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Could Jair Bolsonaro be criminally liable under the ICC Rome Statute for the deforestation of the Brazilian Amazon rainforest?

A case study of the ICC's capacity for environmental harm

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"A society grows great when old men plant trees

in whose shade they know they shall never sit."

- Greek proverb

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INTRODUCTION

"Brazilian government taken to court for assault on environment (…)"[1]

This is one among many headlines referring to illegal actions by Jair Messias Bolsonaro and his ministers against the environment.
Even though not reporting on criminal charges,[2] the term "assault", should trigger the awareness of criminal jurists. Generally defined as "intentionally putting *another person* in reasonable apprehension of an imminent harmful or offensive contact"[3] assault should certainly amount to a criminal offence in any legal system. But is it limited to the protection of humans or could there be a crime like "assault *on the environment"*? If so, which actions, results or which harms must be considered? What is grave enough and what is not? Could its ripple effects even bring the international community into the arena? Which thresholds would need to be crossed to engage this very *ultima ratio?* In other words: does international criminal law ("ICL") have the capacity for environmental harms?

This last question, has engaged scholars for decades, but has often lacked the impetus to spill over into legal application. Yet, presumably sparked[4] by the growing body of scientific knowledge and concern about the environment and the harms human behaviour inflicts on it, the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC") eventually laid a foundation to bridge its practice with aforesaid debates. In its 2016 Policy Paper on Case Selection and Prioritisation it stated that: "(…) [T]he Office [of the prosecutor] will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, *the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."*[5]

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[1] Mongabay, Cowie, "Assault on Environment".

[2] *Other* "complaints" actually raise international criminal charges: ABJD, "Complaint Before The ICC"; Brazilian Human Rights Advocacy Collective ("CADHu") and the Dom Paulo Evaristo Arns Human Rights Commission ("ARNS"), "Informative Note to the Prosecutor"; UNISaúde, *reported by* UOL, Chade "Bolsonaro é denunciate em Haia for genocídio e crime contra humanidade".

[3] LLI, "Assault" (emphasis added).

[4] Another factor prompting the OTP could've been two Art. 15 communications: *First,* Legal Representatives of the Victims, "2014 Request to OTP: Situation in Ecuador", concerned with discharge of oil and toxic waste over a 20 years-period; *Second,* Global Diligence, "2014 Communication: Commission of Crimes against Humanity in Cambodia", concerned with large scale-land-grabbings in Cambodia. Both charges were dismissed. *Full analysis, see* Lambert, "Environmental destruction in Ecuador"; Oehm, "Land Grabbing in Cambodia as Crimes against Humanity".

[5] OTP, "2016 Policy Paper", para. 41 (emphasis added); *further*, paras. 7, 40.

Admittedly, this neither creates a new crime, nor does it constitute binding law. Most importantly, it is not mentioned *how* such crimes will be "considered". Nevertheless, the paper is documenting more than a shallow declaration of intent: it expressively lifts environmental harms to the means or results by or of which crimes under the Rome Statute of the International Criminal Court ("Rome Statute") can be committed. In shifting the awareness of the ICC and OTP practice towards environmentally harmful behaviours, it might well be able to provide the scholarly debate with the impetus prior absent and to open up space for a new interpretation of international crimes.[6]

This space is exactly where this thesis seeks fertile ground to put down its roots. Watered by the interpretation of legal practice and -theory and illuminated by insights of international environmental law, human rights ("HR") law and (green) criminology, the boundaries of interpretation will be explored, to ultimately sprout and grow into a sound argument for or against the capacity of the Rome Statute for environmental harms. In other words, it will be answered *how* the proposed prosecution and adjudication of environmental crimes might *actually* take place. In order to achieve such actuality, one particular case will be analysed: The actions and inactions of the sitting president of the Federative Republic of Brazil, Jair Messias Bolsonaro in relation to the deforestation of the Brazilian Amazon rainforest.

To make this case, this thesis unfolds in five chapters. First, the underlying methods will be presented (I). Second, the factual backdrop will be outlined, initially addressing the availability of the Rome Statute for deforestation, then distinguishing some involvements of Bolsonaro with them (II). Third, the formal requirements, immunity rules, and some political implications will be inquired in all due brevity (III). Afterwards and with clear emphasis, the thesis will culminate in the subsumption of Bolsonaro's behaviours under the ICC Rome Statute (IV). Finally, there will be concluding remarks (V).

In a time where the direct effects of a misbalanced environment become more and more perceptible, the urgent need to counteract becomes alarmingly obvious. Yet, there are individual and collective actors notoriously undermining this necessity.[7] But why would they? Often, the economic and political gains are large, the risk of sanctions low.[8] The most responsible are

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[6] Pointing towards the same direction, *e.g.,* Durney, "Crafting a Standard", 415; Prosperi and Terrosi, "Human Factor", 510, 16; Pereira, "After the ICC 2016 Policy Paper", 183; Patel, "Expanding Past Genocide", 197.

[7] *E.g.* Oxfam International, "Carbon emissions of richest 1 percent [is] more than double the emission of the poorest half of humanity".

[8] Limited risk of prosecution paired with the prospect of high reward counts to the key drivers for deforestation, *see* Solinge and Kuijpers, "Amazon Rainforest: green criminological perspective", 201, 9.

often slick enough to power their way around domestic environmental protection provisions (if there are any) and stay virtually untouched by international environmental law, as it only obliges states.[9]

Envisioning the severity of both, what is at stake and within the common responsibility of humankind,[10] it is the primary goal of this thesis to examine, if that era of impunity is on the cusp of change. To end impunity for grave crimes is not only a core maxim of the ICC,[11] but as Hannah Arendt captures in "The Life of the Mind", a civilian duty:

> *"As citizens, we must prevent wrongdoing because the world in which we all live, wrong-doer, wrong sufferer and spectator, is at stake."*[12]

Whether the ICC could take the lead in preventing environmental wrongdoings, and if Jair Messias Bolsonaro has burdened himself with such, will be the topic of this thesis.

I. METHODOLOGY

The background information has been gathered by a documentary analysis of academic writings and reports by governmental- and non-governmental organisations ("NGOs"). International and Brazilian newspapers of different political couleurs have been reviewed. Some insights and translation support came from one acquaintance of the author. All input has been double-checked on veracity and processed in the overall presentation to the best of the writer's knowledge and judgement.

Any legal analysis embodies an interplay of academic' and practitioners' writings and includes relevant case law from the ICC and other international tribunals.[13] As far as own argents are developed or enhanced by already existing ones, the methodological "canones" of

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[9] There's little doubt that Brazil violates principles of *international environmental law, see* Klafehn, "Burning Down the House", 973-80.

[10] Paris Agreement, Preamble, para. 11; the principle arguably applies not only to climate change but to environmental degradation in whole, *compare* Biermann, "Common Concern of Humankind", 426, 416-54.

[11] *Compare* Rome Statute, Preamble para. 4, 5.

[12] Arendt, *Life of Mind*, 117.

[13] The (hybrid) *ad hoc* Tribunals symbiotically nurture the interpretation of ICL together with the ICC, *compare* Wet, "Relationship between the ICC and ad hoc tribunals", 49-50.

Friedrich Carl von Savigny are used implicitly.[14] *Meaning and purpose-, terminology-*, *history- and systems' arguments* are merged with the general rules of interpretation of the Vienna Convention on the law of treaties, Art. 31.

Lastly, any provision that is not otherwise marked, is one from the ICC Rome Statute.

II. PRELIMINARY CONSIDERATIONS

To begin the inquiry into Bolsonaro's criminal accountability for deforestation, this chapter aims at building the factual foundation. To that aim, two questions are asked: First, which facets of deforestation are within the scope of the Rome Statute? Second, how is Bolsonaro involved?

1. Finding the "human factor" in deforestation

The 2016 Policy Paper presupposes that the Rome Statute by conception can include environmental harms as a means by or result of the commission of crimes under its jurisdiction.[15] Green criminology[16] understands environmental harms extensively as harm caused through legal and illegal activities, by individuals or collectives, towards humans (as individuals or groups), animals or the ecosystem as a holistic entity.[17]
Yet, this notion clearly cannot be simply transferred to criminal law due to its proliferation and vagueness.[18] Rather, ICL is limited to harms towards humans, as it adopts an inherent anthropocentric stance.[19] Therefore, what needs to be present in order for the Statute to be prin-

[14] Savigny, *Juristische Methodenlehre.*

[15] OTP, "2016 Policy Paper", para. 41.

[16] *Defined* as a "sub-disciplinary conceptual framework that relies on criminology knowledge to study transgressions committed against ecosystems, human beings and nonhuman beings in the interactions between humans and their natural surroundings", Goyes, *Southern Green Criminology*, 4.

[17] The understanding of the term differs within green criminology, *compare* Lynch and Stretesky, "Global warming, global crime", 62, 70; South, "Green Criminology", 9-10.

[18] *Compare* Art. 22 (2).

[19] Preamble, para. 2: "[…] children, women and men […]"; Durney, "Crafting a Standard", 416.

cipally open for environmental harms, is a link to the violation of legal goods aimed at the protection of individuals[20] - in other words: a "human factor".[21]

The Amazon rainforest, with a surface of close to six million square kilometres, represents more than half of the remaining tropical rainforests worldwide and has an enormous biodiversity.[22] Furthermore, it is inhabited by approximately 900.000 indigenous people[23] from about 300 tribes.[24]

According to reports by the National Institute for Space Research ("INPE") and its project for Monitoring Deforestation in the Legal Amazon by Satellite ("PRODES"), deforestation in the Brazilian Amazon Rainforest increased by about 30-34 percent between August 2018 and July 2019, exceeding the 10.000 km² mark for the first time since 2008.[25] This trend is further escalating in 2020, as of by June "deforestation increased by one month compared [to] the previous year" , according to Deter.[26]
Historically, deforestation has taken place predominantly in the Southern parts of the Brazilian Amazon regions and has given the area the infamous name "Arc of Deforestation".[27] However, improving infrastructure makes remote areas increasingly accessible.[28] Timber extraction, mining, land conversion for agriculture or cattle farming are its predominant drivers. Between 60 and 80 percent of all logging in the Brazilian Amazon is illegal.[29]

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[20] Distilling from the domestic debates about the functioning of criminal law the exact conditions for an international crime are the violation "of fundamental *Rechtsgüter* (translated: "legal goods") that are individualistic and collective at the same time" and the ability of ICL to prevent "actual harm to these *Rechtsgüter*", *see* Ambos, "Function of ICL", 319-24. As this basically reflects the conditions of any crime under the Rome Statute, this will be implicitly addressed under Chapter IV.

[21] *See,* Prosperi and Terrosi, *"*Human Factor", 510-13.

[22] Yale School of Environment, "Amazon Basin".

[23] International law lacks any cohesive definition of "indigenous people". For an approximation, Prosperi and Terrosi, "Human Factor", 522.

[24] *Compare* Rainforest Foundation US, "Brazil"; WWF, "Amazon"; Though the number is diverging, *compare* Specht, *Amazonas,* 12.

[25] PRODES, "Monitoramento do Desmatamento da Floresta Amazônica", table; Folha De S. Paulo, Watanabe, "10,000 Square Kilometres Deforested"; For charts on deforestation, *see further* PRODES, "Terra Brasilis"; interactive map on tree-loss; Global Forest Watch ,"Map".

[26] Deter is another INPE project which "measures forest clearing in real time", *see* Folha De S. Paulo, Watanabe "14th Month of Increased Deforestation".

[27] *Compare* May et al., "The context of REDD+ in Brazil", table 12.

[28] *E.g*. the planned paving of the BR 163: Mongabay, Wenzel, "Bolsonaro revives plan to carve road through untouched areas".

