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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?

Outstanding Note of the Year 2024

Amanda Price[†]

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 former President Jair Bolsonaro’s destruction of the Amazon as alleged by 2021 AllRise Complaint can be prosecuted in the ICC as a crime against humanity.

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I. INTRODUCTION

Acrid air. Smoke so thick that human eyes cannot stay open for more than a few seconds 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 fire. The animals and the 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.¹

The Amazon Rainforest is under assault with the survival of Indigenous groups and humanity hanging in the balance.² 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.³ Bolsonaro's administration not only systematically dismantled agencies tasked to prevent the destruction plaguing the Brazilian Amazon,⁴ but it also

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1. 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 CTR., <https://pulitzercenter.org/people/larry-c-price> [perma.cc/LPF7-9KZM]; 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> [perma.cc/YLX2-PVUJ].
 2. Gustin, *supra* note 1.
 3. See *id.*
 4. Commission of Crimes Against Humanity Against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January

promoted and facilitated the unbridled exploitation of its resources⁵ and disavowed Indigenous groups of their protected land.⁶

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

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.¹² While many argue that a fifth crime of ecocide should be added to this list,¹³ this Note asks, and attempts to answer, whether the Bolsonaro administration's alleged destruction of the Amazon could be prosecuted as a crime against humanity by the ICC.

Article 7(1)(k) of the Rome Statute includes "other inhumane acts"¹⁴ 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.¹⁵

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

2019 to Present, Perpetrated by Brazilian President Jair Messias Bolsonaro and Certain Former and Current Principal Actors of his Administration, ¶ 41 (Oct. 12, 2021), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211012_14633_na.pdf [hereinafter *AllRise Complaint*].

5. *Id.* ¶ 44.
6. Kiera Charles, *Bolsonaro's Stance on Land Demarcation Rights*, THE BORGEN PROJECT (July 17, 2019), <https://borgenproject.org/bolsonaros-stance-on-land-demarcation-rights/> [perma.cc/9Y9M-BXJ2].
7. *AllRise Complaint*, *supra* note 4, ¶ 36.
8. *Id.* ¶ 37.
9. *Id.*
10. *Id.*; Charles, *supra* note 6.
11. *AllRise Complaint*, *supra* note 4, ¶ 7.
12. Rome Statute of the International Criminal Court art. 5, 2187 U.N.T.S. 3, July 17, 1998 [hereinafter Rome Statute].
13. See Eleanor Sharpston, *From "Do Trees Have Rights?" to Wondering About Ecocide: Some Legal Reflections*, 52 ENV'T POL'Y L. 117 (2022); see also Polly Higgins et al., *Protecting the Planet: A Proposal for a Law of Ecocide*, 9 CRIME L. SOC. CHANGE 251 (2013).
14. Rome Statute, *supra* note 12, art. 7.
15. See Sharpston, *supra* note 13, at 127–28.

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 new 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.

II. THE DESTRUCTION OF THE AMAZON

A. Overview

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

Coinciding with this sharp uptick in deforestation came Bolsonaro's systematic dismantling of Brazilian environmental agencies,²⁰ rhetoric denying climate change,²¹ efforts to snatch Indigenous land,²² and

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16. Chloe Taylor, *Why Deforestation in Brazil's Amazon has Soared to its Highest Level in 15 Years*, CNBC, <https://www.cnn.com/2021/12/30/why-deforestation-in-brazils-amazon-has-soared-to-its-highest-level-in-15-years.html> [perma.cc/GT9L-JMHS] (Jan. 4, 2022, 4:37 AM EST).
 17. 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> [perma.cc/N6RB-G6F6]. 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, 11:29 AM EST), <https://www.reuters.com/world/americas/first-brazo-logging-raids-under-lula-aim-curb-amazon-deforestation-2023-01-19/> [perma.cc/B6SK6QGK].
 18. Gustin, *supra* note 1.
 19. *Id.*
 20. Liz Kimbrough, *Experts Blame Bolsonaro for Surge in Deforestation, Warn of Worse to Come*, MONGBAY (Nov. 25, 2019), <https://news.mongabay.com/2019/11/experts-blame-bolsonaro-for-surge-in-deforestation-warn-of-worse-to-come/> [perma.cc/H6B7-PNAU].
 21. Lucas Ferrante & Philip Fearnside, *Brazil's New President and 'Ruralists' Threaten Amazonia's Environment, Traditional Peoples and the Global Climate*, 46 ENV. CONS., 261, 262 (2019).
 22. *See id.*

