

# PROSECUTING INTERNATIONAL ENVIRONMENTAL CRIME COMMITTED AGAINST INDIGENOUS PEOPLES IN BRAZIL

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## ABSTRACT

This Article investigates current international environmental crimes perpetrated against the indigenous peoples of the Brazilian Amazon and details how and why these crimes must be investigated and prosecuted at the International Criminal Court (ICC). First, this Article illustrates the severity of the environmental crimes in the Brazilian Amazon, in order to explain why these crimes qualify as international crimes under the jurisdiction of the ICC. This Article then illuminates the legal support explicitly and implicitly included in the language of the Rome Statute that allows the ICC to prosecute such environmental crimes. Keeping in mind the ICC Office of the Prosecutor's 2016 policy paper on case selection and prioritization – which put forth the environmentalist policy goals of the ICC– the language of the Rome Statute allows for the prosecution of environmental crimes as war crimes, crimes against humanity, and genocide. Finally, this Article combines the above analyses to evaluate the viability of ICC prosecutions of the international environmental crimes committed against the indigenous peoples of the Brazilian Amazon. Based on the facts of the current situation in the Amazon, and on the language of the Rome Statute, the Office of the Prosecutor should investigate both crimes against humanity and acts of genocide carried out against the indigenous peoples of Brazil. More specifically, the Office of the Prosecutor should investigate the crimes against humanity of forcible transfer, extermination, and

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persecution—all of which are being perpetrated through environmental means. Regarding acts of genocide, the Office of the Prosecutor should investigate environmental degradation calculated to bring about the destruction of the indigenous peoples of the Brazilian Amazon and should also investigate President Jair Bolsonaro for inciting others to commit these genocidal acts.

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## INTRODUCTION

*For many years we, the indigenous leaders and peoples of the Amazon, have been warning you, our brothers who have brought so much damage to our forests. What you are doing will change the whole world and will destroy our home—and it will destroy your home too . . . [for] if our Earth dies, then none of us will be able to live. — Chief Raoni Metuktire of the Kayapó people.<sup>1</sup>*

Global failure to heed these urgent warnings has forced the indigenous peoples<sup>2</sup> of the Amazon Rainforest to stand alone to protect their ancestral lands, their communities, and their lives.

The Guardians of the Forest, a group of Guajajara indigenous people, are fighting an endless battle against illegal deforestation in the protected Araribóia indigenous territory of the Brazilian Amazon

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1. See Chief Raoni Metuktire, *We, the Peoples of the Amazon are Full of Fear. Soon You Will Be Too*, GUARDIAN (Sept. 2, 2019), <https://www.theguardian.com/commentisfree/2019/sep/02/amazon-destruction-earth-brazilian-kayapo-people> [<https://perma.cc/F22G-MGT6>].

2. See *Brazilian Indians*, SURVIVAL INT'L, <https://www.survivalinternational.org/tribes/brazilian> [<https://perma.cc/7BJA-RNMN>]. Brazil is currently home to approximately 305 discrete indigenous tribes, composed of around 900,000 people. There are currently 690 government-recognized indigenous territories in Brazil, which cover about 13% of the country's land mass. 98.5% of all indigenous land lies in the Amazon Rainforest. The remaining 1.5% of indigenous territory outside the Amazon Rainforest is home to roughly half of all indigenous people in Brazil. Despite hundreds of years of contact with outside society, most tribes have maintained their unique, traditional customs and languages. The indigenous tribes of Brazil range in size from one member to 51,000 members. A large portion of the Amazonian tribes are uncontacted, meaning that their communities exist without sustained contact with neighboring communities or the world at-large. Brazil is home to more than 100 uncontacted tribes, making it the country with the most uncontacted peoples in the world. Most Amazonian tribes are completely self-sustaining. Tribes are able to live off of the forests, savannas, and rivers because these communities maintain an unrivalled knowledge of local plants and animals. Using this vast knowledge, indigenous peoples in the Amazon play a vital role in conserving the forest's biodiversity. *Id.*; see also, *Indigenous Peoples in Brazil*, INT'L WORK GROUP FOR INDIGENOUS AFFS., <https://www.iwgia.org/en/brazil.html#:~:text=Indigenous%20peoples%20in%20Brazil&text=The%20principal%20indigenous%20ethnic%20group,%2C%20while%2076.9%25%20speak%20Portuguese> [<https://perma.cc/5K8Q-MNBM>].

Rainforest.<sup>3</sup> These Guardians risk their lives to stop the expansion of illegal logging and mining in the last remaining forested portion of the Amazon<sup>4</sup> in this region.<sup>5</sup> This fight has not been without casualties.<sup>6</sup> Hoping to sell or extract valuable resources from indigenous territories,<sup>7</sup> heavily-armed land grabbers, wildcat miners,<sup>8</sup> and illegal loggers invade indigenous territories and often kill indigenous people who attempt to protect their lands.<sup>9</sup> Recently, acts of violence against indigenous people have become more frequent and unabashed throughout Brazil.<sup>10</sup> In November of 2019, Paulo Paulino Guajajara, a leader of the Guardians of the Forest, was ambushed and fatally shot by loggers seeking to illegally clear-cut indigenous

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3. See *Outrage Over Killing of 'Forest Guardian' in Brazil's Amazon*, AFP GLOBAL NEWS (Nov. 3, 2019), <https://news.yahoo.com/outrage-over-killing-forest-guardian-brazils-amazon-211420729.html> [<https://perma.cc/9CTS-AP8X>].

4. In this Article, “the Amazon” refers to the Amazon Rainforest, a tropical rainforest largely contained within the territory of Brazil. See *Amazon Facts*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/places/amazon> [<https://perma.cc/8VEK-JDXM>].

5. See *Amazon Guardian Killed, Another Shot, as Loggers Attack in Brazil*, SURVIVAL INT’L (Nov. 2, 2019), <https://www.survivalinternational.org/news/12253> [<https://perma.cc/8QC9-6H3J>].

6. *Id.*

7. Illegally obtained land and resources are often sold to international corporations. See Ada Recinos, *Global NGOs: Dirty Dozen Companies Driving Deforestation Must Act Now to Stop the Burning of the World's Forests*, AMAZON WATCH (Aug. 30, 2019), <https://amazonwatch.org/news/2019/0830-dirty-dozen-companies-driving-deforestation-must-act-now-to-stop-the-burning> [<https://perma.cc/4YGE-WZXX>]; see also Meg Kelly & Sarah Cahlan, *The Brazilian Amazon is Still Burning? Who is Responsible?*, WASH. POST (Oct. 7, 2019), <https://www.washingtonpost.com/politics/2019/10/07/brazilian-amazon-is-still-burning-who-is-responsible/> [<https://perma.cc/ML9G-AF6D>] (discussing the different commercial purposes for the illegal deforestation of the Amazon, including soybean farming, cattle ranching, and mining).

8. Wildcat miners are illegal prospectors, who are often looking for gold. See Marco Hernandez et al., *Amazon Gold Rush: The Threatened Tribe*, REUTERS (June 26, 2020), <https://graphics.reuters.com/BRAZIL-INDIGENOUS/MINING/rlgvdllonvo/index.html> [<https://perma.cc/92ME-T7R6>].

9. See Ernesto Londoño, *Miners Kill Indigenous Leader in Brazil During Invasion of Protected Land*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/world/americas/brazil-miners-amapa.html> [<https://perma.cc/V9G2-2Z9E>] (“Several dozen heavily armed miners dressed in military fatigues invaded an indigenous village . . . and fatally stabbed at least one of the community’s leaders.”).

10. See Sam Cowie, *Brazil's Uncontacted Tribes Face 'Genocide' Under Bolsonaro, Experts Warn*, GUARDIAN (Oct. 7, 2019), <https://www.theguardian.com/world/2019/oct/07/brazil-bolsonaro-tribes-genocide-expert-warning> [<https://perma.cc/E8RU-AZK5>].

land.<sup>11</sup> Over a dozen other tribes have lately experienced or been threatened with violence and invasion.<sup>12</sup>

It is not a coincidence that this increase in violence against indigenous people in Brazil coincides with the election of far-right President Jair Bolsonaro.<sup>13</sup> On the contrary, the increase in violence is a direct response to Bolsonaro's blatantly anti-indigenous policies and frequently racist language.<sup>14</sup> Not only has Bolsonaro taken no

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11. See SURVIVAL INT'L, *supra* note 5.

12. See Joana Moncau & Thais Lazzeri, *Under Post-Election Attack, Indigenous Lands Are Unprotected with FUNAI Dismantling*, REPÓRTER BRASIL (Oct. 2, 2019) <https://reporterbrasil.org.br/2019/02/sob-ataque-pos-eleicao-terras-indigenas-estao-desprotegidas-com-desmonte-da-funai/> [<https://perma.cc/3KP2-FZWU>]; see also Sue Branford & Maurício Torres, *Brazil Sees Growing Wave of Anti-Indigenous Threats, Reserve Invasions*, MONGABAY (Feb. 19, 2019), <https://news.mongabay.com/2019/02/brazil-sees-growing-wave-of-anti-indigenous-threats-reserve-invasions/> [<https://perma.cc/8TFD-TDC2>] (stating that invaders have threatened the lives, livelihoods, homes and families of numerous indigenous leaders).

13. See Branford & Torres, *supra* note 12 (“[O]n 28 October, the same day as Bolsonaro’s electoral win, violence against [the Pankararu] was ratcheted up when a group of outsiders set fire to the Pankararu’s health clinic.”).

