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**"Other Inhumane Acts of a Similar Character Intentionally Causing Great Suffering." Does Ecocide Fit Within the Bounds of Crimes Against Humanity?**

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“OTHER INHUMANE ACTS OF A SIMILAR CHARACTER  
INTENTIONALLY CAUSING GREAT SUFFERING.” DOES  
ECOCIDE FIT WITHIN THE BOUNDS OF CRIMES  
AGAINST HUMANITY?

AMANDA PRICE\*  
APRIL 13, 2023

STUDENT NOTE *forthcoming in the* CASE WESTERN RESERVE  
JOURNAL OF INTERNATIONAL LAW

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## *Abstract*

Article 7(1)(k) of the Rome Statute includes “other inhumane acts of a similar character,” within the enumerated acts of Crimes Against Humanity. This Note examines whether certain acts of ecocide may be prosecuted by the ICC under this provision, proposes a definition for ecocide in a Crimes Against Humanity context, and analyzes whether Bolsonaro’s destruction of the Amazon as alleged by 2021 AllRise Complaint could be prosecuted in the ICC as a Crime Against Humanity.

### I. INTRODUCTION

Acrid air. Smoke so thick that human eyes cannot stay open for more than a mere nanosecond without harsh, reactive tears welling up. Curls of orange flames dance as they engulf yet another acre of what once was pristine Amazon forest teeming with life. It is quiet, save for the crackling lick of flames across wood and an occasional crash signaling that yet another tree has been downed by spreading flames. The animals, and people, who have called this land home and depend upon it for their very survival, have gone. Forced to leave. On the horizon, distant smoke clouds plume. Tufts of white, rippling away from thick, dense, green. Beacons whispering that what is taking place is not isolated but instead, has become commonplace.<sup>1</sup>

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<sup>1</sup> See Telephone Interview with Larry C. Price (Mar. 4, 2023). Price is a two-time Pulitzer Prize-winning photographer and multimedia journalist. *Larry C. Price*, PULITZER CENTER, <https://pulitzercenter.org/people/larry-c-price> (last visited Mar. 4, 2023). Price traveled to Brazil in 2021 to document the illegal deforestation of the Amazon Rainforest. See Georgina Gustin, *The Amazon is the Planet’s Counterweight to Global Warming, a Place of Stupefying Richness Under Relentless Assault*, INSIDE CLIMATE NEWS (Dec. 19, 2021), <https://insideclimatenews.org/news/19122021/amazon-rainforest-brazil-jair-bolsonaro-climate-change/>.

The Amazon Rainforest is under assault with the survival of Indigenous groups, and humanity, hanging in the balance.<sup>2</sup> The fires are no accident, but part of an ever-intensifying burn that viciously multiplied and spread its gnarled reach deeper and deeper into the Brazilian Amazon during Jair Bolsonaro's time in office.<sup>3</sup> Bolsonaro's administration not only systematically dismantled agencies tasked to prevent the destruction plaguing the Brazilian Amazon,<sup>4</sup> but also promoted and facilitated the unbridled exploitation of its resources,<sup>5</sup> and disavowed Indigenous groups of their protected land.<sup>6</sup>

Locally, Indigenous groups have faced violence,<sup>7</sup> mercury poisoning,<sup>8</sup> increased exposure to zoonotic diseases,<sup>9</sup> and invasion of their constitutionally granted territories.<sup>10</sup> Globally, the destruction of the Amazon detrimentally contributes to accelerated climate change.<sup>11</sup>

Article 5 of the Rome Statute grants the International Criminal Court (ICC) jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>12</sup> While many argue that a

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<sup>2</sup> Gustin, *supra* note 1.

<sup>3</sup> *See id.*

<sup>4</sup> Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to Present, Perpetrated by Brazilian President Jair Messias Bolsonaro and Certain Former and Current Principal Actors of his Administration, ¶41, (Oct. 12, 2021), [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211012\\_14633\\_na.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211012_14633_na.pdf) [hereinafter *AllRise Complaint*].

<sup>5</sup> *Id.* at ¶44.

<sup>6</sup> Kiera Charles, *Bolsonaro's Stance on Land Demarcation Rights*, THE BORGEN PROJECT (July 17, 2019), <https://borgenproject.org/bolsonaros-stance-on-land-demarcation-rights/>.

<sup>7</sup> *AllRise Complaint*, *supra* note 4, at ¶36.

<sup>8</sup> *Id.* at ¶37.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; Charles, *supra* note 6.

<sup>11</sup> *AllRise Complaint*, *supra* note 4, at ¶7.

<sup>12</sup> The Rome Statute of the International Criminal Court, art. 5 [hereinafter the Rome Statute]

fifth crime of ecocide should be added to this list,<sup>13</sup> this Note asks, and attempts to answer, whether the Bolsonaro administration's destruction of the Amazon can be prosecuted as a Crime Against Humanity by the ICC.

Article 7(1)(k) of the Rome Statute, includes "other inhumane acts"<sup>14</sup> within the enumerated acts qualifying as Crimes Against Humanity. If certain instances of ecocide can qualify as an "other inhumane act," then the ICC could prosecute ecocide under its currently existing jurisdiction and deter future environmental destruction.<sup>15</sup>

This Note begins by detailing the destruction of the Amazon and recent complaint filed by AllRise accusing Bolsonaro and members of his administration of Crimes Against Humanity. Next, it provides a brief overview of the ICC and the Rome Statute and discusses article 7(1)(k). Then it provides a test for what constitutes an "other inhumane act" by examining ICC case law. Next, this Note examines prominent definitions of ecocide and proposes a definition of ecocide in the Crimes Against Humanity context. Finally, this Note applies its proposed definition to the AllRise Complaint's allegations and explores how a Crimes Against Humanity understanding of ecocide varies from addition of a fifth crime.

