resolved to everyone's satisfaction if the law is to be accepted.

Sanctions

There are various options for a regime of sanctions against those who commit ecocide, including fines, jail sentences and binding actions to restore the habitat. As we have discussed

[72] https://ecocidelaw.com/the-law/the-elements/
[73] Rome Statute of the International Criminal Court, 1988 July 1988, (Art. Translation consulted via: https://zoek.officielebekendmakingen.nl/trb-2000-120.html#IDA1V25
[74] Van der Vyver, J. (2004). The International Criminal Court and the Concept of Mens Rea in International Criminal Law. University of Miami International & Comparative Law Review (12), p. 57.
[75] Higgins, P. (2016). Eradicating Ecocide.
[76] War Crimes Research Office, September 2010. Consulted via: https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-13-modes-of-liability-and-the-mental-element-analyzing-the-early-jurisprudence-of-the-international-criminal-court/

earlier, simply imposing fines is not sufficient to prevent ecocide. This point has been amply proven by the fact that fines have failed to bring the illegal deforestation of the Amazon rainforest to a halt: they are simply calculated into company expenses. Furthermore, fines offer little justice to the victims involved. On the other hand, they can provide income that will benefit the restoration of damaged regions. Although the imposition of heftier fines may seem like an initial solution, this can also lead to corporations filing for bankruptcy if the fines are too high, resulting in no compensation.[77]

The penalty of environmental restoration makes the perpetrator responsible for compensating the damage – in as far as this is possible. Restoring the environment is of crucial importance to the victims of ecocide. However, it is unlikely that this sanction in itself will prevent ecocide when the profit that can be generated exceeds the costs required to restore the area.[78] A jail sentence may be more effective in preventing ecocide because of its deterrent effect and the higher risks involved for the people responsible. However, incarceration does not contribute to the compensation of any environmental damage that has been caused.[79]

A system that combines multiple sanctions is likely the most effective way to prevent ecocide, and at the same time, ensure that the affected living environment is restored, if and where this is possible. Fines and seizure of assets must lead to sufficient economic losses to discourage violation of the law and have the perpetrator pay the lion's share of restoring the environmental damage as much as possible. However, the goal of ecocide law is not only aimed at recovery and compensation; it aims to implement deterrent measures that prevent committing ecocide from being an attractive option. Jail sentences can be implemented alongside other penalties to achieve this goal.

The International Criminal Court (ICC)

Embedding ecocide law in international law can be established through an amendment of the Rome Statute. To amend the Rome Statute, one state party must submit a proposal to add ecocide to the Statute. Any state, no matter how small, may submit an amendment during an Assembly of States Parties. The amendment is adopted when two-thirds of the States Parties vote in favour of the amendment. There are currently 123 States Parties under the Rome Statute. This means that 82 supporting votes are required to be able to adopt the proposal.[80] States can then ratify the amendment, making the amendment a part of the national law of the state.[81]

States who are not a party to the Rome Statute are nonetheless affected by the adopted amendment. The ICC recognises both territorial and personal jurisdiction requirements. This means that an individual can be prosecuted when (1) the crime is committed within the territorial authority of the ICC, or (2) the crime is committed by someone who holds the nationality of the state that falls under the territorial authority of the ICC.[82] The subjects of non-ratifying countries would therefore not be allowed to engage in ecocidal activity in

[77] Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, 284
[78] Ibid.
[79] Ibid.
[80] Article 121(3) of the Statute states that States Parties should strive to adopt amendments through consensus. As a result, it has become customary for States Parties that come to the conclusion that a proposed amendment is not likely to achieve consensus, decide to vote against the amendment. In the Statute is established that if a consensus cannot be reached, a two-thirds majority of the States Parties is sufficient.
[81] https://www.icc-cpi.int/about/how-the-court-works
[82] https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

countries that have ratified the amendment. This also applies to multinationals. The reverse also applies; the subjects of ratifying countries cannot engage in ecocidal activities in non-ratifying countries. The ICC can also extend its jurisdiction if the UN Security Council asks the ICC to do so. When a crime is suspected of being committed under ICC jurisdiction by subjects or in territory that does not fall under ICC jurisdiction, the UN Security Council may decide to refer the situation to the ICC. This has been done before with conflicts in Darfur and Libya.[83]

The International Criminal Court can only execute its authority when national courts are unable or unwilling to prosecute. The primary responsibility for investigating and punishing crimes is left to the state. That is why many signatories of the Rome Statute have implemented national laws to facilitate the investigation and prosecution of crimes that fall under ICC jurisdiction. By making ecocide punishable at an international level, national governments are encouraged to establish effective instruments at a national level.