encouragement of Amazonian land development through financial incentives.²³

Bolsonaro started his term in office by dissolving land demarcation rights for Indigenous peoples,²⁴ acting on a declaration he made as a presidential candidate that Indigenous groups would not get “one more centimeter” of protected land.²⁵ His administration brought an over twofold increase in attacks on Indigenous groups.²⁶ On January 11, 2019, just days after Bolsonaro took office, land grabbers²⁷ invaded Indigenous lands, claiming that, with Bolsonaro as president, Indigenous groups no longer had land rights.²⁸

B. *AllRise Complaint*

On October 12, 2021,²⁹ Austrian group³⁰ AllRise submitted a complaint (the Complaint) to the ICC accusing Bolsonaro and other members of his administration³¹ of crimes against humanity against the Environmental Dependents and Defenders in the Brazilian Legal Amazon.³² The Complaint not only argues that the destruction of the Amazon is scientifically tied to an increased likelihood of extreme global weather events, such as extreme heat and flooding,³³ but also that the

23. See Taylor, *supra* note 16.

24. Charles, *supra* note 6.

25. Ernesto Londoño, *Jair Bolsonaro, on Day 1, Undermines Indigenous Brazilians’ Rights*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/world/americas/brazil-bolsonaro-president-indigenous-lands.html> [perma.cc/F5YA-Z2FE].

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

27. 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.*

28. *Id.* (“[L]andgrabbers . . . threatened to decapitate all the children in the village if the people tried to repossess their lands”).

29. *AllRise Complaint*, *supra* note 4, cover page.

30. 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/> [perma.cc/WA9Y-ATWW].

31. The Complaint was filed against Bolsonaro and “certain former and current principal actors of his administration.” This Note will refer to the those listed in the Complaint as “Bolsonaro” collectively. *AllRise Complaint*, *supra* note 4, cover page.

32. *Id.*

33. *Id.* ¶¶ 7,12.

30 million people for whom the Amazon is home, termed "Environmental Dependents and Defenders," are suffering from acts amounting to crimes against humanity.³⁴ The Complaint alleges that these crimes were perpetrated by influential actors who thrived under Bolsonaro's "cynical scheme"³⁵ to "systematically neuter, pervert and eviscerate the laws, agencies, mechanisms and individuals" who protect the Amazon.³⁶

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]."³⁷

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."³⁸

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."³⁹ 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 Environmental Dependents and Defenders," through murder, persecution, and other inhumane acts of a similar character.⁴⁰

III. THE ROME STATUTE & THE ICC

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

34. *Id.* ¶¶ 13,15.

35. *Id.* ¶ 16.

36. *Id.* ¶ 19.

37. *Id.* ¶ 20.

38. *Id.* ¶ 28.

39. *Id.* ¶ 22.

40. *Id.* ¶ 23.

41. Rome Statute, *supra* note 12, art. 1.

42. *The International Criminal Court (ICC)*, GOV'T OF THE NETH., <https://government.nl/topics/international-peace-and-security/international-legal-order/the-international-criminal-court-icc> [<https://perma.cc/EMY3-RG4J>].