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<sup>13</sup> See Sharpston, Eleanor, *From "Do Trees Have Rights?" to Wondering About Ecocide: Some Legal Reflections*, 52 ENV'T POL'Y L. 117, 130 (2022); See also Higgins, Polly et al., *Protecting the Planet: A Proposal for a Law of Ecocide* 59 CRIME LAW SOC CHANGE 251, 257 (2013).

<sup>14</sup> The Rome Statute, *supra* note 12, at art. 7.

<sup>15</sup> See generally Sharpston, *supra* note 13, at 127.

## II. THE DESTRUCTION OF THE AMAZON

### A. Overview

Brazil is home to approximately 60% of the Amazon.<sup>16</sup> After President Jair Bolsonaro's 2019 election,<sup>17</sup> 2020 brought a 60% increase in the Amazon's deforestation rate.<sup>18</sup> As of December 2021, approximately 10,000 acres of Amazon Forest per day are destroyed.<sup>19</sup>

Coinciding with this sharp uptick in deforestation, came Bolsonaro's systematic dismantling of Brazilian environmental agencies,<sup>20</sup> rhetoric denying climate change,<sup>21</sup> efforts to snatch Indigenous land,<sup>22</sup> and encouragement of Amazonian land development through financial incentives.<sup>23</sup>

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<sup>16</sup> Chloe Taylor, Why Deforestation in Brazil's Amazon has Soared to its Highest Level in 15 Years. CNBC (Updated Jan. 4, 2022, 4:37 AM EST), <https://www.cnbc.com/2021/12/30/why-deforestation-in-brazils-amazon-has-soared-to-its-highest-level-in-15-years.html>.

<sup>17</sup> Luiz Inácio Lula da Silva defeated Jair Bolsonaro in Brazil's presidential election and was sworn in as Brazil's president on January 1, 2023. Gustavo Moreno, *Leftist Lula da Silva is sworn in as president to lead a divided Brazil*, NPR (Jan. 1, 2023), <https://www.npr.org/2023/01/01/1146518711/leftist-lula-brazil-sworn-in-president>; In early January 2023, Lula da Silva initiated raids to target those illegally clearing Amazon forest. Jake Spring, *Exclusive: Brazil launches first anti-deforestation raids under Lula bid to protect Amazon*, REUTERS (Jan. 22, 2023), <https://www.reuters.com/world/americas/first-brazil-logging-raids-under-lula-aim-curb-amazon-deforestation-2023-01-19/>.

<sup>18</sup> Gustin, *supra* note 1.

<sup>19</sup> *Id.*

<sup>20</sup> Liz Kimbrough, *Experts Blame Bolsonaro for Surge in Deforestation, Warn of Worse to Come*, MONGABAY (Nov. 25, 2019), <https://news.mongabay.com/2019/11/experts-blame-bolsonaro-for-surge-in-deforestation-warn-of-worse-to-come/>.

<sup>21</sup> Ferrante, Lucas & Fearnside, Philip, *Brazil's New President and 'Ruralists' Threaten Amazonia's Environment, Traditional Peoples and the Global Climate*. 46 ENV. CONS., 261, 262 (2019).

<sup>22</sup> *See id.*

<sup>23</sup> *See* Taylor, *supra* note 16.

Bolsonaro started his term in office by dissolving land demarcation rights for Indigenous peoples,<sup>24</sup> acting on a declaration he made as a candidate that Indigenous groups would not get “one more centimeter” of protected land.<sup>25</sup> His administration brought an over twofold increase in attacks on Indigenous groups.<sup>26</sup> On January 11, 2019, just days after Bolsonaro took office, land grabbers<sup>27</sup> invaded indigenous lands, claiming that, with Bolsonaro as president, Indigenous groups no longer had land rights.<sup>28</sup>

### *B. All Rise Complaint*

On October 12, 2021,<sup>29</sup> Austrian group<sup>30</sup> AllRise submitted a complaint (the Complaint) to the ICC accusing Bolsonaro and other members of his administration<sup>31</sup> of Crimes Against Humanity against the Environmental Dependents and Defenders in the

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<sup>24</sup> Charles, *supra* note 6.

<sup>25</sup> Ernesto Londono, *Jair Bolsonaro, on Day 1, Undermines Indigenous Brazilians’ Rights*, THE NEW YORK TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/world/americas/brazil-bolsonaro-president-indigenous-lands.html>.

<sup>26</sup> Ferrante, Lucas & Fearnside, Philip, *Brazilian Government Violates Indigenous Rights: What Could Induce a Change?* 152(3) J. GEO. SOC’Y. BERLIN, 200, 201 (2021).

<sup>27</sup> Goldminers are often responsible for pushing Indigenous groups off their land. In May 2021 goldminers set Munduruku leaders’ homes ablaze and attacked Yanomami villages. *Id.*

<sup>28</sup> *Id.* (the landgrabbers invaded Uru-Eu-Wau-Wau Indigenous land and threatened to “decapitate all the children in the village if the people tried to repossess their lands.”).

<sup>29</sup> *AllRise Complaint, supra* note 4, at cover page.