[29] Solinge, "Deforestation Crimes and Conflicts in the Amazon", 272; Solinge and Kuijpers, "Amazon Rainforest", 200.

Deforestation at such a scale is directly linked to a whole set of harms.[30] However, one is particularly promising for the condition of a human link: the harassment, threats, violence, and extrusion of and against indigenous people:

The 2018 report by Brazil's Indigenous Missionary Council ("CIMI") gave account to a systematic increase in violence against indigenous peoples.[31] In the following year, it recorded an "increase in cases in 16 of the 19 categories of violence".[32] Even though the number of murder cases decreased slightly from 135 to 113, especially the category "possessory invasions, illegal exploitation of resources and damages to property" increased from 109 to 256. The numbers in the categories "territorial conflicts", "death threats, "varies threats" and "intentional bodily injuries" doubled. "In tune with reality, this data explains an unprecedented tragedy in the country: indigenous lands are being ostensibly invaded and destroyed across the country."[33]

One prominent incident of this escalating violence concerns indigenous chieftain Paulo Paulino Guajajara, being killed in an ambush by loggers on his own land in 2019.[34]

The correlation between deforestation violence and displacement, is well documented and not at last results from the strong dependency of indigenous on the forest for food and shelter.[35] This is especially true for isolated tribes, such as the many living in the Ituna/Itatá reserve in Pará: a total of about 10% of the territory, traditionally inhabited by indigenous communities, has been invaded and destroyed, and 87% has faced at least attempted land-grabbings[36] in 2019 alone.[37]

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[30] Non-exclusively: Effects of the regional and global climate, species extinction, soil erosion, wildfires, incentivising corruption etc. *see* Solinge and Kuijpers, "Amazon Rainforest", 201-2; More on the severity especially for the global climate, *see* Lovejoy and Nobre, "Amazon tipping point".

[31] CIMI, " 2018, Violence against Indigenous", 11-5, 81-3.

[32] CIMI, "Executive Summary, 2019, Violence against Indigenous", 1.

[33] *Ibid.*

[34] Greenpeace, Marçal, "The Life and Death of the Guajajara".

[35] Inter-American Commission on Human Rights ("IACommHR") and Organisation of American States ("OAS") Report, "Indigenous Tribes Pan-Amazon Region", *e.g.* 71-3, paras. 121-6; 84-5, paras. 152-4; 88-9, paras. 165-6; 94-5, paras. 178-81; 145, paras. 311-3; 177-8, paras. 384-6; 181, paras. 393, 5; Internal Displacement Monitoring Centre ("IDMC"), "Brazil - Displacement 2019".

[36] The change of land without participation of the local communities that depend on it, is often referred to as *"land-grabbing"*. *In depth* on this phenomena, *see* Schutter, "The Green Rush", 504, 524-39.

[37] Mongabay, Ionova, "Indigenous communities 'robbed'"; Reuters, Mendes, "Uncontacted tribes at risk".

Obviously these interferences are infringing the affected people's rights to life, health, water, food, housing, and more.[38] All those rights are constituted in international[39] and regional treaties[40] and domestic constitutions, like the 1988 constitution of the Federative Republic of Brazil.[41]
This is even more for specific environmental HRs that enjoy growing acceptance in some regional or domestic instruments[42] and by (international) commissions and courts.[43] In the case of indigenous people, additional rights like that of culture, development and traditional and spiritual relationship to their territories are subverted.[44]

Accordingly, deforestation is directly connected to the violation of legal goods of indigenous people. As primary advocates for an intact ecosystem and inhabitants of the forest for generations,[45] their interests are diametrically opposed to those of businessmen, loggers, miners and ranchers, and the resulting violence should be of concern for international peace.[46] The necessary "human factor" is therefore present, particularly in the violence and extrusion against and of indigenous people. *Ergo,* the Rome Statute is principally open for behaviours that cause deforestation and with it such infringements.

Jair Bolsonaro Bolsonaro's role in this, will be addressed in the next section.

2. Involvements of Bolsonaro

Naturally, a list of Bolsonaro's actions or inactions cannot be exhaustive. Further, in an actual case, the conducts presented would need to be verified and introduced at a trial

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[38] *In more detail* IACommHR and OAS Report, "Indigenous Tribes Pan-Amazon Region", 115-51.

[39] *E.g.* UN General Assembly, Universal Declaration of Human Rights, Art. 3, 12, and Art. 17, 18, 25, 27; International Covenant on Economic, Social and Cultural Rights, Art. 1, 11, 12, 15; General Assembly resolution 64/292, "The human right to water and sanitation".

[40] American Convention on Human Rights, Art. 4, 7, 11, 12, 17, 21, 22, 26.

[41] Brazilian Constitution, Art. 4 (II) and (III), Art. 5 (X), (XXII), Art. 6, Art. 215 and Art. 231.

[42] *E.g.* African Charter of Human and Peoples, Art. 24; Basic Law for the Federal Republic of Germany, Art. 20a; although the content of at least the latter is debated, *see* e.g. Jung, "Artikel 20a GG", 3.

[43] *E.g.* African Commission on HR, "The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v. Nigeria", para. 52; Inter-American Court of Human Rights ("IACHR"), "Case of the Lhaka Honhat v. Argentina", establishing a "right to a healthy environment".

[44] UN Declaration on the Rights of Indigenous People ("UNDRIP"), Art. 8, 23, 25, 26.

[45] On a brief history of indigenous in the Amazon, *see* Solinge and Kuijpers, "Amazon Rainforest", 202-6.

[46] Preamble, para. 3.

compliant to the Rome Statute and the Rules of Procedure and Evidence, which is outside the author's opportunities.[47] However, for the subject-matter, the chosen presentation will suffice, as this thesis does not intent to make a "waterproof case", but to present cohesive arguments for the capacity of the Statute for environmental harms and by doing so, to "provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[48]

The following list is divided into four groups. Firstly, the rhetorics, secondly, the weakening of environmental protection, thirdly, the strengthening of the agribusiness industry and lastly, behaviours connected to the COVID-19 pandemic.

a. Rhetorics

When it comes to rhetorics, Bolsonaro has always deemed environmental protection measures as hampering economic growth. This is best summed up by his "The Amazon is ours, not yours" statement in the wake of some of the worst wildfires that have ever haunted the Brazilian rainforest in 2019.[49]

With regard to indigenous people, there is a whole collection of statements that may be valuable proof on Bolsonaro's mindset.[50] They vary from straight hate-speech: *"[t]he Indians do not speak our language, they do not have money, they do not have culture. They are native peoples. How did they manage to get 13% of the national territory"*[51]*;* to extermination fantasies: *"[i]t's a shame that the Brazilian cavalry hasn't been as efficient as the Americans, who exterminated the Indians"*[52]*;* to proposing "solutions": *"[y]ou can be sure that if I get there [elected President of Brazil], there will be no money for NGOs. If it's up to me, every citizen*

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[47] As a general rule the ICC follows a Parties-Based approach, *compare e.g.* Rome Statute, Art. 54, 61, 69 and Rules of Procedure and Evidence, Rule 68 and 140; In more detail, *see* Caianiello, "Law of Evidence at the ICC", e.g. 298-303.

[48] Art. 53 (1)(a).

[49] Independent, Casado and Londoo, "Amazon rainforest destruction increases rapidly".

[50] For a list of further statements, *see* Survival International, "What Brazil's President, has said about Indigenous Peoples".

[51] Campo Grande News*,* Marques and Rocha, "Bolsonaro diz que OAB só defende bandido"; S*imilar comments,* UOL Notícias, *"*Índio tá evoluindo, cada vez mais é ser humano igual a nós"; Gazeta Do, Conteúdo, "Bolsonaro: queremos que índio tenha mesmo direito que seu irmão fazendeiro tem".

[52] *According to* Survival International, "What Bolsonaro said", in *Correio Braziliense newspaper, April 12, 1998*.

will have a firearm in the house. There will not be a centimetre demarcated either as an indigenous reserve or as a quilombola [territory for descendants of African slave communities in Brazil]"[53]*; "In 2019 we're going to rip up Rapoesa Serra do Sol [Indigenous Territory in Roraima, northern Brazil]. We're going to give all the ranchers guns"*[54]*; "If I'm elected, I'll serve a blow to FUNAI; a blow to the neck. There's no other way. It's not useful anymore."*[55]

b. Weakening of environmental protection

A variety of policies aimed at weakening environmental protection come hand in hand with these verbal blows, from which three are particularly telling.

(1) On 1 January 2019, Bolsonaro attempted to transfer "responsibility for certifying indigenous territories as protected lands to the ministry of agriculture. The ministry has traditionally championed the interests of industries that want greater access to protected lands."[56] This transfer was blocked by Congress in May. Four weeks later, Bolsonaro repeated the attempt with yet another decree. This again was halted by a supreme Court Judge soon after.[57] The task of demarcating indigenous territory therefore still lies with the Fundação Nacional do Índio ("National Indigenous Affairs Agency" or "FUNAI").[58] However, Bolsonaro did manage to appoint Marcelo de Silva, a known advocate for the interests of the agri-business industry, as FUNAI president in July 2019.[59]

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[53] O Estadão de S. Paulo, Dolcan, "'Não podemos abrir as portas para todo mundo', diz Bolsonaro em palestra na Hebraica"; Guardian, Phillips, "Jair Bolsonaro launches assault on Amazon rainforest protections"; *Similar comments with regards to NGO's and activists*: Gazeta do Povo, "Reservas indígenas atrapalham desenvolvimento do país, diz Bolsonaro"; Gazeta do Povo, "Não doe dinheiro para ONGs. Di Caprio pagou o mico do ano"; Folha de S. Paulo, Andrade, "Bolsonaro Secretary Blames Indigenous People for Fires and Exempts Ruralists".

[54] Youtube, Júnior, "Jair Bolsonaro panda um recede para Roraima".

[55] *According to* Survival International, "What Bolsonaro said", in *Espírito Santo newspaper, Aug 1, 2018.*

[56] Temporary Decree 870/2019*; reported by* NYT, Londoño, "Bolsonaro, Undermines Indigenous Rights"; Mongabay Branford and Torres, "Bolsonaro hands over indigenous land demarcation to agriculture ministry".

[57] Al Jazeera, "Brazil: Supreme Court blocks plan to transfer power over indigenous lands to the agriculture ministry"; Reuters, "Brazil's Bolsonaro hands indigenous land decisions back to farm sector".

[58] FUNAI's main occupation is the safekeeping of indigenous' rights trough *inter alia* "mapping out and protecting lands traditionally inhabited and used by these [indigenous] communities" and "it is charged with preventing invasions of indigenous territories by outsiders", *see* Survival International, "FUNAI".

[59] Guardian, Philipps, "Bolsonaro pick for Funai agency horrifies indigenous leaders".

(2) Bolsonaro was very eager to demoralise and defund the ICMBio and IBAMA[60] agencies.[61] In 2019, his government blocked about 30% of the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis' (Brazilian Insitute of Environment and Renewable Natural Resources, "IBAMA") budget for firefighting. Environmental inspection programs have been cut by 15% and administrative budget by 23%. In general, only a fraction of the earlier budget was contributed to environmental protection organisations. (only R$1.1m compared to 35.6 in 2018).[62] Besides these formal interferences, reports of IBAMA and ICMBio staff mention an informal "top-down effort from Brazil's government to demoralise, disempower, and demotivate staff."[63]

(3) Lastly, Bolsonaro kept up with his pre-election promise to stop the demarcation of protected indigenous lands: "[O]f 1,298 indigenous lands in Brazil, 829 (63%) are pending from the government to finalise its demarcation process (…). Of these 829, a total of 536 lands (64%) have had zero action from the government."[64]

c. Strengthening of agribusiness

Other Bolsonaro policy measures concern the strengthening of the agribusiness *de iure* or *de facto* stance.