It would not be the first time that the Rome Statute is amended. The most significant amendment to date is assigning authority to the International Criminal Court regarding crimes of aggression. Although this crime has been taken up in the Statute since it entered into force in 1998, constant discussion about the definition and conditions of the ICC's authority remained. Ultimately, it was decided that the ICC would not exercise its jurisdiction over the crime until a consensus was reached. In 2010, a review conference was organised to eliminate any differences of opinion. In 2017, the text was ultimately actualised and adopted by the Assembly of States Parties, activating ICC jurisdiction.[84]

4. Case study: West Papua[85]

West Papua is known for its untouched nature, crystal-clear sea and enormous biodiversity. The region is one of the most resource-rich areas in the world. The second-largest tropical rainforest in the world can be found here, and it is home to many unique species of flora and fauna. However, this unique region is plagued by a tragic history marked by repeated ecological plundering, discrimination, and suppression, as well as an ongoing battle for independence. Its rich abundance in natural resources makes this region a target for foreigners that exploit the land for economic profit. The diversity in the types of ecocide that occur, the many invested actors involved, and the link between ecocide and the geopolitics and historical exploitation of the region have made West Papua a prime example of the impact of ecocide on both humans and nature. To understand the situation in West Papua, it is essential first to learn more about its history.

History

After the Netherlands recognised Indonesian independence in 1949, the Netherlands maintained control over West Papua because it differed from the rest of the former Dutch

[83] https://www.icc-cpi.int/about/how-the-court-works
[84] http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression
[85] West Papua is the western half of the island of New Guinea. The western part of this island belongs to Indonesia whilst the eastern part of the island comprises the sovereign state of Papua New Guinea. The part that falls under Indonesian authority was divided up by the Indonesian government - under strenuous objection from the Papuans - into two provinces, West Papua and Papua. However, these two provinces together are still often referred to as West Papua. To avoid any confusion and in recognition of the shared history and problems of these two provinces, 'West Papua' in this paper refers to the communal name given to both provinces of West Papua and Papua.

Indies in geographical, ethnic and cultural respects. The Netherlands started to prepare West Papua for independence in the 1950s, as was required under the UN Charter, the so-called sacred trust.[86] By the end of the 1950s, the Papuans had their own national council, parliament, flag, national anthem, military, police force and currency. With the Cold War threat looming in the background, West Papua was transferred in 1962 to Indonesia at the request of the United States.[87] The Papuans themselves were not involved in the decision. The condition for the transfer was that Indonesia would let West Papua have the final say about their independence. Under international law, a referendum is required in which everyone is allowed to vote regarding the self-determination of the people under UN supervision. Instead, in 1969, Indonesia selected 1,026 Papuan leaders who were supposed to vote on the fate of a population of more than 800,000 by a raising of hands under the watchful eye of Indonesian troops,[88] a vote ironically enough called the Act of Free Choice. The vote was unanimous for integration with Indonesia. In reality, the sacred trust offered absolutely nothing to the Papuans.

From that moment onwards, the exploitation of West Papua truly started to skyrocket. Large corporations exploited the tropical rainforest, the copper and gold mines and the immense reserves of natural gas. Nonetheless, West Papua continues to be the poorest province in all of Indonesia, with 27 per cent of the population living in poverty and one of the highest child mortality and illiteracy rates in all of Asia.[89]

Those who do profit are corporations such as Freeport, Rio Tinto and BP – and the Indonesian government. Agreements for West Papua's exploitation had even been drawn up before the 1969 referendum had taken place. Two years before the Act of Free Choice, the American corporation Freeport McMoRan signed an agreement with the Indonesian government, in which full rights to the gold and copper-rich Ertsberg were transferred to Freeport Indonesia. In exchange, Indonesia received sizeable tax revenues, as well as a minority interest in the corporation. This agreement was struck in 1967, two years before the vote that was to decide whether West Papua would become Indonesian territory in the first place.[90] For the Papuans, European colonialism was replaced by corporate imperialism.

Since then, West Papua has been plagued by the violent suppression of protests, land grabbing, intimidation and violence towards nature and human rights activists, as well as many ecocidal activities, including mining, deforestation and gas extraction. The following paragraphs discuss the two most striking examples of ecocide in West Papua: the exploitation of the Grasberg mine and deforestation.

The Grasberg mine

The original mine, the Ertsberg, was discovered in 1936 by a Dutch geologist. The American company Freeport carried out a second expedition in 1960. The results of this expedition proved promising, and in 1967 the corporation was awarded its first mining contract. The Ertsberg lived up to its economic promise until production started to decline in the mid-1980s.