<sup>30</sup> Ian Profiri, *Brazil President Accused of ‘Crimes Against Humanity’ for Rainforest Destruction*, JURIST (Oct. 13, 2021, 08:07:34 PM), <https://www.jurist.org/news/2021/10/environmental-group-announces-icc-suit-against-bolsonaro-for-rainforest-destruction/>.

<sup>31</sup> The Complaint was filed against Bolsonaro and “certain former and current principal actors of his administration. Hereinafter, shortened to “Bolsonaro.” *AllRise Complaint, supra* note 4, at cover page.



Brazilian Legal Amazon.<sup>32</sup> The Complaint argues that not only is the destruction of the Amazon scientifically tied to an increased likelihood of extreme global weather events such as extreme heat and flooding,<sup>33</sup> but that the 30 million people to whom the Amazon is home, termed “Environmental Dependents and Defenders,” are facing violations amounting to Crimes Against Humanity.<sup>34</sup> The Complaint alleges that these crimes were perpetrated by influential actors who thrived under Bolsonaro’s “cynical scheme”<sup>35</sup> to “systematically neuter, pervert and eviscerate the laws, agencies, mechanisms and individuals...” who protect the Amazon.<sup>36</sup>

The Complaint alleges that Bolsonaro acted with knowledge that his actions would cause “inevitable loss of life and inhumane suffering” and “openly sought to stimulate and invite the mass of exploitative, armed forces [into the Amazon].”<sup>37</sup>

The Complaint further alleges that Bolsonaro continued his state policies in full knowledge of the “grave environmental destruction, loss of human life, and other forms of severe physical, mental and spiritual violence and humiliation... [suffered by] the Brazilian Legal Amazon, and its Dependents and Defenders.”<sup>38</sup>

Further, the Complaint highlights that even as “the murders, loss of life, profound suffering and illness, and environmental destruction,” intensified, Bolsonaro and “his key ministers,” continued to “expand and accelerate the pursuit of their common design.”<sup>39</sup> The Complaint alleges that even without further investigation, evidence against Bolsonaro exhibits, at a minimum, “an intent to facilitate and support... the ongoing widespread attack on the Brazilian Legal Amazon and on its

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at ¶¶ 7,12.

<sup>34</sup> *Id.* at ¶ 15.

<sup>35</sup> *Id.* at ¶ 16.

<sup>36</sup> *Id.* at ¶ 19.

<sup>37</sup> *Id.* at ¶ 20.

<sup>38</sup> *Id.* at ¶ 28.

<sup>39</sup> *Id.* at ¶ 22.

Environmental Dependents and Defenders,” through murder, persecution, and other inhumane acts of a similar character.<sup>40</sup>

### III. THE ROME STATUTE & THE ICC

The Rome Statute establishes the ICC.<sup>41</sup> Established in 2002,<sup>42</sup> the ICC can only prosecute genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>43</sup>

ICC jurisdiction only extends over crimes that are committed by natural people<sup>44</sup> over the age of 18.<sup>45</sup> Importantly, official capacity does not absolve an individual of criminal responsibility<sup>46</sup> and the ICC’s decisions do not impact State responsibility.<sup>47</sup>

Even if a crime falls under those enumerated, the ICC may only exercise jurisdiction if: (1) a State Party refers the situation to the prosecutor;<sup>48</sup>(2) the UN Security Council refers the situation to the prosecutor;<sup>49</sup> or (3) the Prosecutor initiates an investigation<sup>50</sup> and receives authorization for investigation from the Pre-Trial Chamber.<sup>51</sup>

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<sup>40</sup> *Id.* at ¶ 23.

<sup>41</sup> The Rome Statute, *supra* note 12, at art. 1.

<sup>42</sup> *Id.* at art. 7.; *The International Criminal Court (ICC)*, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/international-peace-and-security/international-legal-order/the-international-criminal-court-icc#:~:text=Crimes> (last visited Dec. 31, 2022).

<sup>43</sup> The Rome Statute, *supra* note 12, at art. 5.

<sup>44</sup> *Id.* at art. 25<sup>8</sup>(1).

<sup>45</sup> *Id.* at art. 26.

<sup>46</sup> *Id.* at art. 27; Prosecutor v. Omar Hassan Ahmed Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶113 (May 6, 2019) (confirming that there is an “absence of a rule of customary international law recognizing Head of State immunity before international courts in the exercise of jurisdiction.”).

<sup>47</sup> The Rome Statute, *supra* note 12, at art. 25<sup>8</sup>(4).

<sup>48</sup> *Id.* at art. 13(a).

<sup>49</sup> *Id.* at art. 13(b).

<sup>50</sup> *Id.* at art. 13(c).

<sup>51</sup> *Id.* at art. 15.

Additionally, unless otherwise specified, the mental element required is intent and knowledge<sup>52</sup> - the highest standard for a state of mind.<sup>53</sup> Intent is met where a person “means to engage in the conduct”<sup>54</sup> and “means... or is aware” that the consequence of the conduct will occur “in the ordinary course of events.”<sup>55</sup> Thus, awareness of the consequences, for purposes of prosecution in the ICC, is enough to satisfy intent.<sup>56</sup> The Rome Statute defines knowledge as “awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.”<sup>57</sup>

On September 15, 2016, the ICC Office of the Prosecutor released a Policy Paper on Case Selection and Prioritisation (“Policy Paper”) that detailed prosecutorial discretion in case selection and prioritization.<sup>58</sup> Of specific importance, the Policy Paper stated that the Office would prosecute crimes within ICC jurisdiction that “are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”<sup>59</sup>

This statement resulted in speculation that the Prosecutor would prosecute environmental destruction when used as a tool to

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<sup>52</sup> *Id.* at art. 30.