14. In the year following Bolsonaro’s election, invasions of indigenous territories more than tripled and the murder of indigenous people increased by twenty percent. See Lise Alves, *Brazil’s Indigenous Missionary Council Blames Government for Murder*, CATHOLIC NEWS SERVICE (Nov. 4, 2019), <https://catholicphilly.com/2019/11/news/world-news/brazils-indigenous-missionary-council-blames-government-for-murder> [<https://perma.cc/U3D5-6ZMS>]; Lisa Alves, *Violence Against Indigenous In Brazil on the Rise*, CATHOLIC NEWS SERVICE (Sept. 26, 2019), <https://www.catholicregister.org/home/international/item/30329-violence-against-indigenous-in-brazil-on-the-rise> [<https://perma.cc/P4G7-2H7P>] (detailing a report finding that violence against indigenous people and invasions and illegal exploitation of indigenous land have increased significantly since Bolsonaro took office); see also *Amazon Indigenous Leaders Accuse Brazil ‘Genocide’ Policy*, AFP GLOBAL NEWS (Jan. 18, 2020), <https://news.yahoo.com/amazon-indigenous-leaders-accuse-brazil-genocide-policy-054357991.html> [<https://perma.cc/U5G8-CZWV>] (quoting a group of indigenous leaders who “denounce . . . the Brazilian government’s political policy of genocide, ethnocide and ecocide . . . [and] said that ‘government threats and hate speech’ ha[ve] encouraged violence against [indigenous] Amazon communities); Cowie, *supra* note 10 (experts warn that Bolsonaro’s efforts to overturn existing protections for indigenous peoples could lead to the genocide of the remaining uncontacted tribes); Branford & Torres, *supra* note 12 (discussing a “dangerous shift in policy” under Bolsonaro that encourages and protects land grabbers); Tom Phillips, *Jair Bolsonaro’s Racist Comment Sparks Outrage From Indigenous Groups*, GUARDIAN, (Jan. 24, 2020), <https://www.theguardian.com/world/2020/jan/24/jair-bolsonaro-racist-comment-sparks-outrage-indigenous-groups> [<https://perma.cc/F6FN-TAM8>] (“Bolsonaro declared: ‘Indians are undoubtedly changing . . . They are increasingly becoming human beings just like us.’”).

steps to end the epidemic of violence against the indigenous peoples of Brazil, his administration has taken affirmative action to undercut the rights of indigenous peoples<sup>15</sup> and has made repeated public statements in support of the destruction of Brazil's indigenous population.<sup>16</sup> In fact, Bolsonaro's conduct rises to the level of an international crime,<sup>17</sup> which should be prosecuted at the International Criminal Court ("ICC").<sup>18</sup>

Importantly, many of the crimes perpetrated against the indigenous peoples of Brazil are carried out through environmental means,<sup>19</sup> and environmental degradation is not explicitly included in the definition of most international crimes under the Rome Statute,

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15. See Ernesto Londoño, *Jair Bolsonaro, on Day 1, Undermines Indigenous Brazilian's Rights*, N.Y. TIMES, (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/world/americas/brazil-bolsonaro-president-indigenous-lands.html> [<https://perma.cc/5EHA-WQEN>].

16. See *What Brazil's President, Jair Bolsonaro, Has Said About Brazil's Indigenous People*, SURVIVAL INT'L, <https://www.survivalinternational.org/articles/3540-Bolsonaro> [<https://perma.cc/XZK9-S686>].

17. Here, an international crime means a crime under which international law places criminal responsibility on an individual and is punishable in the international criminal legal system, including at the ICC and at ad hoc international criminal tribunals.

18. The ICC is an international criminal court established by treaty. The ICC "investigates and where warranted, tries individuals charged with the gravest crimes of concern to the international community[.]" *About the ICC*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about> [<https://perma.cc/X7ST-PTT8>]. The ICC should uphold this mandate by investigating the crimes against the indigenous people of Brazil. For too long, crimes against indigenous peoples and crimes perpetrated through environmental means have fallen below the notice of the international community. See *Protection of Indigenous Peoples*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.coalitionfortheicc.org/global-challenges-icc-protecting-indigenous-peoples> [<https://perma.cc/X2LW-UVRX>]. Though outside the scope of this Article, alternative methods of dispute resolution should also be explored. In particular, any methods for redress that better align with the sense of justice of indigenous peoples of Brazil should be considered. Due to the urgency of the situation and the Brazilian government's explicit hostility towards negotiations with the indigenous peoples and towards the involvement of the UN in matters regarding the Amazon, the establishment of such an alternative dispute resolution mechanism is unlikely to be a success in this case. See SURVIVAL INT'L, *supra* note 16 ("Any reserve that I can reduce in size, I will do so. It will be a very big fight that we're going to have with the UN."). Considering the ongoing nature of the violence, current methods of redress available through prosecution at the ICC should be vehemently pursued as a method of achieving justice for the indigenous peoples.

19. See *infra* Part III.

the sole legal source of the ICC's jurisdiction.<sup>20</sup> Despite the omission of direct reference to environmental harms from most crimes listed in the Rome Statute, these environmental crimes do fall within the jurisdiction of the ICC and should be prosecuted accordingly.<sup>21</sup>

This Article investigates current international environmental crimes perpetrated against the indigenous peoples of Brazil for the purpose of demonstrating how and why these crimes should be prosecuted at the ICC. Part I examines examples of international environmental crimes carried out in the Brazilian Amazon and details the urgent nature of the situation. Part II then explains the means through which such international environmental crimes may be prosecuted at the ICC. Finally, Part III provides an in-depth analysis of the justiciability and viability of prosecutions for the international environmental crimes perpetrated against the indigenous peoples of the Amazon.

In late 2019, Brazilian attorneys and human rights advocates from Brazil's Human Rights Advocacy Collective (hereafter referred to by the Portuguese acronym "CADHu") and the Dom Paulo Evaristo Arns Commission for Human Rights (hereafter referred to as the "ARNS Commission") sent the Office of the Prosecutor of the ICC<sup>22</sup> a request to begin a preliminary examination into Bolsonaro's criminal conduct that they argue constitutes incitement to genocide and crimes against humanity.<sup>23</sup> At the time of publication, the Prosecutor

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20. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

21. See *infra* II.

22. The Office of the Prosecutor is an independent organ of the ICC that examines situations under the jurisdiction of the Court, conducts investigations, and carries out prosecutions against the individuals allegedly most responsible for the crimes. See *Office of the Prosecutor*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/otp> [<https://perma.cc/A55D-7A4R>].

23. HUMAN RIGHTS ADVOCACY COLLECTIVE (CADHU) AND THE ARNS COMMISSION, INFORMATIVE NOTE TO THE PROSECUTOR: INTERNATIONAL CRIMINAL COURT PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO INCITEMENT TO GENOCIDE AND WIDESPREAD SYSTEMATIC ATTACKS AGAINST INDIGENOUS PEOPLES BY PRESIDENT JAIR MESSIAS BOLSONARO IN BRAZIL (2019), <https://apublica.org/wp-content/uploads/2019/11/e-muito-triste-levar-um-brasileiro-para-o-tribunal-penal-internacional-diz-co-autora-da-peticao.pdf> [<https://perma.cc/UD2N-J7NP>] [Hereinafter "CADHu and ARNS Report"]; see also Dom Phillips, *Indict Jair Bolsonaro Over Indigenous Rights, International Court is Urged*, THE GUARDIAN (Nov. 27, 2019), <https://www.theguardian.com/world/2019/nov/27/jair-bolsonaro-international-criminal-court-indigenous-rights> [<https://perma.cc/L9SA-XUDC>] (describing

of the ICC has yet to begin such an examination. The Prosecutor of the ICC should grant CADHu and the ARNS Commission's request to open an investigation into these crimes<sup>24</sup> and hold the rightful parties accountable through a full and fair criminal trial.<sup>25</sup> These prosecutions will be an imperative first step towards both restoring peace and security for the indigenous peoples of the Amazon and establishing precedent for prosecuting international environmental crimes, thereby deterring the future commission of similar acts.

### I. CRIMES PERPETRATED AGAINST THE INDIGENOUS PEOPLES OF BRAZIL

To better illustrate why and how environmental crimes in the Brazilian Amazon should be prosecuted at the ICC, Section A of this Part explores the history and current instances of environmental violence against the indigenous peoples of Brazil. Some international legal scholars are hesitant to describe environmental crimes as crimes against humanity or as acts of genocide for fear that such a classification would dilute the perceived severity of these established international crimes.<sup>26</sup> This fear is often misplaced and may be based on either a lack of information about or understanding of the situation or, more troublingly, on a neo-colonial perspective that diminishes the importance of the suffering of people of color.<sup>27</sup> The

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CADHu and the Arns Commission's "informative note" to ICC Prosecutor Fatou Bensouda, which requested a preliminary investigation of Bolsonaro for "incitement to genocide and widespread systematic attacks against indigenous peoples").

24. *See id.*

25. As Brazil is a Party to the Rome Statute and the crimes occurred on Brazilian territory, the ICC has jurisdiction over these crimes, and the Prosecutor may start an investigation *in proprio motu*. *See* Rome Statute, *supra* note 20, arts. 12(2) and 15(1); *see also State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/brazil.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/brazil.aspx) [https://perma.cc/S2X2-F5RC] (naming Brazil as a party to the Rome Statute).

26. *See How Do You Define Genocide?*, BBC NEWS (Mar. 17, 2016), <https://www.bbc.com/news/world-11108059> [https://perma.cc/ZA5Q-JPZK].

27. When Canadian Prime Minister Justin Trudeau agreed with the Canadian National Inquiry into Missing and Murdered Indigenous Women and Girls' finding that the crimes against indigenous women and girls in Canada constituted a genocide, his use of the word was met with backlash. *See* Rob Breakenridge, *Use of the Word 'Genocide' Undermines the MMIWG Report*, GLOBAL NEWS (June 8, 2019), <https://globalnews.ca/news/5366507/mmiwg-genocide-debate/> [https://perma.cc/B9GL-YBDT]. Some claimed that the use of the word genocide in this case would "water down" the term and that "Canada's

information presented in Section A will alleviate concerns about the legitimacy of international environmental crime in Brazil and will show that the environmental crimes against the indigenous peoples are severe enough to warrant prosecution at the ICC.<sup>28</sup> Section B will then highlight the urgent need for prosecution in light of the current COVID-19 global health crisis.<sup>29</sup>

#### A. The Environmental Violence Facing the Indigenous Peoples of Brazil

To begin, violence against the indigenous people of Brazil is not a strictly new occurrence. Within the first century of Portuguese settlement, millions of indigenous people died as diseases from Europe swept through indigenous communities.<sup>30</sup> Later, European settlers enslaved the surviving indigenous people of Brazil and forced them to labor on plantations.<sup>31</sup> The mass murder of the indigenous people of Brazil did not end with the 1888 abolition of the most overt forms of slavery.<sup>32</sup> As Brazil neared the mid-century, many tribes

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ability to speak out about genocide . . . was weakened as a result of this.” *Id.* Reporter Rob Breakenridge, claimed that the use of the term genocide to describe the mass murder of indigenous women and girls was “arguably absurd” and “only serves to give people an excuse to disregard all [of the commission’s] work.” *Id.*; see also Ben Crump, *I Believe Black Americans Face a Genocide. Here’s Why I Choose That Word*, *GUARDIAN* (Nov. 15, 2019), <https://www.theguardian.com/commentisfree/2019/nov/15/black-americans-genocide-open-season> [<https://perma.cc/L6MP-5NQD>].