(1) On 5 November 2019, Bolsonaro revoked a 10-year-old decree that prohibited sugarcane cultivation in the Brazil Amazon rainforest, enabling even more "predatory economic expansion."[65]

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[60] The Instituto Chico Mendes de Conservação da Biodiversidade ("Chico Mendes Institute for Biodiversity Conservation", or "ICMBio"), named after the former rubber worker, then environmental activist Chico Mendes and IBAMA are semi-governmental organisations, operating under the Ministry of the Environment and are occupied with doing inspections, fire prevention and enforcing environmental protection laws, *see in more detail* Ministry of the Environment, "ICMBio"; - "IBAMA".

[61] One related push not mentioned here, is the paralysation of the Amazon fund with Decree 9759/2019, *see* Klafehn, "Burning Down the House", 980-2.

[62] O Estadão de S. Paulo, Girardi, "Gastos com ações de gestão ambiental do País despencam neste ano".

[63] For both formal and informal interferences*, see e.g,* Greenpeace International, "Amazon deforestation reaches highest level in more than a decade"; Folha de S. Paulo, Bonduki, "Bolsonaro Uses Quarantine to Destroy the Environment"; Folha de S. Paulo, Maisonnave and Almeida, "Deforestation Grows Again in Indigenous Area of Pará after Ibama Dismissals"; Greenpeace, Jordan and Clarke, "Bolsonaro blocked fire prevention".

[64] CIMI, "Executive Summary, 2019, Violence against Indigenous", 2.

[65] *See* Reuters, Teixeira, "Sugarcane cultivation in the Amazon"; *Compare,* Decree 10.084/2019; *see further* Mongabay, Hofmeister, "Brazil has removed restrictions on Amazon sugarcane production".

(2) On 11 December 2019, Bolsonaro issued temporary executive decree MP 910 allowing farmers seizing up to 2500 hectares within reserves to legalise their "possession". Under the infamous alias "land grabbing law" this "allows land speculators to register large swathes of public lands that they grabbed before December 2018, using the illegal deforestation they accomplished as proof of their "occupation. (…)."[66] The decree was heavily negotiated and at the last minute removed from Congress' agenda.[67] Yet in the meantime, it is likely having produced legal and factual effects.[68]

(3) Other ventures by Bolsonaro include the attempted openings[69] of indigenous territory for agricultural[70], ranching[71], and mining efforts[72].

d. COVID-19

While the world is facing extraordinary challenges due to the COVID-19 pandemic, reports of the Brazilian government turning a blind eye to deforestation are aggregating.[73] It is said that the government remained completely inactive, while global society looked elsewhere, enabling deforestation to jump 55% in the first four months of 2020 compared to last

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[66] *See* Mongabay, Branford and Borges, "Bolsonaro's Brazil: 2019 brings death by 1.000 cuts to Amazon"; *further,* Independent, Gregory, "Coronavirus: Amazon deforestation could trigger new pandemics".

[67] Congresso em Foco, Mota, "Com alterações, MP 910 deve ser votada na terça; veja o relatório na íntegra", Congresso em Foco, Lima, "MP da Grilagem (910) em PL de Cordeiro (2633)".

[68] Provided by the Brazilian Constitution, Art. 84 (XXVI) and Art. 62, a temporary decree has *immediate effect* but requires congressional approval within 120 days.

[69] Accompanied by harmful infrastructure projects such as dams, railway and highways, such as the reopening of Highway BR-319 "right through the heart of the Amazon Forest", *see* Ferrante et al., "Amazonian indigenous peoples are threatened by Brazil's Highway BR-319", 1-5; Mongabay, Fearnside et al., "BR-319 illegal side road threatens Amazon protected area".

[70] Gazeta Do Povo, Conteúdo, "Governo Bolsonaro organiza decreto para liberar produção agrícola em terras indígenas".

[71] Folha de S. Paulo, Conteúdo, "'We Have to Raise Cattle on Indigenous Land to Reduce Meat Prices,' says Bolsonaro"; Gazeta Do Povo, "Bolsonaro quer criar gado em terra indígena para derrubar preço da carne".

[72] Reuters, "Bolsonaro says Brazil rainforest reserve may be opened to mining".

[73] Mongabay, Butler, "Amazon deforestation increases for 13th straight month in Brazil"; Mongabay, Cowie, "Assault on environment"; Americas Quarterly, Unterstell, "Can Brazil's Armed Forces Protect the Amazon?"; Independent, Gregory, "Coronavirus: Amazon deforestation could trigger new pandemics".

year.[74] Furthermore, Bolsonaro vetoed a decision to provide drinking water, hospital beds, and hygiene to indigenous communities as an aid-measure during the pandemic.[75]

e. Interim summary

As shown by these actions, the President of the Federative Republic of Brazil has done little to prevent the environmental harm of deforestation from getting worse. On the contrary, he enacted policies to counter environmental protection and to strengthen the stance of business interests. He metaphorically disarmed the indigenous communities and equipped the loggers with those arms. During an unprecedented worldwide pandemic, he even denied indigenous people basic human survival conditions.

However grim this description, it is neither the purpose nor the competence of the ICC to point fingers or to "guardrail" democracy,[76] but to punish individual wrong-doings that constitute international crimes under its jurisdiction.[77] Whether the situation of indigenous people in the Brazilian rainforest and the selected behaviours of Bolsonaro fall under the ICC's jurisdiction and what other considerations might be worth to explore beforehand will be the topic of the next chapter.

III. FORMAL REQUIREMENTS AND POLITICAL IMPLICATIONS

This chapter will shed some light on the procedural and political hurdles, that have to be addressed *ex ante*. In two sections, it will first be evaluated whether the jurisdiction of the ICC is triggered by the events in question and second, a political perspective on the issue, will be added.

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[74] BBC, Costa, "Amazon under threat: Fires, loggers and now virus".

[75] Folha de S. Paulo, Rocha and Teixeira, "Supreme Court Justice Rules that the Government Must Fight Coronavirus among Indigenous People"; Gazeta do Povo, "Bolsonaro veta trechos de lei com medidas para proteger indígenas na pandemia".

[76] *Referring* to the guardrails of a functioning democracy ("mutual toleration" and " institutional forbearance"), as described by Levitsky and Ziblatt, *How Democracies Die,* 125-144; In a side-note*,* Bolsonaro would likely fail the litmus test for authoritarian behaviours from the same book, *ibid* 79, when applying some of his characteristics: *compare* Brian Winter, "Messiah Complex", 119-131.

[77] C*ompare* Preamble, paras. 4-6, Art. 1, 5.

1. Jurisdiction of the ICC

The first issue is whether the ICC has jurisdiction and competence over the presumptive crimes and if an investigation could be initiated.
This would be the case **if Brazil had accepted the jurisdiction of the Court, if the conditions for the exercise of jurisdiction, the territorial and personal competences, and the initiative requirements were present.**

(a) The Federative Republic of Brazil has signed and ratified the Rome Statute and transformed it into domestic law *via* the National Congress' approval of Decree 4.388/2002. Moreover, in Art. 5 (4) of the Brazil Constitution it explicitly "accepts the jurisdiction of an International Criminal Court to whose creation it has expressed its adhesion." This opens up the ICC's competence pursuant to Art. 12 (1)(2) for both the territory of the Brazilian Amazon rainforest and the persona Jair Bolsonaro. Notably, according to Art. 27, the immunity of Bolsonaro - as a sitting President - is waived with regard to the jurisdiction of the ICC. Any domestic immunity rule cannot obstruct ICC proceedings.[78]

(b) The requirements for an exercise of the jurisdiction are provided by Art. 12 *et seq*. Diverging slightly depending on the specific trigger-mode,[79] this essentially requires the presence of a core crime under Art. 5.[80] The four crimes under the ICC's jurisdiction are Genocide, Crimes against Humanity, War Crimes, and the Crime of Aggression.[81] It is beyond question that the described situation does not amount to War Crimes[82] and Aggression. The other two alternatives however, seem principally possible, even more so after the 2016 Policy Paper. Therefore, the jurisdiction of the Court could be given if at least one of these crimes was committed with a certain degree of likelihood.

(c) The conditions for an initiation of an investigation are logically interdependent to such likelihood. According to Art. 53 (1), the Prosecutor shall initiate an investigation, if there

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[78] *Further* Cassese and Gaeta, *ICL*, 246-7.

[79] The three trigger mechanisms are: State-referral (Art. 13 (a) and 14); Security Council acting under United Nations Charter, Chapter VII (Art. 13 (b)); Prosecutor *propio motu* (Art. 15).

[80] *Ratione materiae.*

[81] Art. 5-8 bis.

[82] Art. 8, requires an armed conflict, which is is obviously not present. Noteworthily Art. 8 (2)(b)(iv) is the only provision of the Statute mentioning the *environment* explicitly. It arguably originates in the usage of Agent Orange during the Vietnam war that caught global attention not at least through the infamous picture "Napalm Girl" on the title page of the New York Times, Jun 9, 1972. For more historical nuance on the effects of the Vietnam war on ICL, *see* Pereira, "After the ICC 2016 Policy Paper", 184-90.

is "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; […] The case is or would be admissible under Art. 17; and […] taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would […] serve the interest of justice."
A case is inadmissible - *ne bis in idem* - if it's being or has been investigated or prosecuted by a state, unless it is "unwilling or unable genuinely to carry out the investigation or prosecution" or the decision made results from such "unwillingness or inability".[83]
In fact, there could be several pending "cases" at the moment. However, all of them are different in scope or content. First, the domestic case from the introduction only concerns the legitimacy of official acts that are not even executed by President Bolsonaro but by his minister and the IBAMA president. Criminal liability is in no perceivable way the topic of this case.[84] Second, the Art. 15 communications brought to the ICC by ABJD, CADHu and ARNS or UNISaúde either concern conducts only with regard to COVID-19, or have not yet prompted the OTP to formally open up a "case".[85] Therefore, these charges either vary from those promoted in this thesis or do not establish a "case" within the meaning of Art. 17. Therefore, none of the current proceedings makes the one presented here inadmissible.

(d) Nevertheless, admissibility further requires that all available domestic remedies have to be exhausted before calling on the ICC.
The Brazilian president enjoys broad immunity.[86] Only two-thirds of the Chamber of Deputies could counteract that privilege and accept criminal- or malversation charges.[87] Following the procedure for the former, the charges would then be submitted to the Supreme Court, in which case the Prosecutor General of the Republic has the last say about lifting the presidents' "immunities in relation to any process which could trigger his criminal liability."[88] Consequently, before calling on the ICC, a request to the Prosecutor General would have to be made in order to exhaust all domestic remedies. If he rejects or does not react at all, the ICC would be able to step in as the complementary source of justice.[89] However, a reaction of the Prosecutor is

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[83] Art. 17 (1)(a) and (b).

[84] *Compare* Mongabay, Cowie, "Assault on Environment".

[85] *Compare* the procedure set forth by Art. 15 to the exemplary communications: ABJD, "Complaint Before The ICC"; CADHu and ARNS, "Informative Note to the Prosecutor"; UNISaúde, *reported by* UOL, Chade "Bolsonaro é denunciate em Haia for genocídio e crime contra humanidade".

[86] Brazilian Constitution, Art. 86, paras. 3 and 4.

[87] Brazilian Constitution, Art. 86, para. 1 with Art. 85.

[88] Law 8.038/1990, Art. 1 together with Internal Rules of the Federal Supreme Court, Art. 230b.