<sup>53</sup> Mohammed Saif-Aiden Wattad, *The Rome Statute & Captain Planet: What Lies Between ‘Crimes against Humanity’ and the ‘Natural Environment,’* 19 *FORDHAM ENVTL L. REV.* 265, 276-77 (2009).

<sup>54</sup> The Rome Statute, *supra* note 12, at art. 30(2)(a).

<sup>55</sup> *Id.* at art. 30(2)(b).

<sup>56</sup> Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶777 (Mar. 7, 2014) (“thus this form of criminal intent presupposes that the person knows that his or her actions will necessarily bring about the consequences in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur.”).

<sup>57</sup> The Rome Statute, *supra* note 12, at art. 30(3).

<sup>58</sup> See The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, INTERNATIONAL CRIMINAL COURT [ICC], (Sept. 15, 2016), [https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

<sup>59</sup> *Id.* at ¶41.

commit a crime within the ICC's jurisdiction.<sup>60</sup> While environmental destruction on its own cannot form the basis of a Crime Against Humanity in the ICC because it does not have the necessary human impact required,<sup>61</sup> the Policy Paper seems to suggest that human harm stemming from environmental destruction is something that can be prosecuted in the ICC.<sup>62</sup>

#### IV. ARTICLE 7 OF THE ROME STATUTE

Article 7 defines Crimes Against Humanity,<sup>63</sup> which do not require an ongoing conflict<sup>64</sup> and are often understood as acts that “shock our sense of human dignity.”<sup>65</sup> Crimes Against Humanity have long been a norm of international law.<sup>66</sup> An act must satisfy two provisions of article 7 - the “Chapeau”<sup>67</sup> and the enumerated acts<sup>68</sup> - to qualify as a Crime Against Humanity.

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<sup>60</sup> See Caitlin Lambert, *Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?*, 30(3) LEIDEN J. INT'L L. 707, 709 (2017); Alessandra Mistura, *Is There Space for Environmental Crimes Under International Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, 43.1 COLUMBIA J. ENV'T L. 181, 183 (2018); Ricardo Pereira, *After the ICC Office of the Prosecutor's 2016 Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, 31 CRIM. L. F. 179, 181-183 (2020); Liana Georgieva Minkova, *The Fifth International Crime: Reflections on the Definition of “Ecocide,”* 25 J. GENOCIDE RSCH. 62, 62 (2023).

<sup>61</sup> The Rome Statute, *supra* note 12, at art. 17(1)(d).

<sup>62</sup> The Office of the Prosecutor, *supra* note 58, at ¶41.

<sup>63</sup> The Rome Statute, *supra* note 12, at art. 7.

<sup>64</sup> *Id.*; GOVERNMENT OF THE NETHERLANDS, *supra* note 42.

<sup>65</sup> Nikos Theodorakis & David P. Farrington, *Emerging Challenges for Criminology: Drawing the Margins of Crimes against Humanity*, 6.2 INT'L J. CRIM SOC. THEORY 1150, 1155 (2013).

<sup>66</sup> Crimes Against Humanity, UNITED NATIONS, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited Dec. 31, 2022).

<sup>67</sup> Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L. J. 457, 457 (1998); The Rome Statute, *supra* note 12, at art. 7(1).

<sup>68</sup> The Rome Statute, *supra* note 12, at art. 7(1).

### A. The “Chapeau”

The “Chapeau” requires that an act is (1) “committed as part of a widespread or systematic attack,”<sup>69</sup> (2) “directed against any civilian population,”<sup>70</sup> and (3) committed “with knowledge of the attack.”<sup>71</sup>

The Rome Statute defines an “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>72</sup> Thus, the act cannot be isolated, but must be part of a broader scheme.<sup>73</sup> The qualification of “any civilian population,” seems to broaden the scope of Crimes Against Humanity.

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<sup>69</sup> *Id.*; The Pre-Trial Chamber II in *The Prosecutor v. Jean-Pierre Bemba Gombo* stated that “attack” “refers to a campaign or operation carried out against the civilian population...” and “the commission of the acts referred to in article 7(1) of the Statute constitute the ‘attack’ itself...” *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 75 (June 15, 2009) (hereinafter *Gombo Case*); The Pre-Trial Chamber stated “widespread” requires that the attack is “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.” *Id.* at ¶ 83.

<sup>70</sup> The Rome Statute, *supra* note 12, at art. 7(1); The Pre-Trial Chamber II in the *Gombo case* stated that the “civilian population must be the primary object of the attack and not just an incidental victim of the attack” but that it does not need to implicate an “entire population of [a] geographical area.” *Gombo Case*, *supra* note 69, at ¶ 76-77.

<sup>71</sup> “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” The Rome Statute, *supra* note 12, at 7(1).

<sup>72</sup> The Rome Statute, *supra* note 12, at art. 7(2).

<sup>73</sup> The Pre-Trial Chamber II in the *Gombo case* qualified that a policy does not need to be formalized to meet the requirements. *Gombo Case*, *supra* note 69, at ¶ 81.

The knowledge requirement of the “Chapeau” follows the mental element enumerated by article 30, where mere negligence in the commission or omission of an act will not constitute a Crime Against Humanity.<sup>74</sup> But, because knowledge is likely satisfied by mere knowledge that “a consequence will occur in the ordinary course of events,”<sup>75</sup> knowledge is satisfied if the actor knows their intended conduct will cause a Crime Against Humanity.