28. These facts will also indicate that a case based on these crimes would be admissible before the ICC. Under Article 17 of the Rome Statute, a case is admissible only if the case is not being investigated by a State with jurisdiction over it or is being investigated by a State that is unwilling or unable to genuinely carry out the investigation. See Rome Statute, *supra* note 20, art. 17. The case also must be sufficiently grave to justify the action of the court. See *id.* Here, the Brazilian government’s involvement in the crimes indicates an inability to genuinely carry out an investigation. See Cowie *supra* note 10; see also Phillips, *supra* note 23 (“Brazilian investigation would fall under the prosecutor-general – chosen by Bolsonaro.”). The gravity of the situation is equally plain from the relevant facts.

29. See *COVID-19 Pandemic*, U.N. DEV. PROGRAMME, <https://www.undp.org/content/undp/en/home/coronavirus.html> [<https://perma.cc/4EAX-7QNF>].

30. See Vanessa Barbara, *The Genocide of Brazil’s Indians*, *N.Y. TIMES* (May 29, 2017), <https://www.nytimes.com/2017/05/29/opinion/the-genocide-of-brazils-indians.html> [<https://perma.cc/EXA4-8ZF8>].

31. See *id.*

32. See Nicolas Bourcier, *Brazil Comes to Terms with its Slave Trading Past*, *GUARDIAN* (Oct. 23, 2012) <https://www.theguardian.com/world/>

were forced to leave their ancestral homes and relocate to overcrowded reservations and concentration camps.<sup>33</sup>

The 1988 adoption of the new Brazilian Constitution recognized indigenous peoples' rights to the land that they traditionally occupied and seemed to promise reprieve for the indigenous communities of Brazil.<sup>34</sup> Tribes were supposed to gain access to their newly demarcated territories within five years of the Constitution's enactment, but for most tribes, the timeline was much longer, and many have never been granted their rightful access.<sup>35</sup> As recently as 2015, tribes attempting to reoccupy their ancestral land were met by rancher-backed armed militias who murdered, torture, raped, and abducted the indigenous people.<sup>36</sup>

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2012/oct/23/brazil-struggle-ethnic-racial-identity [https://perma.cc/CY8C-JW3C]. The treatment of the Tenharim people is a current example of the ongoing destruction and enslavement of indigenous peoples in Brazil. See Tatiana Farah, *This Indigenous Tribe in the Amazon Survived Forced Labor and Epidemics. Now Their Land is on Fire*, BUZZFEED NEWS (Aug. 29, 2019), <https://www.buzzfeednews.com/article/tatianafarah/indigenous-amazon-fires-amazonas-tenharim-bolsonaro> [https://perma.cc/GP2M-2EYL]. Much of the Tenharim territory was destroyed by illegal set fires. The loggers and ranchers who set these fires threaten the very existence of the tribe. In addition to losing their territory and livelihood to intentionally set fires, the Tenharim were forced to move from their land due to the construction of the Trans-Amazonian Highway. Additionally, the Tenharim were themselves compelled to work to clear the forest of their ancestral lands. They “work[ed] as slaves” and received no compensation for their work on the highway other than “a box full of dolls” delivered by the Brazilian Paranapanema company. *Id.*

33. See Barbara, *supra* note 30 (describing the expulsion of the Guarani-Kaiowa tribe from their ancestral land, which the Brazilian government then turned over to farmers and ranchers).

34. See Karla Mendes, *Brazil Supreme Court Land Demarcation Decision Sparks Indigenous Protest*, MONGABAY (Apr. 26, 2019), <https://news.mongabay.com/2019/04/brazil-supreme-court-land-demarcation-decision-sparks-indigenous-protest/> [https://perma.cc/AE4E-7H5N].

35. See *id.* (“Though the 1988 Constitution required the demarcation of indigenous lands, administrations since that time have dragged their feet, and been very slow in accomplishing the task leaving many ancestral indigenous territories unprotected.”); see also Barbara, *supra* note 30 (detailing the 2005 demarcation of the Guarani-Kaiowa territory, which lasted only a few months before a federal judge suspended the demarcation based on petition from local ranchers).

36. In 2015, the Guarani-Kaiowa attempted to reoccupy a part of their lost territory but were met by a rancher backed armed militia. This militia shot and killed Guarani-Kaiowa leader Semião Vilhalva. Within a year, local famers executed another attack on the Guarani-Kaiowa and nine people were shot. See Barbara, *supra* note 30.

The high rates of violence against indigenous people in Brazil have only increased since the election of President Bolsonaro.<sup>37</sup> The number of invasions of indigenous territories leapt from sixty-two for the whole of 2018<sup>38</sup> to more than 160 in the first half of the following year.<sup>39</sup> 2019 also saw a twenty percent increase in the number of murdered indigenous people as compared to 2018.<sup>40</sup> Every Amazonian tribe has faced higher risks of attack since Bolsonaro's election.<sup>41</sup> Tribes are continuously struggling to keep land-grabbers off their territory, as thousands of illegal miners—"apparently emboldened by Bolsonaro's repeated proclamations that indigenous territories were too big"—invade indigenous land in search of natural resources.<sup>42</sup>

These invasions are particularly dangerous for uncontacted tribes who often lack immunity to common illnesses.<sup>43</sup> For these tribes, contact with outsiders carrying common viruses can be disastrous.<sup>44</sup> Threats of illnesses carried by invaders prevent tribes from moving safely within their territories.<sup>45</sup> This restriction on movement has dire consequences for tribes like the Karipuna, who rely on chestnut collection as a vital source of income and so must be free to move throughout their territory.<sup>46</sup>

#### B. The Heightened Dangers of Environmental Crime During the COVID-19 Pandemic

With uncontacted tribes' particular vulnerabilities in mind, intervention to protect the indigenous peoples of Brazil has never

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37. See Cowie, *supra* note 10.

38. See *id.*

39. See Alves, *Brazil's Indigenous Missionary Council Blames Government for Murder*, *supra* note 14.

40. See Alves, *Violence Against Indigenous In Brazil on the Rise*, *supra* note 14.

41. See Tom Phillips, 'He Wants to Destroy Us': Bolsonaro Poses Gravest Threat in Decades, Amazon Tribes Say, *GUARDIAN* (July 26, 2019), <https://www.theguardian.com/world/2019/jul/26/bolsonaro-amazon-tribes-indigenous-brazil-dictatorship> [<https://perma.cc/H4CK-HRE8>].

42. See *id.*

43. See *id.*

44. See *id.*

45. See Alves, *Brazil's Indigenous Missionary Council Blames Government for Murder*, *supra* note 14.

46. See Ana Aranda, *Karipuna, People Live on the Verge of Genocide in Rondônia*, *CONSELHO INDIGENISTA MISSIONÁRIO* (Sept. 27, 2017), <https://cimi.org.br/2017/09/povo-karipuna-vive-iminencia-de-genocidio-em-rondonia/> [<https://perma.cc/Q9TL-NLDB>].

been more pressing than in the face of the COVID-19 pandemic.<sup>47</sup> Respiratory illness is already the main cause of death in indigenous communities,<sup>48</sup> and this novel coronavirus is more contagious and more deadly than the common influenza viruses previously responsible for a considerable percentage of respiratory illnesses.<sup>49</sup> Dr. Sofia Mendonça, a researcher at the Federal University of São Paulo, believes that COVID-19 will have a similarly devastating impact on indigenous communities as previous highly contagious respiratory diseases such as the measles.<sup>50</sup>

Under the current circumstances, the National Indian Foundation, the Brazilian government agency primarily responsible for ensuring indigenous rights and welfare, is using its limited remaining funds to fight for indigenous peoples' survival against COVID-19, further reducing the amount of resources available for environmental protection measures.<sup>51</sup> For this reason, officials from the Indigenous Missionary Council of Brazil (hereafter referred to by

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47. COVID-19 is an infectious disease caused by a newly-discovered coronavirus, which often manifests as a mild to severe respiratory illness. *See Coronavirus*, WORLD HEALTH ORGANIZATION, [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) [<https://perma.cc/Y6XS-PMGC>]. COVID-19 is most dangerous to older people and those with underlying medical problems. It spreads primarily through cough, speech, and sneezing. At the time of publication there are no specific vaccinations or treatments for COVID-19. *Id.*

48. *See* Joao Fellet, *Coronavirus 'Could Wipe Out Brazil's Indigenous People'*, BBC NEWS (Apr. 6, 2020), <https://www.bbc.com/news/world-latin-america-52139875> [<https://perma.cc/ER5M-4YK8>].

49. *See* Denis Grady, *How Does the Coronavirus Compare with the Flu?*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/article/coronavirus-vs-flu.html> [<https://perma.cc/8635-ZV4V>].

50. *See id.* A 1960s measles outbreak in the Yanomami community killed fifty percent of the population of some Yanomami villages. On April 9, fifteen-year-old Alvanei Xirixana was the first Yanomami tribal member to pass away from COVID-19 complications. Xirixana lived in a village along the Uraricoera river, which is often used by illegal gold miners as transportation into Yanomami territory. *See* Tom Phillips, *First Yanomami COVID-19 Death Raises Fears for Brazil's Indigenous Peoples*, GUARDIAN (Apr. 10, 2020), <https://www.theguardian.com/world/2020/apr/10/first-yanomami-covid-19-death-brazl-indigenous> [<https://perma.cc/B78Q-BBSB>]; *see also* Dr. Maria Stella de Castro Lobo et al., *Report of the Medical Team of the Federal University of Rio de Janeiro on Accusations Contained in Patrick Tierney's Darkness in El Dorado*, U. MICH., <http://www.umich.edu/~idpah/SEP/sepmdrpt.html#1> [<https://perma.cc/K7KW-Y59B>] (“[In 1967 t]he daughter of a missionary from the New Tribes Mission (NTM), came from Manaus to Toototobi (a tributary of the upper Rio Demini), bearing [measles], which infected the Yanomami in that region and launched an epidemic.”).