[89] Preamble, para. 10, Art. 1.

unlikely,[90] and the argument is possible that the "Brazilian Justice system is not in a position to conduct an effective investigation […]."[91] Thus, for the subject-matter, it will be assumed that the *ne bis in idem* and complementary principle do not greatly oppose the admissibility under Art. 17 for the proposed endeavour.

(e) Considering that the 2016 Policy Paper, if anything, opens up the gravity test for environmental harms,[92] the presented situation in the Brazilian Amazon and the alleged crimes happening there obviously are of sufficient gravity. The ICC adjudication would serve the interest of the victims and the interest of justice. Both the effects and the presented behaviours have been backed by numerous reports and can therefore reasonably be believed to have occurred.

Hence, the initiative requirements are given and the ICC has jurisdiction and competence; the formal requirements can be established.

2. Political implications

The concept of state sovereignty in its facet of immunity for state leaders might be renounced under the ICC rules. Nevertheless, a prosecution against a sitting president has severe political implications. Investigating, prosecuting, and adjudicating Bolsonaro might spur national and international (and transnational)[93] conflicts.

First, considering the still broad support for Bolsonaro in particular regions of Brazil,[94] civil unrest might arise in opposition to an eventual accusation. With the remaining power of the

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[90] Prosecutor General Augusto Aras was appointed by Bolsonaro and remained inactive, *according to* ABJD, "Complaint Before The ICC", 16; It is unlikely that he will act different in face of the proposed charges here, *compare* UOL, Andrade and Rezende, "Aras é aprovado com folga pelo Senado e assume a chefia da PGR".

[91] CADHu and ARNS, "Informative Note to the Prosecutor", 53.

[92] Pereira, "After the ICC 2016 Policy Paper", 182; Prosperi and Terrosi, "Human Factor", 510-2.

[93] Transnational cooperation is already eroding, e.g. visible in the Mercosur Agreement: After 20 years of negotiations a recently leaked document has caused another outcry about its lack of environmental protection, *see* Greenpeace European Unit, "EU-Mercosur: leaked treaty has no climate protection, undermines democracy"; Notably such an agreement would likely violate the renewed CO2 reduction ambition of 60% compared to 1990 until 2030 lately suggested by the European Parliament, *see* European Parliament, "EU climate law: MEPs want to increase 2030 emissions reduction target to 60%".

[94] *Compare* Winter, "Messiah Complex", 120.

military as a political actor,[95] this could well be the proverbial straw that breaks the camel's back and cause even deeper partisanship and more violence in Brazil and the rainforest. In this situation a successful *surrendering request* becomes improbable and could depict the ICC as toothless.[96] Such developments could ultimately prompt the Security Council to "block" the investigation according to Art. 16 if the situation amounts to a threat of international peace and security.[97] Even though not impossible, it is unlikely that Bolsonaro will accept the procedure and simply "lay down arms" as it recently happened in the Kosovo.[98]
Second, a case could further estrange the international community. The international acceptance especially from the "Global South" is already crumbling and fairly justified accusations of the ICC being a tool of "western universalism" or even "imperialism" become louder.[99] Unleashed by yet another case against a "Southern-Leader", Brazil and other State parties could consider withdrawing from the Rome Statute.[100]

Looking at its preamble, the Rome Statute reaffirms "territorial integrity or political independence" and the "guarantee of lasting respect for […] international justice"[101], it becomes clear that this presupposes some degree of political considerations. This is obviously problematic for a judicial institution, but as a reality it is what we have to deal with: a decision of the OTP or the ICC will have to consider politics to a degree.[102]

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[95] Winter, "Messiah Complex", 124-5.

[96] Art. 63 (1) requires the presence of the accused for trial; Art. 89, 91 and 98 consequently lay down rules for surrendering the accused to the court.

[97] Charter of the United Nations, Art. 39, 41; to the likelihood of such a procedure, s*ee* Security Council Report, "In Hindsight: The Security Council and the International Criminal Court"; Schuerch, Res, "The Security Council Deferral Power Under Article 16 Rome Statute", 222-6.

[98] NYT, Kwai, "Kosovo President Resigns to Fight War Crimes Case in the Netherlands".

[99] In fact 100% of its so far 28 cases address individuals from the Global South, *see* ICC database, "Cases"; This "injustice" has led the Philippines and three African states to withdrawal from the Rome Statute in 2018 and 2016 (Burundi, South Africa and Gambia, the latter both revoking their decision in the aftermath); *Further on the critique, see* Ssenyonjo, "State Withdrawals from the Rome Statute of the International Criminal Court"; Xavier and Reynolds, "The Dark Corners of the World" 962, 64, 70-77; Kiyani, "Afghanistan & the Surrender of International Criminal Justice"; *More generally* Schwobel-Patel, "The Re-branding of the International Criminal Court (and Why African States Are Not Falling For it)".

[100] Art. 127; Given the embodiment of the ICC in the Brazilian Constitution, an effective annulment would need a qualified majority of three-fifths in two voting rounds in the National Congress and the House of Representatives, which is unlikely but not impossible in a heated scenario like this, *compare* Brazilian Constitution, Art. 59 (I), 60.

[101] Preamble paras. 7 and 11.

[102] In more depth on the politicalisation of the ICC, *see* Tiemessen, "The International Criminal Court and the politics of prosecutions", 458-9.

If making such considerations and the risks are being weighed up, this thesis suggests to take the following thoughts into account:
It is long after the obsolete Lombrosian notion of the "born criminal"[103] that criminal law has opened up for the idea of crimes in leadership positions, not at last through the work of Edwin Sutherlands' "White-Collar Criminality".[104] An enormous shift towards what makes a criminal has happened in criminology and legal practice. A similar transition is arguably happening again to include "Green-Collar Criminality".[105]
Green Criminology has endorsed many studies of harms, victims, and perpetrators, and has developed a rich conversation from which criminal law could draw its insights. One of these insights is that *state actors* "*from industrialised countries* have played a major role in producing and exacerbating environmental and pollution problems."[106] Given that it's mostly industrialised countries that are responsible for environmental degradation,[107] prosecuting environmental crimes might actually be able to alleviate the acceptance problem ICL is facing. By setting a bold and carefully argued precedent, the ICC could not only widen its remits for environmental harms, but also pronounce a powerful warning towards high-level perpetrators from such "industrialised countries". Paradoxically by adjudicating another leader "from the South", as a "prototype perpetrator" of environmental harms, the ICC could widen the capacity of ICL for crimes that are naturally more within the *modus operandi* of the "developed world".[108]

In summary, the formal requirements for a case before the ICC are predominantly given. After giving careful thoughts to the implications of a proceeding, the OTP could therefore start its investigations.

The remaining issue, on whether they will find the situation to amount to crimes under the ICC's jurisdiction in fact, will be analysed in the following chapter.

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[103] Godwin, "Lombroso: Criminal Man: That the criminal is born, not made", 3-17.

[104] Rothe and Friedrichs, "The State of Criminology of Crimes of the State"; *originally* Sutherland, "White Collar Criminality", 1-12.

[105] Wolf, "Green-Collar Crime", 500-2.

[106] Wolf, "Green-Collar Crime", 507.

[107] Ahuti, "Industrial Growth and Environmental Degradation", 6.

[108] The terminology of "developed" and "developing" countries is problematic, *compare* Goyes, *Southern Green Criminology,* 42.

IV. SUBSUMPTION UNDER THE CORE CRIMES OF THE ROME STATUTE

The paramount question is whether Bolsonaro's actions or inactions with regard to the deforestation in the Brazilian amazon rainforest could amount to Genocide or Crimes against Humanity under the Rome Statute.

1. Genocide

Bolsonaro might first be held responsible for Genocide.
Frequently accused by media for his "genocidal policies"[109], this presumption might seem tangible. However, the legal notion of genocide, as the technically strongest and most stigmatised Crime against Humanity, demands a strict interpretation.[110] This gravity is embedded in a specific requirement of intent: the **"intent to destroy in whole or in part a national, ethnical, racial or religious group".**[111] It is this excessive *mens rea* condition that casts considerable doubt on the liability of Bolsonaro.[112] With regard to indigenous people in the Brazil Amazon rainforest, there is very little evidence backing the claim that Bolsonaro either intended to destroy them, or even only vaguely knew about other people's intent to do so and willingly took that risk. The only indicator in favour of that hypothesis is his statement: "*It's a shame that the Brazilian cavalry hasn't been as efficient as the Americans, who exterminated the Indians."* However, that comment was made in 1998, so not only is it likely insufficient proof, but arguably it is out to the ICC's *ratione temporis.*[113]
Therefore, there is serious reason to doubt the *dolus specialis.*

Resourceful prosecutors could now attempt to interpret the provision of Genocide as being inclusive for other "racial groups". The term of race is linguistically not limited to *races of human* but could also include the various *races of animals and trees* and therefore open the interpretation of Genocide for all kinds of environmental destructions that are intended to de-

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[109] *E.g.* Folha de S. Paulo, Mendes, "The shadow of genocide haunts Bolsonaro"; The Wire, Saxena and Costa "Bolsonaro's Colossal Negligence Sparks 'Genocide' Debate in Brazil".

[110] *Compare* Cassese and Gaeta, *ICL*, 127-8; *Contradicting,* Schabas, "Art. 6 Commentary", 143.

[111] *See* Art. 6 *chapeau;* the group focus of Genocide has been advocated by its "inventor" Raphael Lemkin, *Axis Rule in Occupied Europe*, e.g. 79; The contrast to the emphasis on individuals by his "adversary" Hersch Lauterpacht is being vividly depicted in Sands, *East West Street,* 385.

[112] To the requirement, *see* Cassese and Gaeta, *ICL*, 44-5, 125-6.

[113] Art. 22 (1).

stroy a specific natural entity. Yet, such interpretation is a violation of the Principle of Legality as it would over-stretch the understanding of Genocide and the general anthropocentric orientation of ICL.[114] Genocide is limited to the intended destruction of a *human genus*, and by conception does not include "Amborcide", "Ecocide" or similar notions. Nevertheless, there is a lively academic debate postulating an international crime of Ecocide that is worth to keep an eye on for the future.[115] For now, the Rome Statute as it is, clearly does not emphasise legal rights of the environment but of humans.

Bolsonaro *in dubio pro reo* has not committed any acts of Genocide and has not participated likewise; even not *via* the special provision of incitement to genocide.[116]

2. Crimes against humanity

Bolsonaro could be criminally accountable for Crimes against Humanity under Art. 7 by employing his rhetorics and policies aimed at the weakening of environmental protection and strengthening of the agribusiness industry as part of a certain policy against indigenous people.

a. Chapeau[117]

In order for Art. 7 to be fulfilled, first, the *chapeau* requirements of Crimes Against Humanity have to be established, meaning that at least one of the alleged criminal acts needs to be committed **"as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."**[118]

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[114] Art. 22 (2).

[115] S*ee* Pereira, "After the ICC 2016 Policy Paper", 190-206; Greene, "The Campaign to Make Ecocide an International Crime"; Mégret, "The Problem of an International Criminal Law of the Environment"; Cho, "Emergence of an International Environmental Criminal Law?".

[116] As incitement to genocide would also require the special *mens rea*, *see* Werle, "Individual Criminal Responsibility", 972.

[117] The *chapeau* or context requirement is an interesting additional facet of ICL compared to domestic criminal law, as "ICL requires the attribution to a person (by way of a relationship between the agent and the criminal result along with an added *collective* element - the attribution to a (criminal) organization which is often, but not always the state". Compared to the national focus on individual crimes (*Einzeltaten)* there is an "additional *international or contextual element (Gesamttat)*, *see* Ambos, "Remarks on the General Part of International Criminal Law", 663.