### *B. Enumerated Acts*

It is only after the “Chapeau” is established that the enumerated acts come into play.<sup>76</sup> Article 7 enumerates many acts that qualify as Crimes Against Humanity including murder, extermination, and torture.<sup>77</sup>

If the “Chapeau” is met, commission of any of the enumerated acts will constitute a Crime Against Humanity. While article 7 cements the enumerated acts as Crimes Against Humanity, unenumerated acts may still be Crimes Against Humanity. Article 7(1)(k), allows Crimes Against Humanity to evolve to meet new international needs and norms<sup>78</sup> by providing that unenumerated acts may be Crimes Against Humanity if they are “of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>79</sup>

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<sup>74</sup> The Rome Statute, *supra* note 12, at art. 30.

<sup>75</sup> *Id.* art. 30.

<sup>76</sup> Lambert, *supra* note 60, at 720.

<sup>77</sup> The Rome Statute, *supra* note 12, at art. 7

<sup>78</sup> GILLIAN MACNEIL, LEGALITY MATTERS, CRIMES AGAINST HUMANITY AND THE PROMISE OF THE PROHIBITION ON OTHER INHUMANE ACTS 119 (Gerard Werle & Moritz Vormbaum, eds., 2021).

<sup>79</sup> The Rome Statute, *supra* note 12, at art. 7(1)(k).

C. “Other Inhumane Acts” – Art. 7(1)(k)

Under article 7(1)(k), acts not specifically enumerated can be Crimes Against Humanity if they meet specific requirements.<sup>80</sup> Three ICC cases have helped provide a test to determine when an act may qualify as an “other inhumane act.”

In *the Prosecutor v. Dominic Ongwen*,<sup>81</sup> the Chamber considered whether forced marriage fit within the already enumerated crime of sexual slavery or whether it was an “other inhumane act.”<sup>82</sup> The Chamber found that forced marriage was an “other inhumane act” because it was notably different from the enumerated crime of sexual slavery.<sup>83</sup> Importantly, the Chamber provided a test to determine when an act may properly be determined as an “other inhumane act” that can be distilled to include two elements: (1) the perpetrator inflicts great suffering, or serious injury to body or to mental or physical health and (2) in an action that is sufficiently similar in gravity to the other enumerated acts. Unsurprisingly, the Chamber emphasized that the elements for the “Chapeau” must additionally be met including that the

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<sup>80</sup> *Id.*

<sup>81</sup> Prosecutor v Dominic Ongwen, ICC-02/04-15-422-Red, Decision on the Confirmation of Charges, ¶87 (Mar. 23, 2016) (hereinafter *Ongwen case*).

<sup>82</sup> *Id.* at ¶87-88.

<sup>83</sup> *Id.* at ¶92. The Chamber found forced marriage differed from sexual slavery because forced marriage additionally involved, “restrictions on the freedom of movement, repeated sexual abuse, forced pregnancy, or forced labour, in particular the forced performance of domestic duties...” The Chamber noted that the marriage imposed on the victim the “social status of the perpetrator’s wife” which implemented a social stigma on the victim and “impl[ied] a relationship of exclusivity between the ‘husband’ and ‘wife,’ which could lead to disciplinary consequences for breach of [the] exclusive arrangement, and therefore, is ‘not predominately a sexual crime.’” *Id.* at ¶94 citing Prosecutor v. Brima, Kamara and Kanu, SCSL-2004-16-A, Appeal Judgment, ¶19 (Feb. 22, 2008); The Appeals Chamber upheld the Trial Chamber’s designation of marriage as an “other inhumane act.” Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 A, Judgment on the appeal of Mr. Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment,” ¶ 1024 (Dec. 15, 2022) [hereinafter *Ongwen appeal*].

perpetrator act with “*knowledge* that their actions are part of a *widespread or systematic attack* against a *civilian population*,”<sup>84</sup> (emphasis added).

In *the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, the Chamber stipulated that conduct charged under an enumerated act cannot additionally be charged as an “other inhumane act.” The Chamber underscored that article 7(1)(k) must be “interpreted conservatively...”<sup>85</sup> The Chamber held that acts of serious physical injury<sup>86</sup> and acts forcing family members to witness the killings or mutilations of their family members qualified as “other inhumane acts”<sup>87</sup> because the harm suffered by the victims was of similar character and comparable gravity to the enumerated acts.<sup>88</sup>

However, the Chamber found that destruction of victims’ property did not qualify as an “other inhumane act” because evidence failed to demonstrate that “such conduct caused ‘serious injury to mental health’ within the definition of other inhumane acts.”<sup>89</sup>

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<sup>84</sup> *Ongwen case*, *supra* note 81, at ¶89 citing *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Appeal Judgement, ¶ 736 (26 Oct. 26, 2009); The Rome Statute, *supra* note 12, at art. 7; The Appeals Chamber in *Ongwen* distilled the requirements for an “other inhumane act” as “(i) the act must be of a nature and gravity to any other act referred to in article 7(1); (ii) the act must have resulted in great suffering, or serious injury to body or to mental or physical health; and (iii) the act must have been part of a widespread or systemic attack directed against any civilian population.” *Ongwen appeal*, *supra* note 84, at ¶ 1018; The Appeals Chamber noted that “a chamber may have recourse to any relevant international instruments... to determine whether a specific conduct qualifies as a form of other inhumane acts.” *Id.* at ¶1021.

<sup>85</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Decision on the Confirmation of Charges, ¶269 (Jan. 23, 2012) (hereinafter *Hussein Ali case*).