51. *See* Fellet, *supra* note 48.

the Portuguese acronym CIMI) worry that land grabbing and violence against indigenous people may escalate during this time and that “people with interest in indigenous lands can take advantage of [the] chaotic situation.”<sup>52</sup>

Already, COVID-19 has forced the Brazilian Institute of Environment and Renewable Natural Resources (hereafter referred to by the Portuguese acronym “IBAMA”) to cut back on efforts to fight deforestation and environmental crime.<sup>53</sup> Indigenous communities on voluntary “lockdown” cannot make up for this enforcement deficit without risking catastrophic contagion throughout their communities.<sup>54</sup> So far, COVID-19 and the related withdrawal of environmental enforcement agents coincide with a more than seventy percent increase in deforestation as compared to rates in 2019.<sup>55</sup>

International community intervention through ICC prosecutorial investigation may be the only means for protecting the indigenous communities of the Amazon from violence during this

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52. CIMI is an organization of Catholic Bishops founded in 1972 to defend the rights of the indigenous peoples in Brazil. See Eduardo Campos Lima, *Catholic Missionaries Warn that Brazil's Indigenous People are at High Risk from Coronavirus*, JESUIT REV. (Mar. 24, 2020), <https://www.americamagazine.org/politics-society/2020/03/24/catholic-missionaries-warn-brazils-indigenous-people-are-high-risk> [<https://perma.cc/67LC-PZN2>]; see also Lorenzo Cotula, *Stopping Land and Policy Grabs in the Shadow of COVID-19*, INT'L INST. FOR ENV'T & DEV. (Jun. 1, 2020), <https://www.iiied.org/stopping-land-policy-grabs-shadow-covid-19> [<https://perma.cc/H9G6-CDMS>] (“[R]eports about land governance in the time of COVID-19 suggest that national elites . . . are using the reduced space for oversight and accountability as an opportunity to seize lands”; “The U.N. Special Rapporteur on the rights of indigenous peoples . . . expressed serious concerns about the way states of emergency are further marginali[z]ing indigenous communities and militari[z]ing their territories, while governments and companies force through agribusiness, mining and infrastructure megaprojects on ancestral lands.”).

53. Current IBAMA enforcement agents are unable to work because their ages put them at high risk and governmental budget cuts have left IBAMA unable to hire any new team members See Jake Spring, *Exclusive: Brazil Scales Back Environmental Enforcement Amid Coronavirus*, REUTERS (Mar. 27, 2020), <https://uk.reuters.com/article/uk-health-coronavirus-brazil-environment/exclusive-brazil-scales-back-environmental-enforcement-amid-coronavirus-idUKKBN21E15V> [<https://perma.cc/L2SL-XKJZ>].

54. See Richard Pearshouse & Jurema Werneck, *Land Seizures and COVID-19: The Twin Threats to Brazil's Indigenous Peoples*, AMNESTY INTERNATIONAL (Apr. 6, 2020), <https://www.amnesty.org/en/latest/news/2020/04/land-seizures-and-covid-19-the-twin-threats-to-brazils-indigenous-peoples/> [<https://perma.cc/WPH7-JGM4>].

55. See *id.*

extremely vulnerable time.<sup>56</sup> Furthermore, the realities of violence against the indigenous peoples of Brazil clearly illustrate the need for immediate action on the part of the international community and show that an investigation by the Office of the Prosecutor of the ICC would be in the interest of justice.<sup>57</sup>

## II. INTERNATIONAL ENVIRONMENTAL CRIMINAL LAW AT THE ICC

Fortunately, as will be illustrated in Part II of this Article, the ICC has jurisdiction over environmental crimes like those occurring in the Brazilian Amazon. In this Part, Section A first details the plain language in the Rome Statute that grants ICC jurisdiction over environmental crime during armed conflict and then describes the stated environmentalist policies of the ICC's Office of the Prosecutor. Section B explains the place for these preservationist policies in the mechanisms of the ICC that allow for prosecution of crimes against humanity and acts of genocide.

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56. Though outside the scope of this Article, Brazilian lawyers have suggested that Bolsonaro's inappropriate coronavirus response may in itself give rise to criminal liability for crimes against humanity at the ICC. See *Bolsonaro in the Hague: Charges Filed Over Coronavirus Response*, BRASIL WIRE (Apr. 3, 2020), <https://www.brasilwire.com/bolsonaro-in-the-hague-charges-filed-over-coronavirus-response/> [<https://perma.cc/NG8H-P9P4>]. The Brazilian Association of Jurists for Democracy filed a complaint on April 2, 2020 alleging that Bolsonaro committed crimes against humanity when he contradicted global health recommendations for combating COVID-19, thereby endangering the lives of the Brazilian people. See *id.*; see also Tom Phillips, *Brazilian Left Demands Bolsonaro Resign Over Coronavirus Response*, GUARDIAN (Mar. 30, 2020), <https://www.theguardian.com/world/2020/mar/30/tp-captain-corona> [<https://perma.cc/389E-36XF>] ("Bolsonaro ignored his own health minister's call for physical distancing and hit the streets of Brazil's capital, declaring: 'We'll all die one day.'").

57. See Rome Statute, *supra* note 20, art. 53 ("In deciding whether to initiate an investigation, the Prosecutor shall consider whether . . . [t]aking into account the gravity of the crime and the interest of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice."). The facts put forth in this Part support a finding that the violence against indigenous peoples of Brazil is sufficiently grave to warrant ICC prosecution. See *supra* Part I. Moreover, the ongoing nature of the attacks and the lack of redressability through the Brazilian national criminal justice systems indicate that ICC intervention would be in the victims' interests. See Cowie, *supra* note 10; see also Phillips, *supra* note 23 (relaying that Eloísa Machado, CADHu member and constitutional law professor at São Paulo's Getúlio Vargas, stated: "[The Brazilian] justice system is not capable of an independent and impartial investigation into President Jair Messias Bolsonaro.").

### A. Explicit Jurisdiction Over Environmental Crimes in the Rome Statute

Despite the serious threats to the life and liberty posed by environmental degradation in a warming climate,<sup>58</sup> destruction of the environment is directly mentioned only once as a crime under the Rome Statute.<sup>59</sup> Under Article 8(2)(b)(iv) of the Rome Statute, it is a war crime to “intentionally launc[h] an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>60</sup> To be considered a war crime, an attack must be committed in the context of and in association with an armed conflict.<sup>61</sup> Consequently, Article 8(2)(b)(iv) of the Rome Statute does play an important role in protecting the environment during war time, but provides no protection against environmental crimes in times of peace.

Hoping to address concerns about the appearance of an environmental protection gap in the Rome Statute, the Office of the Prosecutor of the ICC released a policy paper on case selection and prioritization, which reiterated the Prosecutor’s commitment to fighting against international environmental crime.<sup>62</sup> This 2016 policy paper announced that the Prosecutor will assess the impact of crimes in part based on the “environmental damage inflicted on the affected communities.”<sup>63</sup> The paper further detailed that the Prosecutor “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in,

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58. See *Climate Impacts on Human Health*, ENV’T PROT. AGENCY (Jan. 19, 2017), [https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-human-health\\_.html](https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-human-health_.html) [https://perma.cc/5D2X-R8QJ].

59. See Rome Statute, *supra* note 20, art. 8(2)(iv).

60. *Id.*

61. See *id.*

62. This policy paper serves “as a key guiding instrument for the . . . selection and prioritization of cases.” ICC Prosecutor, *Fatou Bensouda, Publishes Comprehensive Policy Paper on Case Selection and Prioritisation*, INT’L CRIMINAL CT. (Sept. 15, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1238> [https://perma.cc/Y9JC-8JA4].

63. INT’L CRIMINAL CT., OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 14 (2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) [https://perma.cc/WWG9-HXQM].

inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”<sup>64</sup>

This policy paper does not extend the jurisdiction of the ICC to include environmental crimes but instead indicates that the Office of the Prosecutor will prioritize the prosecution of crimes already under the jurisdiction of the ICC committed by or resulting in environmental destruction.<sup>65</sup> Without any further indication of such a policy, it does not appear that the Office of the Prosecutor intends to prioritize the prosecution of war crimes above the other crimes under the jurisdiction of the ICC. Instead, this paper suggests that the Office of the Prosecutor finds that the prohibition on environmental assault can be read into the other crimes listed in the Rome Statute.<sup>66</sup>

## B. The ICC’s Inherent Jurisdiction Over Environmental Crimes

Beyond the Rome Statute’s explicit criminalization of environmental crimes as war crimes under Article 8, the Rome Statute implicitly criminalizes the environmental perpetration of both crimes against humanity and genocide. This Section will first describe the legal support for prosecuting environmental crimes as crimes against humanity under the Rome Statute and then will explain how environmental crimes may be acts of genocide.

### 1. Prosecuting Environmental Crimes as Crimes Against Humanity

The elements of crimes against humanity as delineated by the Rome Statute are easily satisfied by acts of environmental violence. Article 7 of the Rome Statute defines crimes against humanity as a list of specific acts when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>67</sup> An attack is considered “widespread or systematic” under the Rome Statute, if it involves “multiple commissions of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attacks.”<sup>68</sup> The State policy need not be explicit or formally adopted and can be inferred from the

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64. *Id.*

65. *See id.*

66. *See infra* Part II, Section B.

67. Rome Statute, *supra* note 20, art. 7(1).

68. *Id.* at art. 7(2)(a).

totality of the circumstances.<sup>69</sup> The Article 7 definition of crimes against humanity also requires that the perpetrator have intent to act with knowledge that their actions are part of a larger attack.<sup>70</sup> For the purposes of establishing *mens rea* for a crime against humanity, knowledge of an attack can be inferred from an awareness of the consequences of one's actions arising in the "ordinary course of events."<sup>71</sup>

Of the specified acts considered to be crimes against humanity—when committed in keeping with *actus reus* and *mens rea* requirements of the crime—extermination, persecution, and deportation or forcible transfer of a population could all be perpetrated through environmental means or result in environmental degradation.<sup>72</sup> Extermination, defined in the Rome Statute as "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population,"<sup>73</sup> could be carried out through the systematic burning of a natural environment relied upon for a population's survival. Deportation or forcible transfer of a population is defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."<sup>74</sup> Coercive acts under this definition include "serious and intentional harm to vital human assets . . . such as the environment."<sup>75</sup> If intended to severely

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69. See Letter from the Secretary-General of the United Nations to the President of the General Assembly and the President of the Security Council ¶ 47 (Jan. 22, 2016), <https://undocs.org/pdf?symbol=en/A/70/741> [<https://perma.cc/SXS4-2DNZ>]; see also Prosecutor v. Tadić, Case No. ICTY14-94-1-T, Judgment ¶ 653 (May, 7 1997) ("[A] policy need not be formalized and can be deduced from the way the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.").