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[86] Robinson, J., 5 November 2016. Consulted via: https://www.youtube.com/watch?v=3t3yBYAug6U

[87] https://www.freewestpapua.org/documents/secret-letter-from-john-f-kennedy-to-the-prime-minister-of-the-netherlands-2nd-april-1962/

[88] Al Jazeera, 19 October 2011. Consulted via: https://www.aljazeera.com/indepth/opinion/2011/08/201182814172453998.html

[89] TIME, 3 August 2017. Consulted via: https://time.com/4880190/papua-poverty-shootings-justice-paniai/

[90] The Guardian, 12 October 2011. Consulted via: https://www.theguardian.com/commentisfree/2011/oct/12/west-papua-striking-miners-indonesia

Freeport Indonesia started to explore the surrounding mountains for new reserves. In 1987, they found on Grasberg, just a few kilometres south-west of Ertsberg, one of the largest copper and gold reserves in the world.[91]

Today, mining activities have drilled a hole spanning more than a kilometre across into the top of the Grasberg. There are two important environmental arguments against the mining activities on Grasberg. The first is that every day, approximately 200,000 - 230,000 tonnes of untreated waste residue are dumped straight from the mine into the local river system. This mining waste has already led to enormous flooding in the past, with the destruction of forests, mass fish poisoning and the obliteration of local food resources as a result. Second, there are concerns about acid mine drainage – wastewater with an extremely low pH value and high concentrations of poisonous metals that adversely affect the quality of local water sources. The enormous accumulation of waste has turned the rivers in the area, once a flourishing freshwater habitat, into a wasteland.

The disastrous ecological consequences of Freeport's activities have even caused the financial sector to withdraw from the project. In 1996, the British-Australian corporation Rio Tinto decided to invest in a mining expansion on Grasberg, acquiring a 40 per cent share of the mine. Their involvement in this mine led the Norwegian government pension fund to blacklist the corporation in 2008, a list on which Freeport had acquired a spot a few years prior. According to the fund, Rio Tinto's involvement was causing 'severe environmental damage'.[92] The World Bank has announced that they will no longer finance projects where waste products are processed by dumping them in rivers, as was the case in the Grasberg mine, because of the irreversible ecological damage it causes.[93] Moreover, in 1995, the US Overseas Private Investment Corporation decided to revoke Freeport's risk insurance because Freeport 'had created and was continuing to create unreasonably large environmental and health risks regarding the aquatic ecosystem, the terrestrial ecosystem and the local population.'[94]

Moreover, the Grasberg mine is the subject of social and political tension with the local population. Deadly incidents, believed to be attributed to high production speeds, regularly occur at the mine.[95] In 2003, an incident killing eight people led to mass protests in the region. The Papuans demanded – without success – an independent investigation into the ecological, cultural and socioeconomic costs of Freeport's corporate activities in West Papua.[96] The mass protests were also frequently aimed at the high military presence around the mining areas. To defend themselves against the local population's resistance and keep the production at the mine going, Freeport maintains close ties with the Indonesian military, which is regularly accused of violating human rights by human rights organisations such as Amnesty International.[97] Moreover, the mine offers few employment opportunities for the local

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[91] Ballard, C. (2001). Human Rights and the Mining Sector in Indonesia: A Baseline Study. *The Australian National University Canberra*. Consulted via: https://pubs.iied.org/pdfs/G00929.pdf

[92] https://www.ipe.com/norway-excludes-rio-tinto-over-environmental-damage/29077.article; Norway removed the ban in 2019, after Rio Tinto had sold its share of the Grasberg mine.

[93]International Finance Corporation, 10 December 2007. Consulted via: https://www.ifc.org/wps/wcm/connect/595149ed-8bef-4241-8d7c-50e91d8e459d/Final%2B-%2BMining.pdf?MOD=AJPERES&CVID=jqezAit&id=1323153264157

[94] https://ips-dc.org/overseas_private_investment_corporation/

[95] https://www.miningglobal.com/mining-sites/grasberg-worlds-largest-gold-mine

[96] Down to Earth, November 2003. Consulted via: https://www.downtoearth-indonesia.org/story/protests-over-fatal-collapse-freeportrio-tinto-west-papua-mine

[97] Amnesty International, 2 July 2018. Consulted via: https://www.amnesty.nl/actueel/indonesie-veiligheidstroepen-vermoordden-in-papoea-100-mensen

population because Freeport hires primarily migrant workers. The lion's share of the profit flows to Jakarta and the US while the local population is left facing the disastrous consequences rather than profiting from the benefits.

Deforestation

For years, the Indonesian rainforest has been systematically afflicted with deliberate forest fires, disappearing plant and animal species, and uprooted communities. In 2012, 38 per cent of the remaining Indonesian forests were located in the Papua and West Papua provinces.[98] West Papua boasts one of the most biodiverse forests on Earth and is home to 20,000 plant, 602 bird, 125 mammal and 223 reptile species.[99] With the reduction in forest coverage on Sumatra and Kalimantan, the forests of West Papua are among the last intact forests in Indonesia. However, the survival of this forest is jeopardised by ongoing logging activities and the demand for palm oil. Data from recent years have shown an increase in the deforestation of West Papua.[100] Both illegal logging and logging facilitated by the Indonesian government through the issuance of permits play a role here.[101] For examples, reports have shown how the South Korean/Indonesian conglomerate Korindo has burned down the forests on large tracts of ecologically valuable land to make room for plantations. Nonetheless, the Indonesian authorities continue to assign more land to the corporation time and time again.[102] The figures from recent years are shocking: the reduction in forest cover in 2015 increased by no less than 63 per cent compared to the year before.[103] Following the international indignation caused by this peak, the percentage dropped in 2016 and 2017, only to increase again by 38 per cent in 2018.[104]