[118] Cassese and Gaeta, *ICL*, 92-3.

aa. Objective Elements

Objectively this requires "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack".[119] This definition entails the elements "**multiple commission of acts**", "**against the civilian population**" that are "**widespread and systematic by nature**", the existence of a "**state or organisational policy to commit such an attack**" and a sufficient "**link**" between the systemic element and the concrete conduct.[120]

(1) There is evidence of increasing numbers in murder, general mortality and displacement of indigenous people in the Brazil Amazon rainforest.[121] This suffices the provision as there are multiple incidents of the commission of murders, forcible transfers and arguably other crimes such as persecution and other inhumane acts.

(2) All these acts are committed primarily against indigenous people or against people who campaign for indigenous people's rights or environmental protection and are therefore acts against the civilian population.[122]

(3) The attack occurring against indigenous communities is widespread in frequency, number of victims and territorial scale.[123] Further, it is systematic as it follows a pattern in a sense of a "non-accidental repetition of similar criminal conduct on a regular basis".[124] Even without a common plan to commit particular crimes, among multiple perpetrators, this establishes a "pattern of crimes"[125] arising from the deliberate land grabs for the sake of profit. It involves threats, harassment, displacement murder and more, directed against those who resist.[126] *Ergo* the attack is widespread and systematic.

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[119] Art. 7 (2)(a).

[120] *Compare* Schabas, "Art. 7 Commentary", 153.

[121] S*ee* Chapter II (1).

[122] Schabas, "Art. 7 Commentary", 155-6.

[123] CIMI, "Executive Summary, 2019, Violence against Indigenous", 1-2; IACommHR and OAS Report, "Indigenous Tribes Pan-Amazon Region", e.g. 87-8, paras. 165-6 and 94-5, paras. 180-1.

[124] Prosecutor v. Katanga and Chui, Decision, ICC Pre-Trial Chamber I, paras. 394-8.

[125] Schabas, "Art. 7 Commentary", 165.

[126] CIMI, "2018, Violence against Indigenous", e.g. 34-5, 53-7, 73-99, 132.

(4) Further, there would need to be a state or organisational policy to commit such an attack. Compliant to the Elements of Crimes ("EoC") "[t]he acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promotes or encourages such an attack against a civilian population."[127] In fact, there is likely no expressive policy by the Bolsonaro government[128] promoting or encouraging criminal offences against indigenous people.

Nevertheless, in an overall view on the individual circumstances of the facts from above, there is a distinct "general sound" manifesting by the policies and rhetorics of the Bolsonaro government, that is able to ignite the already rumbling tensions and prejudices between the involved actors and arguably incentivises violence towards indigenous people.[129]

The issue is, whether this "general sound" can suffice as an active promotion or encouragement.

The EoC provides that "[a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."[130]

This clearly has state omission in mind. However, the present circumstances weigh even heavier than inaction. Not only is Bolsonaro inactive in organising the protection of indigenous communities, but with statements like *"[i]n 2019 we're going to rip up Rapoesa Serra do Sol [Indigenous Territory in Roraima, northern Brazil]. We're going to give all the ranchers guns",* he is arguably promoting further attacks on indigenous people. Accelerated by his policies, for instance legalising past land grabs or the stripping of IBAMA and FUNAI, which aim at systematically economising the rainforest at the cost of the environment and the in-

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[127] EoC, Art. 7 Introduction, para. 3.

[128] The fact that some policies are implemented by the government and not Bolsonaro alone is irrelevant for the contextual element. The Brazilian presidential constitutional system allows an easy attribution of ministerial behaviours. Art. 84 and 87 (I) provide a dependency relationship, in which the president can appoint and dismiss minsters and has to countersign their acts and decrees. By means of an *argumentum e contrario* Bolsonaro can consequently be held responsible for the acts and decrees of his ministers.

[129] *See* CIMI, "Executive Summary, 2019, Violence against Indigenous", 1: "In some instances […] the invaders even *mentioned the name of President Jair Bolsonaro*, showing that their criminal actions are encouraged by those who should fulfil their constitutional obligation to protect indigenous territories, which are the country's heritage" (emphasis added).

[130] EoC, Art. 7 Introduction, para. 3, fn. 6.

digenous communities living there, Bolsonaro is actively establishing a "climate of impunity".[131]

Bolsonaro has occasionally acted conversely for his benefit. By a decree in July 2020, he put a 120-days moratorium on torching the rainforest, deployed the military to enforce the ban[132], and advocated a renewal of efforts of multilateral actions between countries located at the Amazon area. Yet, he missed the 2019 meeting and did not show up in person in 2020,[133] so his interest really seems to be fairly shallow. Further, the moratorium is insufficient not only because of the now incapacitated environmental agencies but also by conception: the moratorium has harmful exceptions *inter alia* for "controlled burnings" in certain areas "when essential for carrying out agricultural practice, as long as previously authorised by state environmental agency".[134] Similarly, the sending of the military is widely criticised as a "media stunt".[135]

Contrary to this, there is Bolsonaro's slogan *"[t]he Amazon is ours, not yours"*. Under the present circumstances, this must be interpreted as an incitement of economic profiteers to take what they perceive as "theirs" from indigenous. Bolsonaro is amplifying the interests of business people by means of rhetorics, measures or simply turning a blind eye, and simultaneously dismantles the protection of indigenous communities. This must give the former a sense of approval to intensify their attempts to grab land. This view is confirmed by all the data demonstrating an upward trend in violence and deforestation since Bolsonaro's inauguration on 1 January, 2019.[136]

Through the accumulation of behaviours,[137] Bolsonaro is adopting a "general sound" that can with good reason be viewed as a state policy by means of acting and failing to act at the same

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[131] *Compare* Robinson, "Environmental Crimes Against Humanity": "The fact that the *aim* or *motive* of an operation was profit does not preclude it from being a crime against humanity, if one chooses to inflict mass harms on humans in pursuit of one's aims".

[132] Folha de S. Paulo, Carvalho, "Brazilian Government Bans Fires".

[133] Folha de S. Paulo, Coletta, "Brazil Wants to Reactivate Organization to Regain International Prominence in the Amazon"; Gazeta Do Povo, "Bolsonaro deve falter a encontro de passes com florets Amazônica".

[134] Gazeta Do Povo, Conteúdo, "Governo prorroga permanência das Forças Armadas na Amazônia"; additional critique: Amazon Watch, "Bolsonaro's Temporary Fire Ban Fails to Implement Real Policy and Enforcement Measures to Combat Fires".

[135] Greenpeace, Jordan and Clarke, "Bolsonaro blocked fire prevention".

[136] *Compare* Chapter II (1).

[137] *Compare* Schabas, "Art. 7 Commentary", 159: "Proof […] will generally be inferred from repeated acts that follow the same logic".

time. If even omission can suffice, this *a fortiori* applies for the demeanour at hand. Thus, the condition of a systematic state policy to commit such attacks is fulfilled.

(5) Lastly, the presumably criminal acts fulfil the *nexus condition* to the described policy as they simultaneously are the very acts that establish the policy in the first place.[138] This is not to say yet that the individual acts are criminal, which will be answered distinctly.

With this last reservation, the Bolsonaro government fulfils the objective *chapeau* requirements.

bb. Subjective Elements

The "perpetrator"[139] would further need to have **knowledge of the attack**.[140] Art. 30 (3) defines knowledge as the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". The EoC further specifies that the perpetrator doesn't have to have "knowledge of all the characteristics of the attack or the precise details of the plan or policy […]".[141] However, they need to "kn[o]w that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against any civilian population."[142] Without going into too much detail on the distinct notions of Art. 30 yet, it is reasonable to claim that Bolsonaro had both knowledge of the attack and of the alleged conducts to be a part of it.

Accordingly, the Bolsonaro government through nurturing a sense of rivalry and impunity, fulfils the objective and subjective contextual requirements of Crimes against Humanity. The *chapeau* conditions are satisfied.

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[138] *Argumentum a minori ad maius;* Such a strong link is not even necessary. It is sufficient for Crimes against humanity, if an individual, with singular offences against few individuals, undertakes his or her conducts as a "part of a pattern of misbehaviours" against a group and the "perpetrator is aware that his conduct is part of a pattern", *compare* Cassese and Gaeta, *ICL*, 94.

[139] Whether Bolsonaro really is a perpetrator, will be discussed in the next subsection.

[140] Art. 7 (1), chapeau.

[141] EoC, Art. 7 Introduction, para 2.

[142] Each last para. of EoC, Art. 7 (1)(a)(b)(c)(…).

b. Modes of liability

The possible underlying offences that could incriminate Bolsonaro are murder, extermination, deportation or forcible transfer, persecution, and other inhuman acts. Before proceeding to analyse them in detail, it is expedient to ask the question under which general mode he might have committed them.
The modes of criminal liability are listed in Art. 25 and in essence distinguish between **perpetration** and **participation**.[143]

(1) The perpetration of crimes can take shape in three forms: i**ndividually, jointly with another or through another person**.[144] Participation includes **ordering, soliciting, inducing**[145], **aiding, abetting or otherwise assisting**[146] and the **contribution to a group crime**[147].

With the exception of persecution and other inhuman acts it is evident, that Bolsonaro didn't actively commit any crime**.** Neither did he kill, exterminate or displace "by his own hand".[148]

However, offences can be directly committed by positive act or omission.[149]
A culpable omission requires that "(a) **the accused must have had a duty to act mandated by a rule of criminal law;** (b) **the accused must have had the ability to act;** (c) **the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur;** and (d) **the failure to act resulted in the commission of the crime.**"[150]
It is tempting to claim that Bolsonaro, by means of turning a blind eye to the interests of indigenous communities and the issue of deforestation, has culpably failed to act in such a way. Yet, this crucially presupposes a *duty to act, mandated by criminal law*.

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[143] Art. 25 (2) and (3)(a) on perpetration and (3)(b)-(d) on participation; (e) and (f) address inchoate crimes.

[144] Art. 25 (3)(a).

[145] Art. 25 (3)(b).

[146] Art. 25 (3)(c).

[147] Art. 25 (3)(d).

[148] *Compare* Werle, "Criminal Responsibility", 958.

[149] Besides Art. 28, and the expressive notions of omission in certain crime definitions (e.g. Art. 8 (2)(b)(xxv)) the Statute does not mention omission. However, omission is generally accepted as a mode of liability. *See*, Werle, "Criminal Responsibility" 965; Duttwiler, "Liability for Omission in ICL", 26-9, 54-61; and *e.g.* Prosecutor v. Lubanga, Decision, ICC Pre-Trial Chamber I, paras. 152 and 351.

[150] Prosecutor v. Ntagerura et al., Judgement and Sentence, ICTR Trial Chamber II, para. 659.

Such a duty could be derived from the Principles of International Environmental Law. For instance, the Principle of Prevention[151] requires a state to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction causing significant damage to the environment of another state."[152] One could argue, that if the damage caused to the environment of another state is prohibited under international law, this must be even more so for groups of individuals that are under particular protection of international HR law, and that every individual state agent has to carry that respective burden. The development in environmental HR[153] and the particular protection of indigenous people under international law[154] underpins this position, as individuals, more than ever before, are at the crux of international law.[155] This view certainly would appeal to Hersch Lauterpacht as the principal mind behind the conception of Crimes against Humanity with his very focus on the moral and legal obligation of states to protect individuals.[156] However, taking ICL seriously, these principles cannot establish a duty to prevent under *criminal law* as they remain solely within the sphere of states. Even though such alien norms could theoretically be included in the interpretation of ICL according to Art. 21 (1)(b)(c), (3), this is always bound to the limits of terminology, meaning that crimes "shall be strictly construed and shall not be extended by analogy".[157] As the definition refers to a duty established by criminal law, that is where it has to be derived from without exceptions to the disadvantage of the accused.