70. Rome Statute, *supra* note 20, art. 7(1); see also Prosecutor v. Blaskić, Case No. ICTY 95-14-T, Judgment, ¶ 247 (Mar. 3, 2000) ("The accused must first have knowledge of the general context in which his acts occur and then of the nexus between his action and that context.").

71. Rome Statute, *supra* note 20, art. 30(2)(b).

72. *Id.* at art. 7. An environmental crime could also be considered an "other inhuman act" constituting a crime against humanity if the crime were of the similar character or gravity as the act enumerated in Article 5 of the Rome Statute. See Prosecutor v. Kordić and Čerkez, Case No. ICTY 95-14/2-T, Judgement, ¶ 269–72 (Feb. 26, 2001).

73. Rome Statute, *supra* note 20, art. 7(2)(b).

74. *Id.* at art. 7(2)(d).

75. See Draft Code of Offences Against the Peace and Security of Mankind, Fourth Report, Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986).

deprive a protected group<sup>76</sup> of fundamental rights, environmental harm may be considered persecution under the Rome Statute.<sup>77</sup>

## 2. Prosecuting Environmental Crimes as Genocide

When committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, some environmental crimes could be considered acts of genocide under the Rome Statute.<sup>78</sup> The definition of genocidal acts under Article 6(c) includes acts that deliberately inflict on these protected groups the conditions of life calculated to bring about their physical destruction.<sup>79</sup> “Deliberate deprivation for resources indispensable for survival” and “systematic expulsion from homes” constitute acts calculated to bring about a group’s physical destruction under Article 6(c).<sup>80</sup> In the warming global climate, a growing number of people’s lives are precariously linked to the health of their immediate natural environment.<sup>81</sup> Polluting an already limited water supply, or burning forest and farmland in fire prone areas, could easily deprive protected groups of vital resources or cause these groups to flee from their homes.<sup>82</sup>

While there are many environmental crimes that could inflict the conditions of life capable of bringing about the physical destruction of a protected group, the potential for prosecuting such crimes as genocide is greatly limited by the Article 6 requirement that acts of genocide be committed with genocidal intent.<sup>83</sup> However,

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76. Article 7(1)(g) of the Rome Statute protects against persecution of any “identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law.” Rome Statute, *supra* note 20, art. 7(1)(g).

77. *Id.* at art. 7(2)(g).

78. *See id.* at art. 6.

79. *See id.*

80. *See Int’l Criminal Court, Elements of Crimes*, art. 6(c) (2011).

81. *See ENV’T PROT. AGENCY, supra* note 58.

82. Generally, criminal liability for such genocidal acts would extend to anyone who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of these acts. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia Art. 7(1).

83. *See Rome Statute, supra* note 20, art. 6. Significantly, establishing intent under Article 6 does not require an inquest into the perpetrator’s motives. *See Prosecutor v. Kvočka Case No. 98-30/1-T, Appellate Judgement*, ¶ 106 (Nov. 2, 2001) (“The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”). Therefore, if a

the required genocidal intent need not be explicit and instead can be inferred from circumstantial evidence,<sup>84</sup> so long as the inference of intent is “the only reasonable inference available on the evidence.”<sup>85</sup>

Another potential source of criminal liability under the Rome Statute is incitement to genocide through environmental means.<sup>86</sup> Criminal liability for incitement to genocide can arise even if a genocide has not been committed.<sup>87</sup> Incitement instead requires only a public and direct appeal to commit an act listed in the Genocide Convention that is “more than a vague or indirect suggestion.”<sup>88</sup> The directness of the incitement is contextual and depends on the envisioned audience of the appeal.<sup>89</sup> This means that for incitement to be direct, “persons for whom the message was intended immediately grasped the implication thereof.”<sup>90</sup> The direct appeal must be made to the public through speeches, the press, or radio and television broadcasting.<sup>91</sup> Relevant to environmental criminal prosecution, incitement to genocide could include direct and public calls to deprive a protected group of the resources indispensable for survival or to systematically expel a protected group from their homes.<sup>92</sup>

### III. PROSECUTING INTERNATIONAL ENVIRONMENTAL CRIMES AGAINST THE INDIGENOUS PEOPLES OF THE BRAZILIAN AMAZON

The articles of the Rome Statute that criminalize crimes against humanity and genocide allow for the prosecution of environmental degradation,<sup>93</sup> and these provisions should be

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perpetrator has the intent to destroy a protected group, it is irrelevant whether this intent is financially motivated.

84. See Prosecutor v. Jelisić, Case No. ICTY 95-10, Judgment, ¶ 47 (Dec. 14, 1999).

85. Prosecutor v. Krstić, Case No. ICTY 98-33, Appellate Judgment, ¶ 41 (Apr. 19, 2004).

86. See Rome Statute, *supra* note 20, art. 25.3(e).

87. See Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 678 (Dec. 3, 2003).

88. *Id.* at §692.

89. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 556 (Sept. 2, 1998).

90. *Id.* at ¶ 558. See also Nahimana, Case No. ICTR 99-52-T, *supra* note 87, at ¶ 701 (stating that incitement must be unambiguous in the intended context).

91. See Prosecutor v. Nzabonimana, Case No. ICTR 98-44D-A, Appellant Judgment, ¶ 125.

92. See *Int'l Criminal Ct.*, Elements of Crimes, art. 6(c)(4) (2011).

93. See *supra* Part II, Section B.

implemented to prosecute international environmental crimes occurring in Brazil. Part III of this Article discusses the recent acts in Brazil that should qualify as international environmental crimes. Many of these crimes can, in some way, be attributed to President Bolsonaro based on his policies of inaction and nonenforcement of environmental protection laws<sup>94</sup> and his public hate speech about indigenous peoples,<sup>95</sup> which together led to the recent increase in Amazon Rainforest fires.<sup>96</sup>

#### A. Crimes Against Humanity Perpetrated Against Indigenous Peoples in Brazil

The indigenous peoples of the Amazon Rainforest have experienced forcible transfer, extermination, and persecution, all committed “as part of a widespread or systematic attack directed against [the indigenous] civilian population, with knowledge of the attack.”<sup>97</sup> Thus, these crimes against the indigenous peoples comport with the general elements of crimes against humanity and so should be investigated as per CADHu and the ARNS Commission’s request.<sup>98</sup>

First, the existence of a widespread or systematic attack on the civilian population<sup>99</sup> is easily established in this case. A widespread or systematic attack involves “multiple commission of acts referred to in [A]rticle 7, paragraph 1, of the [Rome] Statute”—including acts of forcible transfer, extermination, and persecution—“pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>100</sup> The commission of the crimes against the indigenous peoples of the Amazon Rainforest have been not only

94. “Fines for illegal logging in the Amazon in Brazil have been effectively suspended since October 2019 under a Bolsonaro administration decree.” *Brazil: Amazon Penalties Suspended Since October*, HUMAN RIGHTS WATCH (May 20, 2020), <https://www.hrw.org/news/2020/05/20/brazil-amazon-penalties-suspended-october> [https://perma.cc/ZLD8-KPXC]. Bolsonaro has also removed senior environmental officials “in apparent retaliation for a successful operation against large-scale illegal mining and deforestation in the Amazon.” *Id.*

95. See SURVIVAL INT’L, *supra* note 16.

96. See *Amazon Fires Increase by 84% in One Year*, BBC NEWS (Aug. 12, 2019), <https://www.bbc.com/news/world-latin-america-49415973> [https://perma.cc/7Q69-J3PV].

97. Rome Statute, *supra* note 20, art. 7(1).

98. See CADHu and ARNS Report, *supra* note 23.

99. A civilian population is one that is comprised mostly of people who are not members of the police or armed forces. See Geneva Conventions, Additional Protocol I, art. 50 (1997).

100. *Int’l Criminal Ct.*, Elements of Crimes, art. 7 (2011).

multiple but numerous.<sup>101</sup> Additionally, this attack is linked to an existing State policy to “actively promote or encourage such an attack,”<sup>102</sup> which may be inferred from the totality of the circumstances.<sup>103</sup> Bolsonaro’s “deliberate failure to take action, which is consciously aimed at encouraging such attack,”<sup>104</sup> his affirmative administrative actions, and his express opinions about the rights of indigenous peoples together establish this State policy.<sup>105</sup>

Bolsonaro’s deliberate failure to take action is evident from the administration’s refusal to prosecute violence against indigenous peoples.<sup>106</sup> This refusal to prosecute increases the likelihood that invaders will carry out their threats against indigenous peoples.<sup>107</sup> A

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101. See Sam Cowie, *Jair Bolsonaro Praised the Genocide of Indigenous People. Now He’s Emboldening Attackers of Brazil’s Amazonian Communities*, INTERCEPT (Feb. 16, 2019), <https://theintercept.com/2019/02/16/brazil-bolsonaro-indigenous-land/> [<https://perma.cc/M39B-MT8C>] (“armed bands of land grabbers, known as ‘grileiros,’ have been staging attacks on Indigenous communities—a pattern of violence that has surged in the wake of Bolsonaro’s election.”).

102. *Int’l Criminal Ct.*, Elements of Crimes, art. 7 (2011).

103. See Letter from the Secretary-General of the United Nations, *supra* note 69.

104. *Int’l Criminal Ct.*, Elements of Crimes, art. 7 (2011).

105. See also Phillips, *supra* note 41 (“Marcos Mayoruna, [a] Matsés leader, alleged that by deliberately failing to stop invaders entering the Javari reserve . . . Bolsonaro’s administration was trying to force them from lands that could be commercially developed.”); Teresa Tomassoni, “*We are in Great Danger*”: *In Amazon, Indigenous Chief is Killed by Illegal Miners*, NBC NEWS, (July 29, 2019), <https://www.nbcnews.com/news/latino/we-are-great-danger-amazon-indigenous-waiapi-chief-killed-illegal-n1035806> [<https://perma.cc/W8TN-LQCZ>] (stating that when indigenous peoples report ongoing violence and destruction to the National Indian Foundation or government officials such as state senators, it can take days to receive assistance, if the government sends any help at all).