The resistance to palm oil grows, but the production will most probably not decrease: in 2018, in the middle of efforts by the European Parliament to discourage the use of palm oil as a biofuel, a delegation from the Indonesian government was sent to Europe to protect the palm oil industry.[105] Moreover, the government aims to take full advantage of the riches of its lands by placing the construction of roads high on the agenda. These roads are to be constructed in previously inaccessible areas. In West Papua, this has led to the development of a new road network, the Trans-Papua Highway. The Indonesian exploitation of the invaluable West Papuan forests was already significant. However, the Trans-Papua Highway, spanning a total length of 4345 kilometres across a large part of West Papua, raises this destruction to an entirely new level, tearing at the heart of a damaged, but not yet destroyed rainforest.

Legal perspectives

Over the years, many lawyers have supported the Papuans' search for justice, particularly the prominent Australian human rights lawyer Jennifer Robinson. Many legal avenues, courts,

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[98] World Resource Institute, 6 November 2018. Consulted via: https://www.wri.org/blog/2018/11/indonesias-last-forest-frontier-3-facts-know-about-papua
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Mongabay, 19 September 2019. Consulted via: https://news.mongabay.com/2019/09/palm-oil-korindo-fsc-papua-indonesia-investigation-violations/
[103] Mongabay, 24 July 2019. Consulted via: https://www.wri.org/blog/2019/07/indonesia-reducing-deforestation-problem-areas-remain
[104] Ibid.
[105] Greenpeace, 27 April 2018. Consulted via: https://www.greenpeace.org/southeastasia/press/696/new-deforestation-revealed-as-indonesian-minister-arrives-in-eu-to-defend-palm-oil-industry/

and agreements have been considered in offering protection for the Papuans and their habitat. However, most of these are either inadequate or inaccessible to West Papua because of its non-sovereign status. For instance, the International Court of Justice is only accessible to UN member states or authorised international organisations. Given that West Papua falls under Indonesian authority and is not a sovereign state, it cannot plead its case independently with a court of justice.[106] For filing charges based on international agreements, the Papuans are dependent on soft law. The Declaration on the Rights of Indigenous Peoples is the most important document for safeguarding the rights of indigenous peoples such as the Papuans with regards to their land, environment, food resources, and traditional and cultural practices. Indonesia has signed this declaration. However, given that the declaration is not binding and is based on soft law, Indonesia can simply claim that it does not recognise the Papuans as an indigenous people and therefore is not obliged to protect their living environment.[107]
In 1996, the residents suffering due to the mining activities of the American corporation Freeport tried to submit their claim to the American courts. In separate state and federal claims, they argued that Freeport was complicit in violating human rights committed by Freeport's security troops. Environmental destruction and 'cultural genocide' through the destruction of the living environment were mentioned in the claim.[108] Both cases came to nothing due to the legal barriers posed by the submission of claims to a foreign court, just like what occurred in the earlier case of the citizens of Ecuador versus Chevron-Texaco.
A universal guarantee of environmental standards through ecocide law could ensure that the ecocide in West Papua is brought to a halt. Indonesia is not a party in the ICC and is therefore not obligated to ratify the Rome Statute. However, as outlined in the previous chapter, adding ecocide to the Rome Statute does affect countries that do not subscribe to ICC jurisdiction. Once ecocide is added to the Statute, it will be forbidden for all transnational corporations from ratifying states to commit ecocide, including in areas that fall under other jurisdictions. This is because ICC jurisdiction is applicable to subjects of states that fall within the territorial authority of the ICC, regardless of where the crime is committed.[109] A ban of these proportions could move Indonesia to switch its economic activities to more responsible and sustainable models. It should be noted here that Indonesia is highly economically dependent on industries that carry out ecocide. One way or another, an intermediate form must be adopted that allows corporations to change their ecocidal business practices, where required with the help of international organisations and experts.[110] Clearly, this is no mean feat.

International solidarity

Resource-rich, relatively inaccessible regions such as West Papua are attractive for corporations such as BP, Freeport, Rio Tinto and Korindo because of the tax benefits and lax environmental laws. The absence of freedom of the press – journalists are not granted access to the area,[111] nor is the UN High Commissioner for Human Rights[112] – means that the disastrous activities of multinationals are largely kept out of the limelight. The Indonesian government actively contributes to the exploitation of natural areas in West Papua. The consequences of these activities for the biodiversity and the living environment of West

[106] Robinson, J. (2010). Self-Determination and the Limits of Justice: West Papua and East Timor. *Future Justice.*
[107] https://www.iwgia.org/en/indonesia.html
[108] Ibid.
[109] https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf
[110] https://www.stopecocide.earth/faqs-ecocide-the-law
[111] The Guardian, 22 July 2019. Consulted via: https://www.theguardian.com/media/2019/jul/22/freedom-of-the-press-in-indonesian-occupied-west-papua
[112] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23206&LangID=E

Papua's inhabitants are disastrous. These destructive practices can only be brought to a halt if combating ecocide is embedded in international law.