43. The Rome Statute, *supra* note 12, art. 5.

ICC jurisdiction only extends over crimes that are committed by natural people⁴⁴ over the age of 18.⁴⁵ Importantly, official capacity does not absolve an individual of criminal responsibility,⁴⁶ and the ICC's decisions do not impact State responsibility.⁴⁷

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;⁴⁸ (2) the U.N. Security Council refers the situation to the Prosecutor;⁴⁹ or (3) the Prosecutor initiates an investigation⁵⁰ and receives authorization for investigation from the Pre-Trial Chamber.⁵¹

Additionally, unless otherwise specified, the mental elements required are intent and knowledge⁵²—the highest standard for a state of mind.⁵³ Intent is met where a person "means to engage in the conduct"⁵⁴ and "means . . . or is aware" that the consequence of the conduct will occur "in the ordinary course of events."⁵⁵ Thus, awareness of the consequences, for purposes of prosecution in the ICC, is enough to satisfy intent.⁵⁶ The Rome Statute defines knowledge as "awareness that a circumstance exists or that a consequence will occur in the ordinary course of events."⁵⁷

44. *Id.* art. 25(1).

45. *Id.* art. 26.

46. *Id.* art. 27; Prosecutor v. Omar Hassan Ahmed Al-Bashir, ICC-02/05-01/09 OA2, Judgment in 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.").

47. Rome Statute, *supra* note 12, art. 25(4).

48. *Id.* art. 13(a).

49. *Id.* art. 13(b).

50. *Id.* art. 13(c).

51. *Id.* art. 15(3).

52. *Id.* art. 30(1).

53. Mohammed Saif-Aiden Wattad, *The Rome Statute & Captain Planet: What Lies Between 'Crimes against Humanity' and the Natural Environment*, 19 FORDHAM ENV'T'L L. REV., 265, 276–77 (2009).

54. Rome Statute, *supra* note 12, art. 30(2)(a).

55. *Id.* art. 30(2)(b).

56. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 777 (Mar. 7, 2014) ("[T]hus 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.").

57. Rome Statute, *supra* note 12, art. 30(3).

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.⁵⁸ 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."⁵⁹

This statement created speculation that the Prosecutor would prosecute environmental destruction when used as a tool to commit a crime within the ICC's jurisdiction.⁶⁰ 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,⁶¹ the Policy Paper seems to suggest that human harm stemming from environmental destruction is something that can be prosecuted in the ICC.⁶²

IV. ARTICLE 7 OF THE ROME STATUTE

Article 7 defines crimes against humanity,⁶³ which do not require an ongoing conflict⁶⁴ and are often understood as acts that "shock our sense of human dignity."⁶⁵ Crimes against humanity have long been a

58. 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.

59. *Id.* ¶ 41.

60. See Caitlin Lambert, *Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?*, 30 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 COLUM. 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).

61. Rome Statute, *supra* note 12, art. 17(1)(d).

62. The Office of the Prosecutor, *supra* note 58, ¶ 41.

63. Rome Statute, *supra* note 12, art. 7.

64. *Id.*; GOV'T OF THE NETH., *supra* note 42.

65. Nikos Theodorakis & David P. Farrington, *Emerging Challenges for Criminology: Drawing the Margins of Crimes Against Humanity*, 6 INT'L J. CRIMINOLOGY & SOCIO. THEORY 1150, 1155 (2013).

norm of international law.⁶⁶ An act must satisfy two provisions of Article 7—the “Chapeau”⁶⁷ and the enumerated acts⁶⁸—to qualify as a crime against humanity.

A. *The “Chapeau”*

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

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.”⁷² Thus, the act cannot be isolated but must be part of a broader scheme.⁷³ The qualification of “any civilian population” seems to broaden the scope of crimes against humanity.