106. See *Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil’s Amazon*, HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> [<https://perma.cc/T2FC-Z25L>]; see also Sam Cowie, *Brazilian ‘Forest Guardian’ Killed by Illegal Loggers in Ambush*, GUARDIAN (Nov. 2, 2019), <https://www.theguardian.com/world/2019/nov/02/brazilian-forest-guardian-killed-by-illegal-loggers-in-ambush> [<https://perma.cc/PX38-CT9K>] (“Of the 157 land conflict killings in Maranhão state . . . just five cases went to court.”).

107. Violent threats from would be land invaders are pervasive throughout indigenous communities. See Moncau & Lazzeri, *supra* note 12. These threats often reference President Bolsonaro’s policy of non-enforcement. See *id.* Indigenous leaders have received letters stating that “the time of Lula [the former leftist Workers’ Party president] is over and [rightist] Bolsonaro’s hour has come.” See Branford & Torres, *supra* note 12. Indigenous leader Adriano Karipuna stated that he received threats that invaders would make him and his brother disappear. See Moncau & Lazzeri, *supra* note 12. Rosivaldo Ferreira da Silva, also known as

2019 Human Rights Watch report found that nineteen of the twenty-eight investigated land-conflict related killings in the Brazilian Amazon were preceded by threats and that had Brazilian authorities investigated these threats many of the murders could have been prevented.<sup>108</sup>

Not only has Bolsonaro deliberately failed to take action to end the invasion of indigenous land, he has also gone to lengths to further his policy of promoting attacks against indigenous peoples by cutting funding for the government agencies responsible for indigenous welfare and environmental protection.<sup>109</sup> Some of Bolsonaro's first acts as President of Brazil were to end all further demarcation of indigenous territories and transfer responsibility for existing demarcations to the Brazilian Ministry of Agriculture, an agency intended to promote agricultural production—a mission in clear conflict with preservation of the fertile ancestral land of the indigenous peoples.<sup>110</sup> Bolsonaro continues to encourage attacks on indigenous peoples and their territory in 2020, recently supporting a bill that would decriminalize mining on protected indigenous lands and expressing intent to change current environmental protection laws to allow for large-scale commercial agriculture on indigenous territory.<sup>111</sup> Under these proposals, indigenous communities would have no right to veto environmentally destructive projects once authorized by the Bolsonaro administration.<sup>112</sup>

In addition to these explicitly anti-indigenous policies, Bolsonaro has plainly and publicly expressed his intentions to undermine indigenous rights.<sup>113</sup> Bolsonaro said that protections for

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Cacique (Chief) Babau, a leader of the Tupinambá indigenous group, received threats that a group of landowners, military personal, and civilian police intended to have him and his family killed. *See* Branford & Torres, *supra* note 12. He received information of a plan to “stop him and his family on a highway, plant drugs and arms in his car, then murder all passengers, including his two young nieces, claiming that Babau had returned fire.” *Id.*

108. *See* HUMAN RIGHTS WATCH, *supra* note 106.

109. *See* J.P. Linstroth, *Preventing Brazilian Indigenous Genocide and Protecting the Amazon*, COUNTER PUNCH (Jan. 7, 2019), <https://www.counterpunch.org/2019/01/07/preventing-brazilian-indigenous-genocide-and-protecting-the-amazon/> [https://perma.cc/Y398-YRKV].

110. *See id.* (“[T]he Ministry of Agriculture is traditionally known to protect the interests of big business, especially soy farmers and cattle ranchers. Both are powerful lobbying groups in Brazil and likewise partly responsible for destroying the Amazon and its people.”).

111. *See id.*

112. *See id.*

113. *See* SURVIVAL INT'L, *supra* note 16.

indigenous territory “stifle agri-business”<sup>114</sup> and indigenous territory demarcation is a crime of high treason.<sup>115</sup> In 2019, when introducing his plan to revoke the protected status of an indigenous territory, Bolsonaro stated that he would “give a rifle and a carry permit to every farmer,” suggesting that would be invaders had permission to use violence to remove indigenous peoples from the land.<sup>116</sup> Similarly, Bolsonaro stated that he was “going to rip up Raposa Serra do Sol” indigenous territory and “give all the ranchers guns.”<sup>117</sup>

Bolsonaro’s dangerous hate speech, combined with his anti-indigenous and anti-environmental administrative resolutions, indicate a clear State policy in support of the destruction of indigenous land and violence against indigenous peoples. Moreover, Bolsonaro’s supporters are aware of this policy and are actively attempting to further its purpose.<sup>118</sup> Thus, the crimes committed against the indigenous peoples of the Brazilian Amazon clearly conform to the requirements to be considered an attack on a civilian population under Article 7 of the Rome Statute.<sup>119</sup>

Second, the destruction of protected indigenous land in Brazil also meets the *mens rea* requirement for a crime against humanity, as the individual acts of violence against indigenous people are perpetrated with knowledge of a larger attack on indigenous peoples as a group. The individual perpetrator’s knowledge of the larger attack is apparent from the invaders’ entitled and emboldened actions.<sup>120</sup> Even the nature of the attacks on indigenous peoples has

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114. Antonio Maques & Leonardo Rocha, *Bolsonaro Says OAB Only Defends Bandits and Indigenous Reservation is a Crime*, CAMPO GRANDE NEWS (Apr. 22, 2015), <https://www.campograndenews.com.br/politica/bolsonaro-diz-que-oab-so-defende-bandido-e-reserva-indigena-e-um-crime> [https://perma.cc/JN55-LLLG].

115. See Marcelo Godoy, *No Warning Shot: First in the Forehead*, ESTADÃO (Apr. 2, 2017), <https://infograficos.estadao.com.br/politica/bolsonaro-um-fantasma-ronda-o-planalto/entrevista> [https://perma.cc/3WN2-UWED].

116. Cowie, *supra* note 101.

117. SURVIVAL INT’L, *supra* note 16; see also Alexandre Júnior, *Jair Bolsonaro manda um recado para Roraima*, YOUTUBE (Jan. 21, 2016), <https://www.youtube.com/watch?v=jUgDXVbPHZs> (displaying a video recording of the statement).

118. See Moncau & Lazzeri, *supra* note 12, (“[A]ttacks on indigenous communities have exploded since Bolsonaro took the lead in the election polls.”).

119. See Rome Statute, *supra* note 20, art. 7.

120. See Cowie, *supra* note 100 (“‘With Bolsonaro, the invaders are feeling more at ease,’ said Bitete Uru-Eu-Wau-Wau, who lives on an Indigenous reserve.”); Moncau and Lazzeri, *supra* note 12 (discussing how Bolsonaro’s anti-

changed under Bolsonaro.<sup>121</sup> Roberto Liebgott, CIMI's southern regional coordinator, stated that before Bolsonaro "the invaders would take the wood and leave. Now they take the wood and set the rest on fire."<sup>122</sup>

The numerous violent acts committed in response to Bolsonaro's stated and demonstrated anti-indigenous policies fulfill the requirements to be considered crimes against humanity.<sup>123</sup> More specifically, these acts constitute forcible transfer, extermination, and persecution.

### 1. The Forcible Transfer of Indigenous Peoples in Brazil

Land grabbing, deforestation, and the resulting Amazon Rainforest fires<sup>124</sup> are the coercive means by which indigenous peoples are being forcibly transferred from their homes,<sup>125</sup> and these forcible transfers meet all necessary elements of crimes against humanity.<sup>126</sup> To be considered a crime against humanity under the Rome Statute, the forcible transfer of a population from an area in which they are lawfully present must be achieved through coercive means without grounds permitted under international law.<sup>127</sup> In Brazil, indigenous peoples are expelled from their ancestral lands,

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indigenous rhetoric and the destruction of the National Indian Foundation have inflamed violence against the indigenous peoples of the Amazon).

121. Clarissa Beretz, *Bolsonaro Helping to Fuel Explosion of Violence Against Indigenous Peoples in Brazil*, COMMON DREAMS (Oct. 19, 2019), <https://www.commondreams.org/views/2019/10/19/bolsonaro-helping-fuel-explosion-violence-against-indigenous-peoples-brazil> [https://perma.cc/S5AG-XE43].

122. *See id.*

123. *See* Rome Statute, *supra* note 20, art. 7(1).

124. *See* BBC NEWS, *supra* note 96. A coalition of global NGOs released a statement about the rising number of fires in the Amazon, which states: "Bolsonaro certainly deserves the primary blame for the fires currently burning the Amazon, given his violent, regressive, and racist policies and his explicit encouragement to 'open the Amazon for business.'" Recinos, *supra* note 7.

125. *See* Aristos Georgiou, *Amazon Fires Threaten 'World's Most Endangered Tribe' As Campaigners Say Indigenous Fire Departments Are Being Stopped: 'These People Depend on the Forest'*, NEWSWEEK (Aug. 30, 2019), <https://www.newsweek.com/amazon-fires-world-most-endangered-tribe-indigenous-fire-brigades-1456959> [https://perma.cc/9EA9-XN5J] ("Most of these people are constantly fleeing.").

126. *See* Rome Statute, *supra* note 20, art. 7(1)(d).

127. *See id.* at art. 7(2)(d).

which have been legally demarcated as indigenous territory.<sup>128</sup> The coercive means used to transfer these indigenous populations range from direct expulsion through force,<sup>129</sup> to more the oblique methods of expulsion through destruction of vital resources.<sup>130</sup>

The destruction of natural environments indispensable to human survival is explicitly named as a coercive act under the definition of forcible transfer in Rome Statute.<sup>131</sup> For the indigenous peoples of Brazil, the Amazon is such an indispensable natural environment, providing indigenous communities with vital shelter, water, food, and medicine.<sup>132</sup> Chief Raoni Metuktire stated that “when you pour poisons on the land . . . chemicals from agriculture and mercury from gold mines . . . it starts to die. If the land dies . . . we too will all die.”<sup>133</sup> For these reasons, the deforestation of protected indigenous lands is a coercive act forcing the indigenous peoples from their homes.<sup>134</sup>

The violent expulsions of indigenous peoples and the destruction of their vital natural resources are largely carried out by illegal loggers, ranchers, and miners, but these individuals are not necessarily those “most responsible” for these crimes, and so they are not necessarily the people who should be prosecuted at the ICC.<sup>135</sup> The Office of the Prosecutor’s investigation into the forcible transfer of indigenous peoples should instead focus on the liability of corporate superior officers whom exercised effective authority and control over

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128. See Farah, *supra* note 32 (“[A]t least 10 separate fires have broken out in [Tenharim] territory . . . Chief Gilvan Tenharim told BuzzFeed News . . . ‘my great-grandfather picked nuts here . . . It is not just the fear of losing the Brazil nut, but this is the territory of my ancestors.’”).