What constitutes a duty to prevent Crimes against Humanity under ICL is unclear. Whereas in the case of Genocide, the sheer existence of genocidal tendencies may awaken the duty of state actors to at least "name and shame" the incidents as a countermeasure,[158] this cannot be simply transferred to Crimes against Humanity, which have no comparable treaty dealing with their scope and conditions like the United Nations Convention for the Prevention and Pun-

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[151] Which is part of customary international law (*compare to* Statute of the International Court of Justice, Art. 38 (1)(b)), *see* Legality of the Threat or Use of Nuclear Weapons, AO, ICJ, para. 29; *further* on the Principle and its nexus with the Precautionary Principle, Sands et al., *Principles of International Environmental Law,* 211-2, 229-32.

[152] Argentina v. Uruguay ("Pulp Mills"), Judgment, ICJ, para. 101.

[153] *See* e.g. the European Court of Human Rights' "evolutive approach" in taking environmental concerns into the HR application of *inter alia* the right to life, to a respect for private and family life, to a fair trial and court access, Durney, "Crafting a Standard", 421-46; IACHR, "Case of the Lhaka Honhat v. Argentina".

[154] *See* UNDRIP and UNHR, "Indigenous Peoples and the United Nations Human Rights System", 1, 4, 9, 33.

[155] Evans, *International Law,* 260-7.

[156] Sands, *East West Street*, esp. 290-2.

[157] Art. 22 (2).

[158] For a sophisticated derivation, *see* Schiffbauer, "The Duty to Prevent Genocide under International Law", 81-94.

ishment of the Crime of Genocide. This too is imperative due to the prohibition of analogy in criminal law.

The question whether there is a duty to prevent in the subject-matter remains unanswered. The stronger arguments may claim that there is not, however, a conclusive answer is obsolete for two reasons: first, Bolsonaro did not just stay inactive, but has seized his rhetorics and policies by a positive act. Second, and maybe more importantly, it is hard to imagine any relevant conduct in the rainforest that Bolsonaro had the *concrete ability to prevent*. Considering that deforestation has occurred in the rainforest since the first conquistador set foot on South-American territory, probably before and certainly after his time in office, it would require a very abstract notion of ability to incriminate Bolsonaro. This, in turn, would lead to a rampant criminal liability of especially powerful individuals and does not suffice the strict requirements a construction of criminal responsibility needs to uphold.[159] In other words: The question is not, whether Bolsonaro could have prevented deforestation from happening, because it is absurd to think that he could, but whether he could have stopped making preventive measures less effective and impairing the situation by giving the destructive forces stronger means and public approval.
Consequently, commission by omission disqualifies as a mode of liability.

(2) Thus, the relevant conducts can only be viewed as positive acts, that partially presuppose the criminal conduct of others. This brings the next forms of perpetration, the commission through another person or jointly with another, to mind. Indirect perpetration requires that the principal perpetrator **uses another person as a tool to commit a crime**.[160] With regard to the relationship between direct and indirect perpetrator, the former is typically an inferior or needs to use an existing "hierarchical structure comprising sufficient fungible subordinates ensuring automatic compliance with the leader's will".[161] Due to a lack of such a relationship between Bolsonaro and the people on the ground committing the offences, indirect perpetration is not given. Bolsonaro might be president and chief in arms[162], yet the crimes in question are not executed by the military but by farmers, loggers etc.

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[159] Art. 22 (2).

[160] Schabas, "Art. 25 Commentary", 572.

[161] Cassese and Gaeta, *ICL*, 178.

[162] Brazil Constitution, Art. 142 chapeau.

(3) Bolsonaro could be accountable for joint commission. Unlike the ad hoc tribunal's case law, which shaped the concept of joint criminal enterprise ("JCE"), the Rome Statute, even though remaining open for its inclusion in principal,[163] so far differs in its practical interpretation of joint criminality. While the JCE doctrine suffices with fairly small objective contributions to a crime ("significant")[164], co-perpetration under the Rome Statute requires an "**essential" contribution to a crime rendered by a common plan between the perpetrators.**[165] The individual's contribution must be of vital importance to the implementation of the planned violation - it must be *conditio sine qua non* - placing the co-perpetrator in control (or "domination") of the crime.[166] In the case of Bolsonaro, no behaviour is essential in such a way. Murder, displacement, persecution and everything else would take place, with or without those acts. Moreover, there are very few indications to assume an implicit or explicit common plan to commit such crimes. Contrary to this, one could argue that with the 2016 Policy Paper a more extensive understanding of joint criminality became compulsory. The paper exactly wants to include environmental harm to be the means by which crimes can be committed. Those harms are almost by definition committed by groups of people with more or less individual impact. In addition, ICL naturally deals with leaders and it is incomprehensible to let especially those "off the hook", who have the highest capacity to impact environmental harms for the better or worse.[167] Yet again, this would violate the Principal of Legality. ICL defines its modes under which conducts can be committed exclusively[168] and the facets of commission, under Art. 25(3)(a), mirror the highest degree of culpability. Accordingly, they have to be interpreted restrictively.[169] Such narrow interpretation in compliance with ICC case law and the wording of the Statute can only lead to the understanding that if direct and joint commission appear in one sentence they need to weigh equally. Consequently, the *actus reus* of both perpetrations must be equally essential.

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[163] Cassese and Gaeta, *ICL,* 175.

[164] Cassese and Gaeta, *ICL,* 163.

[165] Schabas, "Art. 25 Commentary", 569; Werle, "Criminal Responsibility", 962.

[166] Refers to the German *Tatherrschaftslehre* that is generally utilised to distinguish perpetration from participation, *see* Beulke et al., *Strafrecht: Allgemeiner Teil,* para. 807; adopted into ICL, *see e.g.* Prosecutor v. Lubanga Decision, ICC Pre-Trial Chamber I, paras. 330, 999 and 1003.

[167] *See* Schabas, "Art. 25 Commentary", 569.

[168] Art. 22.

[169] Werle, "Criminal Responsibility", 961.

Lacking such essential contribution, Bolsonaro is not responsible as a co-perpetrator and thus not as a perpetrator at all, at least in the commission of murders, extermination and deportation or forcible transfer.

(3) Nevertheless, he could have participated in relevant crimes. There is no sufficient proof for Bolsonaro **instructing or prompting a principal perpetrator by means of a substantial contribution** to the murder, extermination, deportation or forcible transfer of indigenous people.[170] As has been said, all of these results are only loosely connected to the involvement of Bolsonaro and he certainly does not play an initial role in their commission. Therefore, the modes of liability ordering or soliciting and inducing are not pertinent.

In summary, the remaining modes of liability that could incriminate Bolsonaro under the Rome Statute are "aiding, abetting or otherwise assisting"[171] and the "contribution to a criminal group" together with perpetration in the case of persecution and other inhuman acts.

These modes will form the basis of the following analysis of the underlying offences.

c. Aiding and Abetting[172] in murder; - extermination; Contribution to a group murder

Bolsonaro could have aided and abetted or otherwise contributed to (group) acts of murder or extermination.

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[170] *Contrary* to CADHu and ARNS, "Informative Note to the Prosecutor", para. 10: "state policy of incitement" - the policy as interpreted here, does solely manifest a "climate of impunity", but individual acts - even the land-grabbing decree - do not cross the line of ordering, soliciting or inducing a crime: provided by Art. 25 (3)(b) this would require a "prompting" or "instructing", which - by terminology and systematics - requires a direct and initiative effect - meaning a strong causal nexus on the commission of a crime. This understanding is compulsory in order to distinguish from complicity participation in Art. 25 (3)(c). The crimes in the rainforest have happened before and will likely happen after Bolsonaro, he "only" made them more acceptable and accessible through moral or legal support. *Compare* Cassese and Gaeta, *ICL*, 196-7; Schabas, "Art. 25 Commentary", 574-6; Werle, "Criminal Responsibility", 967.

[171] Notably this thesis won't distinguish greatly between aiding (physical assistance), abetting (psychological assistance), since such distinction is arguably ambiguous and more importantly negligible for the legal analysis, *see* Schabas, "Art. 25 Commentary", 576-7; Instead it will use those terms interchangeably and occasionally refer to "assistance" and "complicity" as an umbrella term.

[172] Both can be fulfilled by a positive act or omission, see Werle ,"Criminal Responsibility", 965; Prosecutor v Tadić, Judgement, ICTY Appeals Chamber, para. 188.

(1) While the *actus reus* elements like the causing of death[173] of for example chieftain Guajajara as part of a widespread and systematic attack, and Bolsonaro's assistance as a **substantial contribution** to it, seem feasible,[174] the *mens rea* requirements ultimately acquit Bolsonaro. This is because aiding and abetting, additionally to the general Art. 30 requirements, needs a *dolus specialis*. Following the wording of Art. 25 (3)(c), the assistance must have been committed **"for the purpose of facilitating the commission of the crime".** Evidently such an intent cannot be reasonably assumed. The policies and rhetorics of Bolsonaro are directed at offering new economic opportunities within the Brazil Amazon rainforest, not to kill people.
There is no proof that the commission of murder is within the certain awareness of Bolsonaro.[175]

(3) The same goes for the **assistance in extermination** since the main difference to murder lies in the method and scale of killing.[176] Thus, an assistance in it naturally requires congruent mental elements.

In a side-note, the exploitation of water or the deprivation from it could be interpreted as an exterminatory measure.[177] Therefore, the building of dams, mines and related accidents[178] might amount to extermination if they result in the death of individuals and the necessary *mens rea* can be established. Similarly, Bolsonaro's veto against supplying water and hygiene to indigenous people during the COVID-19 pandemic could amount to extermination. However, those conducts are hardly related to the subject-matter and thus drop out for this analysis.

(4) While the significant contribution to a group murder and/or extermination might be present,[179] the mental element of contribution to a group crime requires Bolsonaro to have **aimed at "furthering the criminal activity or criminal purpose of the group" or its common purpose or have had awareness of the group's intent to commit a particular**

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[173] EoC, Art. 7(1)(a), para. 1, fn. 6.

[174] One could argue, that Bolsonaro's policies made it easier to invade indigenous territories as they removed the fear of repression for perpetrators, as is done analogue under Chapter IV (2)(d)(aa).

[175] More to this requirement under Chapter IV (2)(d)(bb).

[176] EoC, Art. 7 (1)(b), para. 1., fn. 8 and para. 2.

[177] *Compare* Prosecutor v. Al Bashir, Second Decision on Arrest Warrant, ICC Pre-Trial Chamber I, paras. 37-8.

[178] Mongabay, Mendonça, "After a mine killed their river".

[179] Schabas, "Art. 25 Commentary", 580.

crime.[180] In contrast to aiding and abetting there is no special intent needed, but knowledge of the group's crime is sufficient.[181] However, the knowledge must refer to a specific group crime, criminal purpose or at least the criminal intentions of the group as being murderers or exterminators. Since there is again no sound evidence for such a knowledge, the contribution to the group murder - *in dubio pro reo* - drops out.

Consequently, Bolsonaro is not criminally responsible for aiding and abetting in murder unless the special intent can be demonstrated in a particular case.

d. Aiding and abetting in deportation or forcible transfer

Bolsonaro could have assisted in the crime of deportation or forcible transfer of people for instance from the Ituna/Itatá region by means of his policies and rhetorics.[182]

aa. Objective Element

The *actus reus* requirements of aiding and abetting to the commission of deportation or forcible transfer of population would need to be present in the person of Bolsonaro.