What we need to achieve this is solidarity among the international community. The Papuans have found an ally in the tiny island state of Vanuatu, a country in the Pacific Ocean that is dealing with the consequences of climate change like no other due to rising sea levels. Vanuatu's government regularly brings up the fate of the Papuans in international forums, such as during the UN General Assembly and the Pacific Islands Forum.[113] It has also been calling on the countries primarily responsible for climate change – the countries that have profited the most from industrialisation – to take climate action for years. Only by listening to this call to action through the implementation of ecocide law, but also by adjusting our own climate and environmental policy to keep the global temperature increase below 1.5°C, can we prevent further escalation and guarantee a clean environment and healthy living conditions.

5. Conclusion

Rising sea levels across the globe, the forest fires in the Amazon, the leaching of deadly pollutants by mining corporations in Peru and the oil spills in Nigeria; these environmental tragedies are the devastating consequences of the structural undermining of our living environment and illustrate the ineffectiveness of current legal mechanisms. Today, in 2020, the consequences of ecocide are being felt by the entire world as it struggles to deal with the coronavirus crisis, a crisis caused by a zoonotic disease. The ecocidal practice of deforestation has granted industries access to areas where humans had never ventured before. As the frontiers separating humans from the natural environment become increasingly blurred, viruses can quickly jump from animals to humans, resulting in the disruption of entire societies.[114] To continue along this course would mean an increased loss in biodiversity, the jeopardising of environmental safety, an increased risk to public health, an increase in environmental crime and the resulting development of conflicts. Moreover, the risk of developing new zoonotic diseases increases. Ecocide literally undermines the survival of humans and animals.

National law has proven inadequate in combating these crises because the framework for legislation is either kept too general or is simply ignored in light of an absence of international guarantees. On an international scale, many agreements for protecting the environment are based on soft law that offers little to no legal guarantees. International institutions such as the United Nations struggle to reduce greenhouse gas emissions despite decades of negotiations. Civil society links these deficiencies to the lobbying power of corporations.[115]

Given the impact of the present-day climate and biodiversity crisis on current and future generations, and in the interest of finding justice for the victims of ecocide, a binding international law must be implemented that discourages damage to the ecosystems on which we are dependent. The Rome Statute, with its binding legal standards, offers the opportunity to implement such a law. The criminalisation of ecocide must be seen as both a normative and

[113] The Guardian, 3 October 2018. Consulted via: https://www.theguardian.com/world/2018/oct/03/indonesia-accuses-vanuatu-of-inexcusable-support-for-west-papua
[114] The Guardian, 18 March 2020. Consulted via: https://www.theguardian.com/environment/2020/mar/18/tip-of-the-iceberg-is-our-destruction-of-nature-responsible-for-covid-19-aoe; The New York Times, 28 January 2020. Consulted via: https://www.nytimes.com/2020/01/28/opinion/coronavirus-china.html
[115] https://www.foei.org/wp-content/uploads/2012/06/Statement-on-UN-Corporate-Capture-EN.pdf

authoritative legal strategy where the responsibility for protecting our environment is firmly placed with the individuals who lead a corporation or country. In this regard, international law will work complementary to and together with national environmental law. This complementarity is necessary for both the effectiveness of national law and the safeguarding of justice where national mechanisms fall short.
Ecocide law will offer protection against the often reinforcing interaction between large corporations and the state where ecocide is committed and facilitated. The actors that cause extensive destruction of the living environment through their actions will be held accountable to a legal duty of care through these laws. Now that the world has borne witness to the destructive and irreversible consequences of climate change and environmental damage, we need to safeguard ourselves against future crises with the help of the hardest law available – international criminal law.

Both civil society and the international community have shown that a constructive discussion about the crime of ecocide is necessary. The debate must now be continued at a political level. On an international level, the Netherlands can commit itself to embed ecocide law in international law and contribute to establishing a duty of care for the living environment. Parallel to this on a national level, we need to look at how rules can be drafted to prevent ecocide by corporations, including Dutch businesses, within their own country and abroad. Above all, we need a change in perspective: the anthropocentric approach where nature is simply a driving force behind an economy that puts humans first must make way for an approach that does justice to the intrinsic value of all living organisms and their natural environment.

6. Financial section

Much of what has been discussed in this paper regards foreign policy. The initiator does not expect any direct financial consequences for the budget arising from the decision points.