<sup>86</sup> The physical injuries alleged involved forcible circumcision and penile amputation as well as other mutilations. *Id.* at ¶270-72.

<sup>87</sup> *Id.* at ¶280.

<sup>88</sup> *Id.* at ¶¶273, 277.

<sup>89</sup> *Id.* at ¶279.



In *the Prosecutor v. Charles Blé Goudé*, the Chamber found substantial grounds to find that injuries inflicted upon victims during a variety of attacks qualified as “other inhumane acts” because the acts were “of a character similar to the other acts referred to in article 7(a)... [and] caused great suffering and serious injury to body.”<sup>90</sup>

Thus, it can be understood that an unenumerated act may qualify as a Crime Against Humanity if the act meets the elements of the “Chapeau,” inflicts great physical or mental suffering, and is of a similar character to the enumerated acts.

## V. DEFINING ECOCIDE

On July 28, 2022, the U.N. General Assembly adopted a resolution recognizing “the human right to a clean, healthy, and sustainable environment.”<sup>91</sup>

The 2022 Intergovernmental Panel on Climate Change Report Summary for Policy Makers (The Report) demonstrates just how drastic the impending effects of climate change are and will be if swift action is not taken<sup>92</sup> and details the widespread impact of human-induced climate change like extreme weather events, loss of ecosystems, and increased food and water insecurity.<sup>93</sup> The Report specifically states that climate change contributes to humanitarian crises and causes displacement across the globe<sup>94</sup> and underscores the long-term consequences of climate change.<sup>95</sup>

Given these drastic consequences, it is no surprise that there have been calls throughout the global community to mobilize

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<sup>90</sup> *The Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11, Decision on the Confirmation of Charges, ¶119 -120 (Dec. 11, 2014).

<sup>91</sup> G.A. Res 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (Aug. 1, 2022).

<sup>92</sup> *See generally* Intergovernmental Panel on Climate Change, Summary for Policymakers (2022).

<sup>93</sup> *Id.* at B.1-B1.3 (2022).

<sup>94</sup> *Id.* at B.2 (2022).

<sup>95</sup> *See generally id.* at B.3-B1.4.7.

international criminal law to prosecute those enacting the most heinous acts of environmental destruction.

*A. Definition Proposed by Polly Higgins*

One of the most prominent ecocide definitions was proposed by UK Barrister and author<sup>96</sup> Polly Higgins to the United Nations Law Commission in April 2010.<sup>97</sup> Higgins proposed an amendment to the Rome Statute to include the crime of ecocide, which she defined as, “the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.”<sup>98</sup>

Higgins’ definition creates an international crime that rests solely on the destruction and harm of the environment.<sup>99</sup> Unlike the threshold mental element of knowledge and intent established by the Rome Statute,<sup>100</sup> Higgins’ proposed definition creates a crime of strict liability.<sup>101</sup>

Higgins emphasizes that her proposed ecocide definition criminalizes human caused and naturally occurring ecocide that would create a duty of care<sup>102</sup> on governments and businesses to “ensure that any business practice that causes mass damage, destruction or loss of ecosystems is brought to an end.”<sup>103</sup>

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<sup>96</sup> Polly Higgins, STOP ECOCIDE INT’L, <https://www.stopecocide.earth/polly-higgins> (last visited Mar. 5, 2023).

<sup>97</sup> Higgins et al, *supra* note 13, at 257.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> The Rome Statute, *supra* note 12, at art. 30.

<sup>101</sup> Higgins et al, *supra* note 13, at 262.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

*B. Definition Proposed by Stop Ecocide Expert Panel*

On June 22, 2021, a panel of twelve lawyers from the Stop Ecocide Foundation proposed amending the Rome Statute to add a fifth crime of ecocide under the ICC’s jurisdiction.<sup>104</sup> The Panel defined ecocide as, “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”<sup>105</sup> While the preamble to the proposed definition acknowledges harm caused to human populations, the definition purports to punish acts of ecocide even if they do not cause residual human harm.<sup>106</sup>

Unlike the definition proposed by Polly Higgins which operates under strict liability,<sup>107</sup> the Panel suggests a mental element of recklessness – where an actor would only need awareness of the substantial likelihood that severe and widespread or long-term environmental damage would arise from their actions.<sup>108</sup> This mental element is lower than the default knowledge and intent imposed by the Rome Statute,<sup>109</sup> making it more likely that ecocidal acts would be captured by the proposed amendment.<sup>110</sup>

The Panel elaborates that many of the aspects of their proposed definition, such as the use of the terms “widespread,” “long-term,” and “severe,” and their use of a proportionality test and endangerment liability stem from article 8(2)(b)(iv)<sup>111</sup> which

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<sup>104</sup> INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE, COMMENTARY AND CORE TEXT, (Stop Ecocide Foundation, 2021) (hereinafter “Stop Ecocide Panel”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Higgins et al, *supra* note 13, at 262.

<sup>108</sup> Stop Ecocide Panel, *supra* note 104.

<sup>109</sup> The Rome Statute, *supra* note 12, at art. 30.

<sup>110</sup> *See generally*, Stop Ecocide Panel, *supra* note 104.

<sup>111</sup> *Id.*

criminalizes intentional excessive environmental damage during War.<sup>112</sup>

*C. A Proposed Ecocide Definition in the Crimes Against Humanity Context*

Higgins’ and the Stop Ecocide Panel’s definitions work to create an international crime of ecocide by amending the Rome Statute.<sup>113</sup> But, without amendment, neither definition will be put into action. The hurdles of amendment are discussed in Section VII of this Note.