129. A report from non-profit Brazilian media organization Repórter Brasil found that soon after Bolsonaro’s election, Fourteen different indigenous territories fell under attack. *See id.* Invaders armed with chainsaws, sickles, guns, and fire entered indigenous land to log, mine, and clear-cut the land for profit. *See Moncau & Lazzeri, supra* note 12.

130. *See id.*

131. *See* Draft Code of Offences Against the Peace and Security of Mankind, Fourth Report, Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986).

132. *See id.*

133. *See* Chief Metuktire, *supra* note 1.

134. *See* Draft Code of Offences Against the Peace and Security of Mankind, Fourth Report, Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986).

135. The Office of the Prosecutor of the ICC has a responsibility to investigate and prosecute “the individuals who are allegedly most responsible” for Rome Statute crimes. *See supra* note 22.

the subordinates that caused the environmental destruction.<sup>136</sup> To face prosecution, superior officers must have either known or “consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes,”<sup>137</sup> concerning “activities that were within the effective responsibility and control of the superior.”<sup>138</sup>

The land grabbing and destruction of indigenous territories is primarily for the purposes of resource extraction, farming, and ranching,<sup>139</sup> all acts that largely occur under the effective control of superior corporate officials. These officials could not account for how this new land was acquired without either actual knowledge of the crimes or consciously disregarded information clearly indicating that subordinates were committing these crimes. Furthermore, attacks on indigenous peoples perpetrated by extractive and agricultural industry workers are so numerous that it is unlikely that each act was carried out by individuals working alone without the support or at least the awareness of their corporate superiors.<sup>140</sup> In considering which companies to investigate, the Office of the Prosecutor should look to Amazon Watch’s 2019 list of companies most responsible for that year’s Amazon fires.<sup>141</sup> One notable company on Amazon Watch’s list is JBS-Beef,<sup>142</sup> a United States beef processor known to routinely source cattle from illegally deforested Amazon Rainforest.<sup>143</sup> Superior officers at JBS with knowledge of this deforestation should be held responsible for their crimes at the ICC.<sup>144</sup>

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136. Article 28(b) of the Rome Statute allows for corporate superiors to “be criminally responsible for crimes . . . committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.” Rome Statute, *supra* note 20, art. 28(b).

137. *See id.* at art. 28(b)(i).

138. *See id.* at art. 28(b)(ii).

139. *See* Linda Givetash, *The Amazon is Still on Fire. Conservation Groups Blame Illegal Logging and Criminal Networks*, NBC NEWS (Sept. 22, 2019), <https://www.nbcnews.com/news/world/amazon-still-fire-conservation-groups-blame-illegal-logging-criminal-networks-n1056236> [<https://perma.cc/6L6V-3YEK>].

140. *See* Cowie, *supra* note 10.

141. *See* Recinos, *supra* note 7.

142. *See id.*

143. *See* Kelly & Cahlan, *supra* note 7.

144. The ICC can exercise jurisdiction over US corporate officers in the matter using territorial jurisdiction over acts that occurred in Brazil. *See* Rome Statute, *supra* note 20, art. 12(2) (“the Court may exercise its jurisdiction if . . . the State on the territory of which the conduct in question occurred [is a State Party to the Rome Statute].”).

## 2. The Extermination of Indigenous Peoples in Brazil

In addition to forcing indigenous peoples from their homes, environmental destruction has created conditions of life calculated to bring about their destruction.<sup>145</sup> For this reason, the environmental degradation in the Brazilian Amazon should be prosecuted as extermination, the killing of one or more persons—including by “inflicting conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about [their] destruction.”<sup>146</sup> To be considered exterminations, this lethal conduct must constitute or take place as part of a mass killing of members of the civilian population.<sup>147</sup>

At increasingly alarming rates, illegal loggers and ranchers murder the indigenous people of the Amazon with weapons and by setting fires to the forest.<sup>148</sup> The indigenous people who survive these attacks still face conditions of life calculated to bring about their destruction.<sup>149</sup> In addition to destroying indigenous communities’ shelters and sources of food and water, violence and fire prevents many indigenous communities from moving freely throughout the Amazon.<sup>150</sup> Without freedom of movement, indigenous communities will likely lose access to clean water, sufficient food sources, and vital medical care.<sup>151</sup> The deprivation of these vital resources is evidently “calculated to bring about the destruction of part of the population.”<sup>152</sup> The evidence of this calculation is apparent from the perpetrator’s explicit and implicit motivations for the destruction.<sup>153</sup> These perpetrators are not only emboldened by President Bolsonaro’s violent hate speech, but also many have expressed an overt intent to

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145. See Dom Phillips, *Brazil: Fears for Isolated Amazon Tribes as Fires Erupt on Protected Reserves*, GUARDIAN (Aug. 29, 2019), <https://www.theguardian.com/environment/2019/aug/29/brazil-amazon-wildfires-indigenous-reserves-remote-areas> [<https://perma.cc/UC3L-D5A6>] (“These people depend on the forest and as fire kills the animals, they feel completely desperate with the situation.”).

146. See Rome Statute, *supra* note 20, art. 7(2)(b).

147. See *Int’l Criminal Ct.*, Elements of Crimes, art 7(1)(b), (2011).

148. See Londoño, *supra* note 9 (“The killings come as miners and loggers are making increasingly bold and defiant incursions into . . . indigenous territories . . . with the explicit encouragement of Brazil’s far-right president, Jair Bolsonaro.”).

149. See Chief Metuktire *supra* note 1.

150. See Aranda, *supra* note 46.

151. See SURVIVAL INT’L, *supra* note 2.

152. See Rome Statute, *supra* note 20, art. 7(2)(b).

153. See HUMAN RIGHTS WATCH, *supra* note 106.

remove indigenous peoples from the fertile and mineral rich lands of the Amazon.<sup>154</sup>

Corporate and governmental officials who knew or should have known about the criminal actions carried out by those under their effective control and yet failed to take action to put a stop to or report the crimes, are most responsible for this extermination.<sup>155</sup> President Bolsonaro himself is one such government official responsible for failing to protect indigenous communities from known attackers.<sup>156</sup> Bolsonaro's openly expressed and directly implemented anti-indigenous policies effectively establishes his apparent knowledge of his subordinates failure to protect.<sup>157</sup> President Bolsonaro's instructions to subordinates are so direct that they may even constitute ordering the extermination of the indigenous peoples.<sup>158</sup>

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154. Numerous indigenous leaders have received death threats from land grabbers and illegal loggers. *See* Moncau & Lazzeri, *supra* note 12; *see also* *Brazil: Risk of Bloodshed in the Amazon Unless Government Protects Indigenous Peoples from Illegal Land Seizures and Logging*, AMNESTY INTERNATIONAL (May 7, 2019), <https://www.amnesty.org/en/latest/news/2019/05/brazil-risk-of-bloodshed-in-the-amazon-unless-government-protects-indigenous-peoples-from-illegal-land-seizures-and-logging/> [<https://perma.cc/4J3Q-J678>] (describing death threats aimed at the Uru-Eu-Wau-Wau and Karipuna peoples). When members of the Uru-Eu-Wau-Wau tribe encountered forty intruders attempting to illegally clear-cut Uru-Eu-Wau-Wau territory, the intruders threatened to return and murder Uru-Eu-Wau-Wau children. *See id.* Illegal gold miners have carried out threats against the Waiapi people in the Northern Brazilian Amazon. *See* Tomassoni, *supra* note 105. These illegal goldminers entered Waiapi territory armed with automatic weapons and murdered Chief Emyra Waiapi. Chief Emyra Waiapi's body was found with several stab wounds, including to his genitals. Continuing their attack, the illegal miners entered Waiapi homes and threatened those inside, forcing them to flee. *See id.*

155. *See* Rome Statute, *supra* note 20, art. 28(b).

156. *See* HUMAN RIGHTS WATCH, *supra* note 106; *see also* *Int'l Criminal Ct., Elements of Crimes*, art. 7, (2011) (clarifying that a state policy to commit an attack can be implemented through a deliberate failure to act, which is consciously aimed at encouraging the attack).

157. *See* Linstroth, *supra* note 109; *see also* SURVIVAL INT'L, *supra* note 16 (relaying Bolsonaro's clear anti-indigenous rhetoric: "[a]ny [indigenous] reserve that I can reduce in size, I will do so.").

158. *See* Rome Statute, *supra* note 20, art. 25(3)(b); HUMAN RIGHTS WATCH, *supra* note 105 (stating that, according to environmental officials, "[Bolsonaro's] words and actions have effectively given a green light to the criminal networks involved in illegal logging.").

### 3. The Persecution of Indigenous Peoples in Brazil

Considering the anti-indigenous policies and rhetoric surrounding the incidents of violence and environmental destruction in the Amazon,<sup>159</sup> these crimes—which intentionally and severely deprive indigenous peoples of their fundamental rights—qualify as persecution under the Rome Statute.<sup>160</sup> Contrary to international law, the indigenous people of the Amazon are severely deprived of the fundamental rights laid out in the International Covenant on Civil and Political Rights (“ICCPR”).<sup>161</sup> Most notably, the indigenous people of the Amazon are being deprived of their fundamental and non-derogable ICCPR Article 6 right to life.<sup>162</sup> Article 6 of the ICCPR requires that no one be arbitrarily deprived of life and that the right to life is protected by law.<sup>163</sup>

The murder of the indigenous people of the Amazon is an arbitrary and unlawful deprivation of life, and the Brazilian government is not attempting to protect indigenous people’s right to life through the law.<sup>164</sup> Instead, the Brazilian government continually fails to intervene to curb the violence or to convict perpetrators of land conflict-related killings.<sup>165</sup> In keeping with the requirements for a fundamental rights deprivation to be considered persecution, the indigenous people are deprived of their rights due to their ethnic identities.<sup>166</sup>

The ethnically biased motive behind these human rights deprivations is evident from President Bolsonaro’s anti-indigenous

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159. See Cowie, *supra* note 10.