(1) First, that requires a "**deportation or a forcible transfer to another State or location by exclusion or other coercive acts**" of "**lawfully present individuals**", "**without grounds permitted under international law**".[183]

(a) While deportation refers to crossing state borders, forcible transfer means displacement within frontiers.[184] Although it cannot be excluded that some of the affected indigenous tribes

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[180] Werle, "Criminal Responsibility", 971.

[181] "Schabas, "Art. 25 Commentary", 582.

[182] There is very little data on the displacement of *particular* communities in the Brazil Amazon region on *particular* instances of violence. Therefore this analysis will proceed in a more general fashion and examine the displacement of *indigenous communities in the Ituna/Itatá region*. According to the available facts, displacement is real. Yet the focus in concrete events has to remain vague. This is something the OTP would have to consider and investigate with more nuance. However the value of the legal argument remains unaffected by this insufficiency and could be applied to all displacements that happen "under the watch" of Bolsonaro.

[183] EoC, Art. 7 (1)(d), para. 1.

[184] Cassese and Gaeta, *ICL*, 95.

might flee the Federative Republic of Brazil, this is very unlikely in the case of the Ituna/Itatá region. Located in the state of Pará, it is within 1500 km distance to the next border.

(b) With regard to forcible transfer, the notion of "'forcibly' is not restricted to physical force, but may include threat of force or coercion, e.g. caused by fear of violence, duress, detention, psychological oppression […] abuse of power […] or by taking advantage of a coercive environment."[185] People have to be put into a situation where they had "no genuine choice".[186] This broad frame makes the norm particularly available for displacement *via* environmental harms. Violence, invasions, destruction, and as a common link deforestation, as well as the fear of all of the above is leaving the tribes in the region desperate, often with no other option but to leave their ancestral territory in order to physically survive. It can thus be stated, that deforestation is a main driver and cause of forcible transfer.

(c) Notably, the available displacement data claims the single reason of displacement is "natural disasters".[187] It can be a humanitarian necessity to evacuate individuals when they are in imminent danger.[188] However, "[e]vacuation is by definition a temporary and provisional measure and the law requires that individuals […] shall be transferred back to their homes as soon as hostilities in the area in question have ceased".[189] Even though conceivable in some, for the majority of "deforestation-caused-evacuations" there will be no opportunity for the displaced to re-inhabit that territory. Further, humanitarian crisis is not a legitimate reason for displacement if it is "itself a result of the accused's own unlawful activity".[190] Since the majority of deforestation and economic activity in the Brazil amazon rainforest, especially in the Pará region, is illegal, the majority of displacement cases are not permitted under international law.

(d) The people in question must have further been lawfully present in the area from which they were deported or transferred. The Ituna/Itatá region is federally owned and set aside for

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[185] EoC, Art. 7, (1)(d), para 1, fn. 12.

[186] Prosperi and Terrosi, "Human Factor", 519; and Prosecutor v. Stakić, Judgment ICTR Appeals Chamber, para. 279.

[187] IDMC, "Brazil - Displacement 2019"; obviously this data is incomplete or at least ambiguous, as not at least the two latest CIMI reports show.

[188] Schabas, "Art. 7 Commentary", 180.

[189] Prosecutor v. Blagojević, Judgment, ICTY Trial Chamber I, para. 597.

[190] Prosecutor v. Stakić, Judgement, ICTY Appeals Chamber, para. 287.

indigenous people. Its demarcation process as protected indigenous territory is not yet finished.[191]

Art. 7 (1)(d) arguably "exists to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities. […] the protectionism provided to those who have, for whatever reason, come to "live" in the community".[192] Following this *ratio,* a legal property standard or demarcation policy cannot be decisive since that would leave the provisional scope to the government's discretion. In avoidance of this insufficiency a factual inhabiting of the area in question must suffice. Indigenous people actually live in the Ituna/Itatá region without doubt.[193]

Moreover, this is underpinned by the strong connection between indigenous communities and their territory. Implemented in various constitutions and HR treaties such as Art. 231 of the Brazilian Constitution and Art. 26 of the UNDRIP, and in application of the latter, the IACHR has stressed that "*the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they use fully to enjoy, even to preserve their cultural legacy and transmit it to future generations*."[194] Following this empowerment of indigenous land rights, the IACHR has acknowledged indigenous land as a very precondition to their life, culture and other HRs. This fundamental nexus weighs strongly also in favour of the "lawful presence condition".

(e) The people "on the ground" engaging in one or more of the described actions do so with *animus nocendi.* They must know that it will displace lawfully present people without ground permitted by international law. Many, if not most, particularly intent to do so (*dolus directus)*[195] in order to make money, or at least act recklessly with regard to that outcome (*dolus indirectus/eventualis).*[196]

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[191] Mongbay, Ionova, "Indigenous communities 'robbed'": "Outsiders have been banned from Ituna/Itatá since 2011, with the aim of protecting these isolated tribes […]. While the land is under some federal preservation, it is still not fully demarcated as an indigenous territory".

[192] Prosecutor v. Popović et al., ICTY Trial Chamber II, para. 900.

[193] *E.g.* FUNAI, "Desmatamento na Terra Indígena Ituna-Itatá".

[194] IACHR, "Case of the Mayagna v. Nicaragua", para. 149.

[195] Cassese and Gaeta, *ICL*, 43.

[196] Robinson, "Environmental Crimes Against Humanity": "knowledge of substantial certainty of harm".

Thus, the loggers, miners, ranchers and other businessman and their agents fulfil the *actus reus and mens rea* requirements and can be viewed as principal perpetrators of forcible displacement in the Ituna/Itatá region.[197] These acts are also committed **with knowledge and as part of an attack against the indigenous people** in this territory as the perpetrators implicitly and in some instances explicitly[198] act with reference to the supposed impunity nourished by the Bolsonaro policies.[199]

(2) Second, Bolsonaro, by means of his policies and rhetorics, would have to have aided and abetted these commissions of forcible transfers. Such complicity can take place by "providing the means"[200] or by other **assistance with "substantial effects"**.[201]
Assistance in this sense can be physical or psychological and is not limited to date and place of the crime.[202] On the one hand, dismantling FUNAI, ICMBio and IBAMA, or by the attempts to improve the accessibility to indigenous territories for economic aspirators, he may have made such contribution. It is easy to imagine that, for instance loggers, who earlier had to fear repression for crossing indigenous territorial borders illegally, would have refrained from entering the Ituna/Itatá region. On the other hand, similar invasions did happen before and even though Bolsonaro might have made it easier to invade indigenous territory or harder for it's inhabitants to protect it, it is equally feasible to see land grabs happening in Pará without his input.[203]
Yet, according to the ad hoc tribunals, a causal nexus is no necessity. Rather, it is sufficient to encourage or grant moral support or even to just be "present" at the crime scene.[204]
Following this, Bolsonaro could have, through the accumulation of his acts and every act individually, aided and abetted in the displacement.

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[197] *Compare* EoC, Art. 7 (1)(d), para. 1, fn. 13.

[198] CIMI, "Executive Summary, 2019, Violence against Indigenous", 1.

[199] Here lies a fundamental difference to situation in Honduras, which was dismissed by the ICC due to the observation, that violence there, resulted from the "prevalence of criminal and drug trafficking organisations […] rather than land disputes". The occupation of land is at the very core of the conflict in the Brazil Amazon rainforest and is nurtured by state policies, *compare* ICC OTP, "Situation in Honduras: Article 5 Report", paras. 47-51, 127-40, 143.

[200] Art. 25 (3)(c).

[201] *See* Prosecutor v. Tadić, Opinion and Judgment, ICTY Trial Chamber, para. 688; Cassese and Gaeta, *ICL*, 193.

[202] Cassese and Gaeta, *ICL*, 193.

[203] *Compare* CIMI, "2018, Violence against Indigenous", 53-5, 62-5.

[204] Prosecutor v. Blaškić, Judgement, ICTY Appeals Chamber, para. 48.

This argument is reinforced by the "approving spectator" concept. Here, it is sufficient, if an authority figure is physically present at the crime scene and provides moral and psychological support.[205] If this is the case for physical presence, it also applies for cases, where the authority figure is not present, but delivers support at virtually every possible occasion. A president of a 210 million citizens country, who publicly embraces rhetorics like *"we're going to rip up [an indigenous territory]"*, and *"[t]he Indians do not speak our language […] they do not have culture. They are native peoples […]"* and aligns remarkable portions of their policy to this bigotry, certainly induces moral and psychological support for potential wrongdoers who are on the brink to follow words with deeds. Thus, this psychological and moral support is substantial pursuant to the Statute. The land-grabbing decree, is likely the most tangible contribution in such a way, and arguably even falls within the scope of "providing the means for its commission".

Accordingly, Bolsonaro fulfilled the *actus reus* requirements of aiding and abetting the murderer of Guajajara.

bb. Subjective Elements

Bolsonaro would have to have performed his participatory acts with the necessary *mens rea*. Aiding and abetting requires subjective conditions according to Art. 30 and the *dolus specialis* from Art. 25 (3)(c).

(1) Art. 30, in case of aiding and abetting, provides for a **double *mens rea* requirement.** The participant would have firstly either have to have known that his acts would assist the commission of a crime. Secondly, this logically presupposes some decree of knowledge of the principal crime, whereas a prediction of the concrete crime is not necessary.[206]
In sum, **Bolsonaro must have been aware of the fact that his action would assist in the commission of one among several of crimes.**[207]
Bolsonaro's mindset is not easy to grasp. However, when relying on the objective circumstances and the data revolving around violence in the Brazil amazon rainforest it becomes evident that a further egging of the actors and an unbalancing of their legal positions creates

[205] Cassese and Gaeta, *ICL*, 195.

[206] Cassese and Gaeta, *ICL*, 194; Prosecutor v. Furundzija, Judgement, ICTY Trial Chamber, para. 246.

[207] Cassese and Gaeta, *ICL*, 193-4; Prosecutor v Alex T. Brima et al., Judgment, SCSL Appeals Chamber, para. 243.

an unreasonable risk for the commitment of crimes against the already vulnerable indigenous communities. He must have been aware of the risk as it must appear obvious to every objective observer. Yet, he consciously took the risk of placing indigenous people in this advanced danger and performed his conducts regardless of the outcome. Hence, Bolsonaro acted with at least *dolus eventualis* with regard to the principal crime and to his assistance.

(2) The next and decisive question is whether his participatory acts have taken place **"for the purpose of facilitating the commission"** of forcible transfer. Contrary to the commission of murder, this is not as evident, because Bolsonaro's speeches and policies deliberately aim at rainforest clearings, which are factually tied to the expulsion of indigenous who used to live there.
Hence, the question is whether these behaviours can be interpreted as for the purpose of facilitating the forcible transfer of indigenous in the Ituna/Itatá region in the sense of Art. 25 (3)(c).

(a) This *dolus specialis* requirement is fairly unprecedented.[208] It has been negotiated as a compromise between different legal systems failing to agree on whether to have an *intent* or a *knowledge* standard. Debates revolving around its interpretation represent the negotiation difficulties as they view the provisions' substance either in knowledge or intent.[209] On the one hand, one could emphasise knowledge or the *cognitive* element, as this would be a logical prerequisite of any will: if one is aware of the consequences certain actions will have, one always wants those consequences if action follows. This argument would also follow the terminology of Art. 30 (2)(b) and (3), where intent is defined as meaning to cause a *consequence*, and knowledge means awareness that a *consequence* will occur. In other words, knowledge would equal intention, and a distinction of the two is "artificial".[210]
On the other hand, the *voluntative* element could be seen as crucial. If ICL requires knowledge, it would use this technical term, defined by Art. 30 (3), like happened in the *chapeau* of Art. 7 (1). The fact that Art. 25 (3)(c) does not refer to knowledge but "purpose", which would strongly indicate that a different *mens rea* standard is required. Further, purpose, according to the ordinary meaning of the term, clearly requires some kind of wilful action: a behaviour that is aimed towards a certain outcome.