To prosecute crimes of ecocide under existing international law, it is therefore imperative to derive a definition of ecocide that can be immediately applicable.

In this context, this Note proposes a definition for ecocide that has a human harm requirement to allow it to reside within article 7(1)(k)’s prohibition of “other inhumane acts.” In doing so, ecocidal acts that have a severe impact on human populations may be prosecuted as Crimes Against Humanity without need for amendment of the Rome Statute.

To reside within article 7(1)(k), the proposed definition for ecocide must meet the elements of the “Chapeau,” and the test for “other inhumane acts” elaborated in Section IV(C).<sup>114</sup> It must additionally maintain the mental elements of knowledge<sup>115</sup> and intent.<sup>116</sup>

With these requirements in mind, this Note proposes the following definition of ecocide in a Crimes Against Humanity context: “acts committed as part of a widespread or systemic attack committed both with knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment and commissioned with intent to cause great suffering

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<sup>112</sup> The Rome Statute, *supra* note 12, at art. 8(2)(b)(iv).

<sup>113</sup> Higgins et al, *supra* note 13, at 257; Stop Ecocide Panel, *supra* note 104.

<sup>114</sup> The Rome Statute, *supra* note 12, at art 7.

<sup>115</sup> *Id.* at art 7.

<sup>116</sup> *Id.* at art.7(1)(k).

or serious injury to body or to mental or physical health of any civilian population.” (“Proposed Definition”).

The Proposed Definition draws upon much of the Panel’s definition of ecocide<sup>117</sup> but differs in that it incorporates specific language from article 7(1)<sup>118</sup> and adds a mental element of intent. It eliminates the Panel’s unlawful or wanton requirement and instead requires that the acts are committed as part of a widespread or systemic attack, which further incorporates the elements of Crimes Against Humanity.<sup>119</sup>

The mental elements of knowledge and intent necessarily serve to limit the prosecution of ecocide to instances that fall within the gambit of Crimes Against Humanity because, without adopting the same mental elements, acts of ecocide could not be prosecuted as Crimes Against Humanity.

Although the Proposed Definition cannot capture acts of ecocide that do not result in human harm, a significant limitation, the Proposed Definition allows for prosecution of acts of ecocide so atrocious that they result in severe harm to a civilian population. The Proposed Definition has the benefit of residing within an already existing and adopted legal framework which enables criminal prosecution of ecocide without amendment.<sup>120</sup>

## VI. ECOCIDE? BOLSONARO’S DESTRUCTION

The AllRise Complaint alleges that Bolsonaro committed *inter alia* Crimes Against Humanity of “other inhumane acts,” against the Environmental Dependents and Defenders of the Amazon. Because all elements of the Proposed Definition are likely met through the allegations in the Complaint, it is very possible that Bolsonaro could be prosecuted by the ICC for his attack on the Amazon and its Environmental Dependents and Defenders.

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<sup>117</sup> Stop Ecocide Panel, *supra* note 104.

<sup>118</sup> The Rome Statute, *supra* note 12, at art 7.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

*A. Acts committed as part of a widespread or systemic attack*

The Complaint paints Bolsonaro's attack against the Environmental Dependents and Defenders as widespread. Bolsonaro's attack ranged over 5 million km<sup>2</sup> of territory, home to 30 million people,<sup>121</sup> and involved large-scale crimes committed against the Amazon ecosystems that "necessarily and intrinsically also constitute[d] attacks against the population dependent upon [the Amazon ecosystems]."<sup>122</sup> The Complaint additionally claims that Bolsonaro's attack included many methods, such as deforestation, fires, and forest degradation, and had consequences impacting local, regional, and global populations.<sup>123</sup>

Further, the Complaint indicates that the attack was committed in furtherance of a state policy enacted to "ensure widespread environmental destruction and exploitation," for personal financial gain.<sup>124</sup> The Complaint alleges that these factors constitute a widespread attack<sup>125</sup> and in the Crimes Against Humanity context would likely qualify as such.<sup>126</sup>

*B. With knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment*

The Complaint argues that Bolsonaro knew his actions would cause severe, widespread, and long-term environmental damage and harm to the Environmental Dependents and Defenders.<sup>127</sup> The Complaint demonstrates that the Amazon's extreme vulnerability and the consequences of Bolsonaro's unbridled exploitation were well known at the time he took office. But despite this, Bolsonaro

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<sup>121</sup> *AllRise Complaint*, *supra* note 4, at ¶31.

<sup>122</sup> *Id.* at ¶62.

<sup>123</sup> *Id.* at ¶66.

<sup>124</sup> *Id.* at ¶317.

<sup>125</sup> *Id.* at ¶67.

<sup>126</sup> The Rome Statute, *supra* note 12, at art. 7.

<sup>127</sup> *AllRise Complaint*, *supra* note 4, at ¶300.

continued his exploits.<sup>128</sup> Against this backdrop, it is likely that the ICC would find that Bolsonaro's actions were committed with full knowledge of the substantial likelihood of severe, widespread, and long-term damage to the environment.