7. Decision points

The House of Representatives is asked to rule in favour of the request that the government take the following measures:

<u>I Support the call for an international law of ecocide</u>

1. Support or initiate an amendment that aims to add the crime of ecocide to the Rome Statute. Given the consequences of the current climate and biodiversity crisis, the question is not whether an amendment to the Rome Statute should be submitted to recognise ecocide, but a matter of when. The Netherlands can be the initiator for this amendment or support a proposal from another state.
2. Take the diplomatic lead to embed ecocide in international law. Use diplomatic connections to encourage other countries to support ecocide law and join other similarly minded countries such as France, Finland, Belgium, Vanuatu and the Maldives.
3. Support the International Criminal Court prosecutor in his intent to prosecute more environmental crimes by taking every opportunity to refer environmental cases to the Court.

4. Investigate options for introducing the crime of ecocide into Dutch criminal law. Specifically, look into an expansion of the International Crimes Act (WIM).
5. Further specify Article 21 of the Dutch constitution: ' it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.' Safeguard this fundamental right by entrenching it firmly in implementing legislation.

II Promote international corporate social responsibility

6. Make the OECD guidelines binding for corporations that operate internationally. In current policy, observance of the OECD guidelines is encouraged but not binding. At a European level, options will be reviewed to draft binding rules for international corporate social responsibility. However, it is not clear if and when this will be implemented. Obligate corporations at a national level today to identify, prevent and combat ecocide, human rights violations, pollution, attacks on animal welfare and loss of biodiversity in their supply chains.[116]

III Reinforce the rule of law in countries across the globe

7. Strengthen legal instruments for the prosecution of ecocide in countries with a poorly developed rule of law. Use existing subsidy funds to do so. The cabinet has at its disposal several funds for the promotion of the rule of law and human rights across the globe. For example, the Human Rights Fund and Voice can be applied to projects that strengthen the position of indigenous communities and offer environmental activists and nature conservationists legal counsel. The Accountability Fund can provide support to local social organisations that protect the interests of the natural environment and its inhabitants and monitor compliance with environmental laws.
8. Use the embassies to provide support and protection for environmental and human rights activists. Assist them when they need access to the courts.

IV Assign rights to the environment

9. Assign rights to the environment. By giving a nature area or ecosystem legal personality, cases can be taken to court when its interests are being violated, as is the case with ecocide. Countries such as New Zealand, Ecuador, Bolivia and India have preceded the Netherlands in granting rights to certain natural areas.

V Conduct follow-up investigation into ecocide

10. Conduct a follow-up investigation into the following questions:
    - What role did the Netherlands play in previous attempts to recognise ecocide as an international crime?[117]
    - What is the relationship between corruption levels in a country and ecocide, and to what degree do multinationals benefit from this?

[116] See also: Enneking, L., 2014. The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case. Utrecht Law Review, 10(1), pp.44–54.
[117]See also: The Netherlands and the world ecology, via https://portals.iucn.org/library/node/6800

- What are the consequences of an international law of ecocide for the Netherlands? Which economic activities, both national and international, will become a potential criminal offence?
- How can countries highly dependent on industries that commit ecocide reform their economies, and what do they require to do so?

Van Raan

Appendix: The institutional history of ecocide

Appeals to make ecocide a criminal offence are nothing new. The first recorded attempt took place in 1970 during the Conference on War and National Responsibility in Washington D.C. Arthur W. Galston, a renowned biologist specialised in herbicide from Yale University, introduced the term and argued for a new international agreement banning ecocide.[118] Two years later, the erstwhile Swedish prime minister, Olof Palme, called the Vietnam war ecocide during the opening speech at the UN Congress on the Human Environment in Stockholm. These were turbulent years when the subject was brought into the limelight in part due to this war: the consequences of the use of the defoliant chemical Agent Orange by American troops proved disastrous and led to much consternation within the international community. The growing interest in the events surrounding Agent Orange (for details, see below) ensured that civil society and the academic world started looking into the possibilities of turning ecocide into a criminal offence. Researchers were particularly focused on the question of whether intent was a required element of the crime in order to prosecute ecocide. Some saw ecocide as an attack aimed at the destruction of an ecosystem or the human or animal life in an area. Others recognised that ecocide is often simply a consequence of economic activity rather than a direct premeditated attack. The more focused attention increased the pressure on the international community to tackle the issue. In the following years, on two occasions an investigation was conducted into how ecocide could be treated as a criminal offence: once during the drafting and evaluation of the Genocide Convention and once during the drafting of the draft Code of Crimes Against the Peace and Security of Mankind.