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66. *Crimes Against Humanity*, UNITED NATIONS: OFF. ON GENOCIDE PREVENTION AND THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> [https://perma.cc/7LQL-7YHS].
67. Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT’L L.J., 457, 457 (1998); Rome Statute, *supra* note 12, art. 7(1).
68. Rome Statute, *supra* note 12, art. 7(1).
69. *Id.*; The Pre-Trial Chamber II in *Prosecutor v. 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 . . .” *Prosecutor v. 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.* ¶ 83.
70. Rome Statute, *supra* note 12, 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, ¶ 76-77.
71. Rome Statute, *supra* note 12, art. 7(1) (“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 . . .”).
72. Rome Statute, *supra* note 12, art. 7(2).
73. The Pre-Trial Chamber II in *Prosecutor v. Gombo* qualified that a policy does not need to be formalized to meet the requirements. *Gombo Case*, *supra* note 69, ¶ 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.⁷⁴ But, because knowledge is likely satisfied by mere knowledge that "a consequence will occur in the ordinary course of events,"⁷⁵ 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.⁷⁶ Article 7 enumerates many acts that qualify as crimes against humanity, including murder, extermination, and torture.⁷⁷ 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.⁷⁸ Article 7(1)(k) allows crimes against humanity to evolve to meet new international needs and norms⁷⁹ 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."⁸⁰

C. "Other Inhumane Acts" – Article 7(1)(k)

Under Article 7(1)(k), acts not specifically enumerated can be crimes against humanity if they meet specific requirements.⁸¹ 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*,⁸² the Chamber considered whether forced marriage fit within the already enumerated crime of sexual slavery or whether it was an "other inhumane act."⁸³ The Chamber found that forced marriage was an "other inhumane act"

74. Rome Statute, *supra* note 12, art. 30.

75. *Id.*

76. Lambert, *supra* note 60, at 720.

77. Rome Statute, *supra* note 12, art. 7.

78. *Id.* art 7(1)(k).

79. Gillian MacNeil, *Legality Matters, Crimes Against Humanity and the Promise of the Prohibition on Other Inhumane Acts*, in 28 INT'L CRIM. JUST. SERIES 119 (Gerard Werle & Moritz Vormbaum, eds., 2021).

80. Rome Statute, *supra* note 12, art. 7(1)(k).

81. *Id.*

82. Prosecutor v. Ongwen, ICC-02/04-15-422-Red, Decision on the Confirmation of Charges, ¶ 87 (Mar. 23, 2016) [hereinafter *Ongwen Case*].

83. *Id.* ¶ 87-88.

because it was notably different from the enumerated crime of sexual slavery.⁸⁴ 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.⁸⁵ Unsurprisingly, the Chamber emphasized that the elements for the "Chapeau" must additionally be met, including that the perpetrator act with "**knowledge** that their actions are part of a **widespread or systematic attack** against a **civilian population**."⁸⁶

In *the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*,⁸⁷ the Chamber stipulated that conduct charged under an enumerated act cannot additionally be charged as an "other inhumane act."⁸⁸ The Chamber underscored that Article 7(1)(k) must be "interpreted conservatively,"⁸⁹ and held that

84. *Id.* ¶ 92. (finding that 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[ie]d 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 ¶ 93 *citing* Prosecutor v. Brima, 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. 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*]

85. *Id.* ¶¶ 87-92.

86. *Ongwen Case*, *supra* note 82, ¶ 89 *citing* Prosecutor v. Sesay, SCSL-04-15-A, Appeal Judgment, ¶ 736 (Oct. 26, 2009) (emphasis added); Rome Statute, *supra* note 12, 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, ¶ 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.* ¶ 1021.

87. Prosecutor v. Muthaura, ICC-01/09-02/11, Decision on the Confirmation of Charges, ¶ 269 (Jan. 23, 2012) [hereinafter *Hussein Ali Case*].

88. *Id.*

89. *Id.*

acts of serious physical injury⁹⁰ and acts forcing family members to witness the killings or mutilations of their family members qualified as "other inhumane acts"⁹¹ because the harms suffered by the victims were of a similar character and comparable gravity to the enumerated acts.⁹² 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."⁹³

In *the Prosecutor v. Charles Blé Goudé*,⁹⁴ the Chamber found substantial grounds to hold 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."⁹⁵

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."⁹⁶

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.⁹⁷ It details the widespread impact of human-induced climate change, like extreme weather events, loss of ecosystems, and increased food and water insecurity.⁹⁸ The Report specifically states that climate change contributes to humanitarian crises and causes

90. The physical injuries alleged involved forcible circumcision and penile amputation as well as other mutilations. *Id.* ¶¶ 270-71.