160. See Rome Statute, *supra* note 20, art. 7(1)(h). These rights deprivations conform with the Rome Statute requirement that they were committed in connection with other conduct referred to in Article 7, Paragraph 1. Specifically, this persecution occurred in connection with crimes of forcible transfer and extermination.

161. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; see also Cowie, *supra* note 10 (describing the risk of genocide to uncontacted tribes posed by “Bolsonaro’s campaign to strip back protections from the country’s indigenous peoples.”).

162. See ICCPR, *supra* note 161, art. 4(2).

163. See *id.* at art. 6.

164. See Cowie, *supra* note 10.

165. See *id.* (“Few land conflict-related killings in Brazil result in convictions, which advocates say has produced a culture of impunity.”).

166. See ICCPR, *supra* note 161, art. 4(2); see also Akayesu, Case No. ICTR 96-4-T, *supra* note 89, at ¶ 513 (“An ethnic group is generally defined as a group whose members share a common language or culture.”).

hate speech and vocal support of violence against indigenous peoples that accompany his policies of inaction in the face of the destruction of indigenous communities.<sup>167</sup> Similar to the extermination of the indigenous peoples of the Amazon, the persecution of the indigenous peoples gives rise to criminal liability for both corporate superior officers and government officials, including President Bolsonaro.

The Office of the Prosecutor should take up CADHu and the ARNS Commission's request to examine current crimes against humanity against the indigenous peoples of Brazil<sup>168</sup> and in doing so, should investigate all reasonable claims of persecution, extermination, and forcible transfer in this case.

## B. The Genocide of the Indigenous Peoples in Brazil

In conjunction with crimes against humanity, the indigenous peoples of Brazil have faced genocide by deliberate infliction of the conditions of life calculated to bring about physical destruction. As previously discussed, environmental degradation has inflicted on the indigenous peoples the conditions of life calculated to bring about their destruction.<sup>169</sup> These conditions include “deliberate deprivation for resources indispensable for survival” and “systematic expulsion from homes.”<sup>170</sup> Made evident by the increase in violence against indigenous peoples following President Bolsonaro's public condemnations of these communities,<sup>171</sup> perpetrators of destruction inflict deadly conditions on the indigenous peoples because of their ethnicities,<sup>172</sup> thereby fulfilling the elements of the crime of genocide under the Rome Statute.<sup>173</sup>

Intent to destroy the indigenous peoples is “the only reasonable inference available on the evidence,” as the perpetrators knew that inflicting these conditions of life was likely to bring about the destruction of the indigenous peoples.<sup>174</sup> Liability for these

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167. See Cowie, *supra* note 10; see also SURVIVAL INT'L, *supra* note 16 (giving examples of Bolsonaro's anti-indigenous hate speech, including his lamentations that the indigenous peoples have not been “exterminated”).

168. See CADHu and ARNS Report, *supra* note 23.

169. See *supra* Part III, Section A.2.

170. See *Int'l Criminal Ct.*, Elements of Crimes, art. 6(c) (2011).

171. See Cowie, *supra* note 10.

172. See *id.*

173. See *Int'l Criminal Ct.*, Elements of Crimes, art. 6(c) (2011).

174. Krstić, Case No. ICTY 98-33, *supra* note 85, at ¶ 41; Prosecutor v. Nizeyimana, Case No. ICTR 2000-55C-T, Judgment, ¶ 1496 (June 19, 2012) (finding that if a defendant is aware that his/her actions will lead to killing, the

genocidal acts should fall to any corporate<sup>175</sup> or government official who, with intent to destroy the group, in whole or in part, “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of these acts.<sup>176</sup>

President Bolsonaro may himself be liable for inciting others to commit these genocidal acts, as his anti-indigenous language goes so far as to indicate a desire to destroy the indigenous peoples and possibly an intent to incite others to carry out his wishes.<sup>177</sup> Bolsonaro has repeatedly made public<sup>178</sup> appeals to commit acts listed in the Genocide Convention.<sup>179</sup> The question for the Office of the Prosecutor of the ICC will be, were these public appeals direct and “more than a vague or indirect suggestion?”<sup>180</sup> President Bolsonaro has expressed remorse that the indigenous peoples have not yet been eliminated, stating that “[i]t’s a shame that the Brazilian cavalry hasn’t been as efficient as the Americans, who exterminated the Indians.”<sup>181</sup> To address what he sees as a past failing, Bolsonaro has repeatedly threatened to arm those whom would take indigenous territory by force.<sup>182</sup> Moreover, Bolsonaro aims to reduce the size of indigenous territory wherever possible, stating that indigenous people seek to “hold us back.”<sup>183</sup>

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only reasonable conclusion is that he/she possessed genocidal intent); Phillips, *supra* note 145 (declaring it common knowledge that many tribes in the Amazon rely on the forest for their survival and certainly local loggers and ranchers would be aware of this fact).

175. The Office of the Prosecutor of the ICC should once against look to Amazon Watch’s 2019 list of companies most responsible for the year’s Amazon fires. *See* Recinos, *supra* note 7.

176. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), implementing Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 803 (1993), U.N. GAOR, annex, art. 7 (1993) [hereinafter “ICTY Statute”].

177. *See* SURVIVAL INT’L, *supra* note 16.

178. Incitement to genocide must be expressed in “public speeches or in the press, through the radio, the cinema or other ways of reaching the public.” Kalimanzira, ICTR, Appellant Judgment §158.

179. *See* SURVIVAL INT’L, *supra* note 16.

180. Nahimana, Case No. ICTR 99-52-T, *supra* note 87, at ¶ 692.

181. *See* SURVIVAL INT’L, *supra* note 16.

182. *See id.*

183. *See id.*

These pronouncements could give rise to criminal liability for incitement to genocide, if based on the statements' context and envisioned audience, the persons for whom the messages were intended immediately grasped Bolsonaro's direct appeal to commit genocide.<sup>184</sup> As rates of violence against indigenous people have increased following Bolsonaro's public appeals, it seems that the intended audience fully and immediately grasped Bolsonaro's intended genocidal message.<sup>185</sup> In *Prosecutor v. Ildephonse Nizeyimana*, the Trial Court for the International Criminal Tribunal For Rwanda held that "[i]n light of [defendant's] awareness that the implementation of [his] instructions would lead to the killing of [a] family, the only reasonable conclusion is that he too possessed genocidal intent."<sup>186</sup> Bolsonaro's awareness of the violence perpetrated against indigenous peoples by the very farmers and ranchers he aimed to arm points to this same genocidal intent.<sup>187</sup> These acts of genocide and the associated crimes against humanity cannot go unpunished and should be thoroughly investigated by the Office of the Prosecutor at the ICC.

## CONCLUSION

In the warming global climate, at-risk communities are more vulnerable than ever to the life-threatening dangers of environmental degradation.<sup>188</sup> As such, it is imperative that the Office of the Prosecutor of the ICC follows through on the goals set forth in its 2016 policy paper on case selection and prioritization.<sup>189</sup> International crimes committed by or resulting in destruction of the environment must not go unprosecuted. The current language of the Rome Statute allows for certain environmental crimes to be prosecuted as war crimes, as crimes against humanity, and, when committed with

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184. Akayesu, Case No. ICTR 96-4-T, *supra* note 89, at ¶ 558. *See also* Nahimana, Case No. ICTR 99-52-T, *supra* note 86, at ¶ 701.

185. *See* Cowie, *supra* note 10.

186. Nizeyimana, Case No. ICTR 2000-55C-T, *supra* note 174, at ¶ 1496 (June 19, 2012).

187. *See id*; *see also* SURVIVAL INT'L *supra* note 16; Cowie, *supra* note 10 (noting that Bolsonaro, aware of the mounting tensions and violent struggle between land grabbers and indigenous peoples protecting their land, explicitly stated that farmers and ranchers should use guns to gain control over indigenous territory).

188. *See The Effects of Climate Change*, NASA, <https://climate.nasa.gov/effects/> [<https://perma.cc/6KZY-K8QX>].

189. *See* INT'L CRIMINAL CT., *supra* note 62.

intent to destroy a protected group, as genocide. The ICC should assert its power to bring about international justice for all of the most serious international environmental crimes of concern to the international community, including the violent and racist crimes perpetrated against the indigenous peoples of the Brazilian Amazon.

The Office of the Prosecutor of the ICC should take heed of CADHu and the ARNS Commission's 2019 request<sup>190</sup> and investigate those who perpetrate crimes against humanity through environmental means against the indigenous peoples of the Amazon. Specifically, the Office of the Prosecutor should investigate the forcible transfer of the indigenous peoples committed through environmental crimes that are the coercive means by which indigenous peoples are forced from their homes. The Prosecutor should also investigate the extermination of the indigenous peoples perpetrated through the infliction of environmental ills that create the conditions of life calculated to bring about their destruction. The final crime against humanity that the Prosecutor should investigate in this case is the crime of persecution, wherein environmental destruction is used to deprive the indigenous peoples of their right to life due to their membership in particular ethnic groups.

The international community working under the auspices of the ICC must also address the crimes of genocide committed against the indigenous peoples of Brazil. The indigenous peoples of the Brazilian Amazon face genocide perpetrated through environmental harms that deliberately inflict the conditions of life calculated to bring about the destruction of these peoples. The Office of the Prosecutor should investigate these genocidal acts and should also investigate President Bolsonaro for inciting the genocide. Only once those most responsible for these heinous crimes are brought to justice, may the indigenous peoples of the Brazilian Amazon, the guardians of the lungs of the earth, be free to live without fear and to continue to protect us all from the destruction of the planet.<sup>191</sup>

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190. See CADHu and ARNS Report, *supra* note 23.

191. See *Amazon Forest Guardians Fight to Prevent Catastrophic Tipping Point*, PBS NEWS HOUR (Sept. 13, 2018), <https://www.pbs.org/newshour/show/amazon-forest-guardians-fight-to-prevent-catastrophic-tipping-point> [<https://perma.cc/KX5L-YSA9>].