Genocide Convention

The institutional history of ecocide starts with the Convention on the Prevention and Punishment of the Crime of Genocide, drafted in 1948 and hereafter referred to as the Genocide Convention. The crimes that were referred to in this convention were later included practically unchanged in the Rome Statute. The convention was drafted by Raphael Lemkin, a Polish lawyer who lost 48 of his family members during the Holocaust and is known as the spiritual father of the term genocide. He initially proposed to not only include physical genocide (killing individual members of a group) in the convention, but also cultural genocide: the undermining of a group's way of life. Lemkin recognised that the destruction of a people could also occur through means other than direct physical annihilation. This type of genocide could also include ecocide, as the living environment is critical for many people for the preservation of their culture and livelihood. Lemkin called this provision the heart of the Genocide Convention. In 1958, he wrote in his autobiography that there was not enough support for this idea in the committee that assisted him in drafting the convention. Therefore, he had decided with a heavy heart not to force this provision through.[119]

In the years following the implementation of the Genocide Convention, concerns about its effectiveness grew, in part because genocide was occurring more frequently in practice and the text seemed to offer little to the groups the convention aimed to protect. In 1978, the Genocide Convention was re-evaluated by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to analyse whether an expansion of the convention could increase its effectiveness. During this evaluation, the first explicit arguments for making ecocide a criminal offence were mentioned in a UN document. The commission's

[118] Gauger, A., Rabatel-Fernel, M.P., Kulbicki. L., Short, D., Higgins, P. (2012). Ecocide is the missing 5th Crime Against Peace. Human Rights Consortium.
[119] Ibid

recommendations were to re-introduce 'cultural genocide' and add ecocide to the list of crimes under the jurisdiction of the Genocide Convention.[120] In 1985, a second evaluation was carried out where the support of the members of the commission for the addition of the crime of ecocide was emphasised once more.[121] Why the matter was not pursued further remains unclear.

International Law Commission

Another UN commission that has been focussing on genocide for many years is the International Law Commission, hereafter referred to as the ILC. The ILC was founded in 1947 by the United Nations General Assembly with the mandate to formulate the foundations of international law and to draft a code of violations against the peace and security of mankind.[122] The draft Code of Crimes Against the Peace and Security of Mankind (hereafter referred to as the Code) was the forerunner of what we now know as the Rome Statute, the charter of the International Criminal Court.
The drafting of the Code began in 1949. This process came to a halt as early as 1954 because the member states could not agree on the specifications of the article concerning crimes of aggression. The drafting of the entire Code had to wait until a separate working group had worked out this definition, which was not completed until 1974. Four years later, the ILC was given the mandate to continue working on the Code. However, so much time had passed, and international law had developed so rapidly in that time that it was decided to revise the latest draft version of the Code entirely. The new Special Rapporteur drastically changed course and expanded the list to include twelve crimes, including the carrying out of 'intentional and severe damage to the environment.'

The first reading of the Code was presented to the member states in 1991 and included two references to ecocide: Article 26 referring to the carrying out of wilful and severe damage to the environment; and Article 22 regarding war crimes, in which 'employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment' was stated as one of the war crimes.[123] During the discussion following the reading, many of the states spoke out in support for the adoption of ecocide as a crime. There were however concerns about the formulation of Article 26. Many countries felt that the article did not go far enough because it stated that the crime had to be carried out with the intention of destroying the environment. Many states recognised that ecocide is usually carried out without this intent. The text was also in stark contrast to the reference to ecocide under war crimes, in which intent – in this case not the destruction of the environment but the gaining of a military advantage – did not play a role at all. Nonetheless, the support from the member states was overwhelming, and the request was mostly to make the text more explicit. Only three states objected to Article 26: the United States, the United Kingdom, and the Netherlands. The Netherlands wanted the Code to meet its own criteria. The Netherlands felt that the Code should only contain crimes that outrage the conscience of mankind, crimes which by their very nature can only be prosecuted under international jurisdiction, and crimes for which an individual can be held personally responsible, regardless of whether that person was acting in a public capacity. Based on the criteria that they had formulated for themselves, the Netherlands dismissed all the crimes on the list – including Article 26 – except for genocide, crimes against humanity, war crimes and crimes of

[120] E/CN.4/Sub.2/416, 1978. Consulted via: https://digitallibrary.un.org/record/663583
[121] E/CN.4/Sub.2/1985/6, 1985. Consulted via: https://undocs.org/en/E/CN.4/Sub.2/1985/6
[122] https://legal.un.org/ilc/
[123] ILC Yearbook 1991 vol 2 part 2, p. 97: art 22(d)

aggression.[124] The United Kingdom called ecocide a hitherto 'unknown international crime, much less a crime against the peace and security of mankind.'[125] The United States considered Article 26 to be 'too vague' for them to agree to it.[126]

Despite the fact that most of the states emphasised that Article 26 was not only necessary but needed to be expanded upon, the Special Rapporteur decided to remove Article 26 from the second reading of the Code. Not only was ecocide removed, but the number of crimes in the second reading was halved by the Special Rapporteur to solely 'indisputable' crimes.[127] The Special Rapporteur said the following about removing Article 26: 'One always had to choose between what was desirable—in the event, making serious damage to the environment a crime under the Code—and what was feasible.'[128] Ultimately, after almost 50 years of debate, only four crimes were included in the Code.