91. *Id.* ¶ 280.

92. *Id.* ¶¶ 273, 277.

93. *Id.* ¶ 279.

94. *Id.* ¶ 120.

95. *Prosecutor v. Blé Goudé*, ICC-02/11-02/11, Decision on the Confirmation of Charges, ¶¶ 119-120 (Dec. 11, 2014).

96. G.A. Res. 76/300, at 1 (Aug. 1, 2022).

97. *See generally* Intergovernmental Panel on Climate Change [IPCC], *Summary for Policymakers* (2022).

98. *Id.* B.1-B1.3.

displacement across the globe⁹⁹ and underscores the long-term consequences of climate change.¹⁰⁰

Given these drastic consequences, it is no surprise that there have been calls throughout the global community to mobilize 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 British Barrister and author¹⁰¹ Polly Higgins to the United Nations Law Commission in April 2010.¹⁰² 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."¹⁰³

Higgins' definition creates an international crime that rests solely on the destruction and harm of the environment.¹⁰⁴ Unlike the threshold mental element of knowledge and intent established by the Rome Statute,¹⁰⁵ Higgins' proposed definition creates a crime of strict liability.¹⁰⁶

Higgins emphasized that her proposed ecocide definition criminalizes human caused and naturally occurring ecocide that would create a duty of care¹⁰⁷ on governments and businesses to "ensure that any business practice that causes mass damage, destruction or loss of ecosystems is brought to an end."¹⁰⁸

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

99. *Id.* B.2.

100. *See id.* B.3-B.1.4.7.

101. *Polly Higgins*, STOP ECOCIDE INT'L, <https://www.stopecocide.earth/polly-higgins> [<https://perma.cc/4RYS-XYCD>].

102. Higgins et al., *supra* note 13, at 257.

103. *Id.*

104. *See id.*

105. Rome Statute, *supra* note 12, art. 30.

106. Higgins et al., *supra* note 13, at 262.

107. *Id.* at 257.

108. *Id.*

of ecocide under the ICC's jurisdiction.¹⁰⁹ 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."¹¹⁰ 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.¹¹¹

Unlike the definition proposed by Polly Higgins which operates under strict liability,¹¹² 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.¹¹³ This mental element is lower than the default knowledge and intent imposed by the Rome Statute,¹¹⁴ making it more likely that ecocidal acts would be captured by the proposed amendment.¹¹⁵

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),¹¹⁶ which criminalizes intentional excessive environmental damage during war.¹¹⁷

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.¹¹⁸ 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.

109. INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE, COMMENTARY AND CORE TEXT, (Stop Ecocide Foundation, 2021) (hereinafter Stop Ecocide Panel).

110. *Id.* art. II.

111. *Id.* art. III.

112. Higgins et al., *supra* note 13, at 262.

113. Stop Ecocide Panel, *supra* note 109, art. 8 ter.

114. Rome Statute, *supra* note 12, art. 30.

115. *See* Stop Ecocide Panel, *supra* note 109.

116. *Id.*

117. Rome Statute, *supra* note 12, art. 8(2)(b)(iv).

118. Higgins et al., *supra* note 13, at 257; Stop Ecocide Panel, *supra* note 109.

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 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).¹¹⁹ It must additionally maintain the mental elements of knowledge¹²⁰ and intent.¹²¹

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

The Proposed Definition draws upon much of the Panel's definition of ecocide,¹²² but differs in that it incorporates specific language from Article 7(1)¹²³ 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.¹²⁴

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 that enables criminal prosecution of ecocide without amendment.¹²⁵

119. Rome Statute, *supra* note 12, art. 7(1)(k).

120. *Id.*

121. *Id.*

122. Stop Ecocide Panel, *supra* note 109.

123. Rome Statute, *supra* note 12, art. 7(1).

124. *Id.*

125. *Id.*

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.