*C. Commissioned with intent to cause great suffering to body or to mental or to physical health of any civilian population*

The Complaint alleges that Bolsonaro's acts inducing and causing environmental destruction were committed with intent to cause great suffering to the Environmental Dependents and Defenders of the Amazon.<sup>129</sup> Further, the Complaint indicates that the actions encouraged and furthered by Bolsonaro's policies caused grave suffering to the mental and physical health of Indigenous communities who depend upon the Amazon for their very survival.<sup>130</sup>

Much of Bolsonaro's rhetoric dehumanized and disparaged Indigenous groups and encouraged land-grabbers to use arms against them.<sup>131</sup> The impact of infrastructure projects<sup>132</sup> encouraged by Bolsonaro caused water pollution that resulted in mercury and chemical poisoning in Indigenous communities,<sup>133</sup> deprivation of access to water and fish, of which communities depend upon for survival,<sup>134</sup> food insecurity,<sup>135</sup> and increased exposure to deadly zoonotic diseases.<sup>136</sup> Aside from these grave physical detriments, the Indigenous communities face severe mental suffering from environmental destruction because it detrimentally prevents Indigenous groups from following their

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<sup>128</sup> *Id.* at ¶¶276-319.

<sup>129</sup> *Id.* at ¶¶294-300.

<sup>130</sup> *Id.* at §1.2.3(a).

<sup>131</sup> *Id.* at ¶¶ 296-300.

<sup>132</sup> *Id.* at ¶ 122.

<sup>133</sup> *Id.* at ¶¶ 31- 134.

<sup>134</sup> *Id.* at ¶ 135.

<sup>135</sup> *Id.* at ¶¶ 140- 147.

<sup>136</sup> *Id.* at ¶¶ 148-160.

cultural and spiritual traditions that are intricately tied to the environment.<sup>137</sup> If Bolsonaro's rhetoric and actions can be successfully tied to intent to cause great the mental and physical suffering endured by the Environmental Dependents and Defenders, then Bolsonaro's destruction of the Amazon likely will meet all requisite elements to qualify as a Crime Against Humanity.<sup>138</sup>

## VII. A BRIDGE TO AMENDMENT?

While the adoption of a fifth crime of ecocide as proposed by Polly Higgins or the Stop Ecocide Foundation Panel may prove ideal because it would criminalize ecocide even without resulting human harm,<sup>139</sup> amendment requires overcoming many hurdles. Without consensus, a two-thirds State majority would be needed to amend the Rome Statute.<sup>140</sup> With 120 States party to the Rome Statute, 80 States, or two-thirds of those present, would be required to adopt amendment.<sup>141</sup>

Further, State parties may opt out of amendment and would therefore not be subjected to the ICC's jurisdiction for a crime covered by amendment, such as ecocide.<sup>142</sup> Some of the greatest perpetrators of ecocide may not be subject to the force of the ICC if their State does not accept amendment.

Notably, amendments of articles 5,6,7, and 8 enter into force one year after ratification or acceptance.<sup>143</sup> Because the ICC cannot

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<sup>137</sup> *Id.* at ¶¶ 161-168.

<sup>138</sup> As of March 5, 2023, the status of the AllRise Complaint is still pending before the ICC. *The Planet v. Bolsonaro*, CLIMATE CASE CHART, <http://climatecasechart.com/non-us-case/the-planet-v-bolsonaro/> (last visited Mar. 5, 2023).

<sup>139</sup> Higgins et al, *supra* note 13, at 257 (2013); Stop Ecocide Panel, *supra* note 104.

<sup>140</sup> The Rome Statute, *supra* note 12, at art. 121(3).

<sup>141</sup> *Understanding the International Criminal Court*, International Criminal Court (ICC), at 6, (2020).

<sup>142</sup> The Rome Statute, *supra* note 12, at art. 121(5).

<sup>143</sup> *Id.*



exercise its jurisdiction on crimes committed before it entered into force,<sup>144</sup> the question arises as to whether acts prosecutable under a new amendment that were committed prior to amendment would be prosecutable before the ICC at all.

Despite these hurdles, addition of a fifth crime of ecocide would allow the ICC to prosecute acts of ecocide that do not have residual human harm - a significant leap in the movement to protect the environment and prevent climate change.

In contrast the Proposed Definition would allow for immediate prosecution of some acts of ecocide and would allow the ICC to prosecute crimes that occurred any time after the Rome Statute entered into force. But this comes as a tradeoff as the Proposed Definition would not allow for the prosecution of ecocide without human harm and requires the heightened mental states imposed by article 7.<sup>145</sup>

When comparing the Proposed Definition to addition of a fifth crime of ecocide, it seems that the Proposed Definition may serve as an important bridge until amendment takes place. Additionally, if amendment does take place, it could fill any shortcomings that may befall the definition adopted by amendment.

## VIII. CONCLUSION

Certain acts of ecocide may be prosecuted under the currently existing jurisdiction of the ICC as Crimes Against Humanity. This Note proposes an ecocide definition within the Crimes Against Humanity context of “acts committed as part of a widespread or systemic attack committed both with knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment commissioned and with intent to cause great suffering or serious injury to body or to mental or physical health of any civilian population.”

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<sup>144</sup> *Id.* at art. 11(1).

<sup>145</sup> The Rome Statute, *supra* note 12, at art. 7.

The Proposed Definition embodies the requirements of “other inhumane acts” under Crimes Against Humanity so that acts falling under this definition fall under the ICC’s jurisdiction. In analyzing the destruction of the Amazon under Bolsonaro’s administration by examining the AllRise Complaint, it appears that Bolsonaro could be prosecuted for ecocide under the Proposed Definition.

The Proposed Definition may serve as an important bridge until amendment takes place. Future scholarship should be devoted to determining whether widely ensuing impacts of environmental destruction could be prosecuted as Crimes Against Humanity.