To meet the support for the adoption of ecocide as a crime, in 1995 a working group was established by the ILC to investigate other options for naming ecocide as a crime.[129] The working group came up with the recommendation of including ecocide in the Code in one of the following forms:[130]

1. As a separate article;
2. Under the article about crimes against humanity;
3. To remain under Article 22 concerning war crimes.

The ILC had to decide on these options, but there was still much debate among the members of the commission and the member states as to the interpretation of ecocide as a crime. After extensive debate, the chairman of the ILC chose to eliminate the option to include ecocide as a separate article.[131] The option to include ecocide under the article about crimes against humanity or in the article concerning war crimes was called to a vote.[132] The decision to include ecocide in the context of war crimes was made with a vote of twelve commission members to one. [133]

Case study: Agent Orange

Between 1961 and 1971, American troops sprayed more than 43 million litres of the notorious pesticide Agent Orange over Vietnam. The goal was to defoliate the forests and crops that provided 'the enemy' with cover and food. The substance contained dangerous levels of dioxin, the effects of which are still visible 50 years later. After the war, Vietnam was subject to abnormally high rates of birth defects and serious illnesses in children. In particular in villages repeatedly sprayed with Agent Orange, an exceptionally high percentage of birth defects was recorded for many years. American soldiers on the ground also came into contact with Agent Orange and experienced its effects years after the war was over. The Department

[124] ILC Yearbook 1993 vol 2 part 1, p. 83: par 10.
[125] ILC Yearbook 1993 vol 2 part 1, p. 102: par 31.
[126] ILC Yearbook 1993 vol 2 part 1, p. 105: par 24/25.
[127] ILC Yearbook 1995 vol 2 part 2, p. 16: par 38.
[128] ILC Yearbook 1996 vol 1, p. 11: par 35.
[129] ILC Yearbook 1995 vol 2 part 2, p. 32: par 141.
[130] ILC Yearbook 1996 vol 1, p. 7: par 4.
[131] ILC Yearbook 1996, vol 1, p. 13: par 59.
[132] ILC Yearbook 1996, vol 1, p. 13: par 62.
[133] ILC Yearbook 1996 vol 1, p. 14: par. 6/14

for Veterans Affairs in Washington later drew up a list of fourteen illnesses that the GIs had contracted due to pesticide contamination. In stark contrast, no one was concerned about the millions of Vietnamese victims. The corporations responsible for producing the chemical included the American chemical company Monsanto, which was taken over in 2018 by the German pharmaceutical multinational, Bayer. Internal memos from the company show that they were aware of the dangers of the high concentration of dioxin in the chemical, but instead of making it a safer product at the expense of its profitability, Monsanto preferred to get the most profit out of its product. [134]

The Vietnamese' repeated attempts to bring the matter to court in the US were dismissed because according to the court, the use of the chemical did not constitute 'chemical warfare' and was therefore not a violation of international law or the law of war.[135] After a lengthy procedure, Monsanto did agree to several settlements with American victims. In 1984, the seven makers of Agent Orange, including Monsanto, managed to avoid a long-awaited court case with a settlement of 180 million dollars for American veterans and their families who claimed that the toxin had damaged their livelihood. In 2012, Monsanto once again reached an out of court settlement, this time paying 93 million dollars in compensation to the residents of the village of Nitro in West Virginia. Between 1949 and 1971, this was the site of the Monsanto plant where the main component of Agent Orange was produced, resulting in the spread of dioxins throughout the entire village.

It is worth noting that despite Monsanto's history and their paying millions in required compensation for what had happened in the 1960s and 1970s, the company also played a central role in one of the largest pesticide scandals around glyphosate, a weed killer that is extremely harmful to humans, animals and the environment. In 2018, a California court ordered Monsanto to pay a school gardener 78 million dollars in damages, after he had contracted lymphatic cancer from the use of the Monsanto-produced weed killer Roundup. In 2019, 42,700 claims were on the docket against Monsanto regarding glyphosate.[136] Nonetheless, the product is still on the market and Bayer, the parent group, stands by its product. Bayer's CEO, Alex Steiger, responded to the 2018 court ruling as follows: 'We have taken this into account in our finances, and have made the necessary provisions.'[137] Under the current economic system, ecocide is an expense that is calculated into company activities beforehand. Agent Orange and glyphosate illustrate the legal framework in which multinationals can continue to carry out their ecocidal practices with impunity.

[134] The New York Times, 19 April 1983. Consulted via: https://www.nytimes.com/1983/04/19/us/1965-memos-show-dow-s-anxiety-on-dioxin.html
[135] The Asean Post, 30 August 2018. Consulted via: https://theaseanpost.com/article/case-against-monsanto
[136] Fortune, 30 October 2019. Consulted via: https://fortune.com/2019/10/30/roundup-lawsuits-bayer-defiant/
[137] De Tijd, 13 November 2018. Consulted via: https://www.tijd.be/ondernemen/chemie/de-heisa-over-roundup-is-emotioneel-en-vooringenomen/10069007.html