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. According to the Complaint, Bolsonaro's attack ranged over 5 million km² of territory, home to 30 million people,¹²⁶ 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]."¹²⁷ 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.¹²⁸

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.¹²⁹ The Complaint alleges that these factors constitute a widespread attack¹³⁰ and, in the crimes against humanity context, would likely qualify as such.¹³¹

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.¹³² 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. Yet, despite this knowledge, Bolsonaro

126. *AllRise Complaint*, *supra* note 4, ¶ 31.

127. *Id.* ¶ 62.

128. *Id.* ¶¶ 66–67.

129. *Id.* ¶ 317.

130. *Id.* ¶ 67.

131. Rome Statute, *supra* note 12, art. 7.

132. *AllRise Complaint*, *supra* note 4, ¶ 300.

continued his exploits.¹³³ Against this backdrop, the ICC would likely 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.¹³⁴ 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.¹³⁵

Much of Bolsonaro's rhetoric dehumanized and disparaged Indigenous groups and encouraged land-grabbers to use arms against them.¹³⁶ The impact of infrastructure projects¹³⁷ encouraged by Bolsonaro caused water pollution that resulted in mercury and chemical poisoning in Indigenous communities,¹³⁸ deprivation of access to water and fish (upon which communities depend for survival),¹³⁹ food insecurity,¹⁴⁰ and increased exposure to deadly zoonotic diseases.¹⁴¹ 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 cultural and spiritual traditions that are intricately tied to the environment.¹⁴² 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 will likely meet all the requisite elements to qualify as a crime against humanity.¹⁴³

133. *Id.* ¶¶ 276–417.

134. *Id.* ¶¶ 294–300.

135. *Id.* ¶¶ 127–200.

136. *Id.* ¶¶ 296–300.

137. *Id.* ¶ 122.

138. *Id.* ¶¶ 131–34.

139. *Id.* ¶ 135.

140. *Id.* ¶¶ 140–47.

141. *Id.* ¶¶ 148–52.

142. *Id.* ¶¶ 161–68.

143. As of March 6, 2024, the status of the AllRise Complaint is still pending before the ICC. *The Planet v. Bolsonaro*, CLIMATE CASE CHART, <http://>

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,¹⁴⁴ amendment requires overcoming many hurdles. Without consensus, a two-thirds State majority would be needed to amend the Rome Statute.¹⁴⁵ With 120 States party to the Rome Statute, 80 States, or two-thirds of those present, would be required to adopt amendment.¹⁴⁶

Further, States 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.¹⁴⁷ Some of the greatest perpetrators of ecocide may simply 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.¹⁴⁸ Because the ICC cannot exercise its jurisdiction on crimes committed before it entered into force,¹⁴⁹ the question arises as to whether acts prosecutable under a new amendment that were committed prior to amendment would be prosecutable at all before the ICC.

Despite these hurdles, adding a fifth crime of ecocide would allow the ICC to prosecute acts of ecocide that do not have residual human harm¹⁵⁰—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. However, this comes as a tradeoff because the Proposed Definition would not permit the prosecution of ecocide without human harm and requires the heightened mental states imposed by Article 7.¹⁵¹

climatecasechart.com/non-us-case/the-planet-v-bolsonaro/ [perma.cc/SLJ7-QPU8].

144. Higgins et al., *supra* note 13, at 257–58; Stop Ecocide Panel, *supra* note 109, art. II.

145. Rome Statute, *supra* note 12, art. 121(3).

146. Int'l Crim. Ct. (ICC), Understanding the International Criminal Court 6 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

147. Rome Statute, *supra* note 12, art. 121(5).

148. *Id.*

149. *Id.* art. 11(1).

150. *See, e.g.*, Stop Ecocide Panel, *supra* note 109.

151. Rome Statute, *supra* note 12, art. 7.

When comparing the Proposed Definition to the 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, the Proposed Definition 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 framework 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, and commissioned with intent to cause great suffering or serious injury to body or to mental or physical health of any civilian population.”

The Proposed Definition embodies the requirements of “other inhumane acts” under crimes against humanity so that acts falling under this definition become subject to 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 by the ICC 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.