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[208] *Compare* Cassese and Gaeta, *ICL*, 195.

[209] Rishi and Nikunj, "Does "Purpose" Under Article 25(3)(c) Have any Purpose?".

[210] *Compare* Sliedregt and Popova, "Interpreting "For the Purpose of Facilitating" in Article 25(3)(c)?".

This latter interpretation in its tendency is more convincing because it doesn't blur the boundaries between knowledge and intent that many legal systems including the Rome Statute established.[211] Also, it is more restrictive as the cognitive approach would incriminate anyone with knowledge of the crime regardless of personal interest and is therefore preferable with regard to Art. 22 (2).

(b) Accordingly, the Bemba Trial Chamber understood purpose synonymous with intent, in a way that the accomplice "must have lent his or her assistance with the aim of facilitating the offence."[212] However, this phasing of intent and purpose is going too far. It disregards the law's usage of the distinct term "purpose" and precisely not "intent". If the Rome Statute would have "intended" to set an intent requirement, it would have done so by labelling it accordingly or simply not labelling it at all, leaving it to the Art. 30 default intent condition. Instead, it chose to use the term "purpose", which has to play out somehow in the norm's application. This is even more so, because requiring intent would exclude individuals who could present other "purposes" than facilitating a crime, such as financial interests; every (secondary) motive that is not directly intended to facilitate crimes could be used as defence.

Therefore, in order to take the special wording of "purpose" and the shortcomings of a focus either solely on intent or knowledge into account, it is advisable to use a compromise *mens rea* notion. A fitting notion, conceptually between *dolus directus* and *dolus eventualis,* is known in German law as "*dolus directus 2. Grades"* (literally translated: "second degree dolus directus"). This concept requires a certain knowledge of a consequence plus a deliberate act despite that knowledge. Notably, the consequence can even be undesired by the accused; the crux is that they think to know that it will certainly occur.[213] Although not completely congruent, it is closely related to the notion of *dolus indirectus*[214] and has occasionally been adapted by the ICC for interpreting intent under Art. 30.[215] Likewise, *second decree dolus directus* can be adapted for the interpretation of "purpose" under Art. 25 (3)(c).

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[211] Knowledge and intent are defined distinctively in Art. 30.

[212] Prosecutor v. Bemba et. al, Judgment, ICC Trial Chamber VII, para. 97.

[213] Beulke et al., *Strafrecht: Allgemeiner Teil*, para. 332.

[214] *See* the different notions of dolus and their role in ICL: Vyver, "The International Criminal Court and the Concept of Mens Rea in International Criminal Law", 62-3; Badar, "Dolus Eventualis and the Rome Statue Without It?", 438-42; Cassese and Gaeta, *ICL*, 45-9.

[215] *E.g.* Prosecutor v. Katanga and Chui, Defence Application/Decision on the Confirmation of Charges, ICC Pre-Trial Chamber I, para 7; Prosecutor v. Katanga and Chui, Decision, ICC Pre-Trial Chamber I, paras. 251-2; Prosecutor v. Lubanga, Decision, ICC Pre-Trial Chamber I, para. 352.

This concept lies in between the voluntative and the cognitive approaches discussed above, with a stronger tendency towards knowledge. As it requires certain knowledge, not just an abstract awareness and an irrespective act, it is able to balance both strain of theories, overcome their weaknesses and combine their strengths. Consequently, it is overall convincing and should be implemented for the interpretation of "purpose" in Art. 25 (3)(c).

(c) **Transferred to the present case, this means that Bolsonaro would have had to have certain knowledge that his actions will facilitate the commission of forcible transfers in the Ituna/Itatá region**. The Ituna/Itatá region is located in Pará, which is notorious for its illegal deforestation and all the hardship for indigenous people that comes from it. The sitting president of the country must be aware of the sociological problems occurring in this region, and therefore know of the loggers', miners' and ranchers' intent to appropriate land for their economic endeavours. It is only a small step from this general knowledge towards the special knowledge of particular deliberate displacements of people. If Bolsonaro generally knows that people in the Ituna/Itatá region will use all means necessary to grab land for themselves, he must also know that every single one of them will do that if they can. In other words: Bolsonaro knows of the precarious situation in Pará. He must therefore also know that there will be particular displacements caused by deforestation if he improves the legal and factual ability to enter and apprehend rainforest areas.
Bolsonaro's policies and statements are expressively aimed to boost economic growth by removing obstacles and clearing up rainforest territory for businesses. This clearing is indispensably linked to forced displacements as it is the very home of some indigenous that is to be cleared. Accordingly, even if Bolsonaro does not deliberately "want" indigenous to be displaced, he must knowingly accept as a certainty that they will be if he follows through on his primary intention. It is with such certain knowledge that Bolsonaro has adopted his rhetorics and policy measures, for example the land-grabbing decree.
Therefore, Bolsonaro has aided and abetted for the purpose of facilitating the forcible displacement of indigenous people. The *mens rea* requirements are given.

In summary, the *actus reus and mens rea* requirements are given.
Bolsonaro has aided and abetted in the forced displacement of indigenous people in the Ituna/Itatá region.

e. Commission of persecution

Additionally, Bolsonaro, by the same acts, could have committed the crime of persecution if the *actus reus* and *mens rea* requirements are fulfilled.

aa. Objective Elements

(1) That requires the objective condition of **severely depriving one or more persons of fundamental rights contrary to international law.**[216]

Fundamental rights in that sense could be viewed strictly positivistic as rights that are granted by hard-treaty law. This would lead to the exclusion of important HR treaties that have no force of law but are held as a common standard of ideals and goals.[217] As this would severely undermine the international HR standards, a more flexible approach seems preferable and is in fact accepted in ICL.[218]
However, in the present case, a severe deprivation of fundamental rights could even be established following this positivist stance. First, the destruction of territory of indigenous people is a blatant violation of the right to property as articulated in UDHR Art. 17, Brazilian Constitution, Art. 5 (XXII), American Convention on Human Rights, Art. 21 and accepted in ICC jurisprudence.[219] This is even more the case for minority groups like indigenous people, who enjoy extra legal protection. Their right to culture and tradition is internationally accepted.[220] Second, the tight nexus between the territory of the indigenous and their substantial wellbeing, pointed out earlier, uplifts their protection standard even more. Their physical, psychological, and spiritual survival, translated into a variety of rights, is on the brink without the ability to sustain their ancestral territory.[221]

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[216] Art. 7 (2)(h).

[217] *E.g.* the UDHR and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[218] Schabas, "Art. 7 Commentary", 195-6.

[219] *E.g.* Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b), ICC Pre-Trial Chamber II, para 58.

[220] *Compare* UNDRIP and UNHR, "Indigenous Peoples and the United Nations Human Rights System", 6-7.

[221] *Arguing in favour of such an inclusive interpretation e.g.* Prosecutor v. Blaškić, Judgment, ICTY Trial Chamber, paras. 220, 33; Prosecutor v. Tadić, Opinion and Judgment, ICTY Trial Chamber, para. 707.

It is hard to pinpoint particular cases where Bolsonaro deprived one or more individuals of these rights. Yet, looking at the numbers of invasions and illegal logging of indigenous land, for instance in Ituna/Itatá, and their increase since Bolsonaro took office, it is reasonable to assume that his policies and rhetorics play an essential role in depriving fundamental rights to property, culture, tradition and life of indigenous people.[222]

(2) Additionally, the particular indigenous person or persons would have to have been **targeted by reason of identity** of the group or collectivity, **based on political, racial, national, ethnic, cultural, religious, gender ground or any other ground universally recognised as impermissible under international law.**[223]
In fact, the deforestation and displacement take place primarily to clear forest for economic profit. However, it cannot be ignored, that indigenous people are both disproportionally affected and highly dependent on their surroundings. Given the fact that a central spiritual and cultural element of indigenous communities is to preserve the forest, a deforestation policy, composed of dismantling important advocates of environmental and indigenous rights protection, and increasing the accessibility for loggers for instance, naturally targets those trying to preserve it. It would be an artificial split of facts if perpetrators could acquit themselves by pleading that the most affected person or group of persons are not targeted because they actually meant to "make money". This is a matter of motive and cannot preclude the objective fact that indigenous are necessarily targeted as such, based on their ethnic, cultural and religious identity, if their very livelihood is being put to sale. To this end, persecution really is "particularly appropriate to reflect the stigma of some types of conduct associated with environmental damage, particularly targeting indigenous communities".[224]
Accordingly, Bolsonaro's policies target particularly indigenous people based on grounds universally recognised as impermissible under international law.

(3) The **conduct was committed in connection with acts referred to in Art. 7 (1) or any crime within the jurisdiction of the Court.** It has already been pointed out how indigenous communities are affected by murder and forcible displacement under the Statute. As all of these crimes have been committed under the umbrella of deforesting the Brazil Amazon rainforest, the nexus requirement is met.[225]

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[222] CIMI, "Executive Summary, 2019, Violence against Indigenous", 1-2; IACommHR and OAS Report, "Indigenous Tribes Pan-Amazon Region", 115-50, esp. 115-9 and 139-42.

[223] EoC, Art. 7 (1)(h), paras. 2-3.

[224] Prosperi and Terrosi, "Human Factor", 521.

[225] Schabas, "Art. 7 Commentary", 199-200.

(4) As has been indicated, this *actus reus* is committed **directly** and actively by Bolsonaro.[226] He therefore perpetrates them according to Art. 25 (3)(a) and as part of his widespread and systematic attack against indigenous peopl.

bb. Subjective Elements

(1) Bolsonaro took action although he was aware of the factual circumstances like the risk his demeanour places on particularly the enjoyment of fundamental rights of indigenous people. Therefore he acts with sufficient **intent,** compliant to Art. 30.

(2) The crucial facet of the crime of persecution is the **discriminatory intent,** meaning that the delict requires the intentional deprivation of fundamental rights on discriminatory grounds**.**[227] This intent can be drawn from many of Bolsonaro's statements. However, they are best summed up by *"[i]ndigenous reserves are a hindrance to the development of the country"*.[228] In fact, the deforestation policies very much target indigenous people as they are standing between economic prospect and ecological preservation. Yet, it is questionable if this is enough to establish the *dolus specialis* condition. Even though indigenous are disproportionally affected by land-grabs and deforestation, arguably other citizens are too. Bolsonaro's policies do not focus on clearing the forest "of indigenous" but frankly of trees.

Discriminatory intent does require that the accused "consciously intend[ed] to discriminate" with this intention being at least one significant motive among others.[229] It is argued here that the evidence for such an intended discrimination is sufficient. Every of Bolsonaro's described actions is deliberately aimed at either weakening environmental and indigenous protection in the Brazil Amazon rainforest or at equipping loggers, miners and ranchers with legal and moral support to grab land. Even though a primary motive might be the economic development of "his" country, he consciously has to aim his hate-speech and policies towards worsening the *de iure* and *de facto* situation of indigenous as they need to be pushed aside to achieve that primary goal. It is predominantly the indigenous people's rights to land, culture and life

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[226] Werle, "Individual Criminal Responsibility", 958, Cassese and Gaeta, *ICL*, 161-3.

[227] Art. 7 (2)(g).

[228] Survival International, "What Brazil's President, has said about Indigenous Peoples".

[229] *Compare* Prosecutor v. Krnojelac, Judgment, ICTY Trial Chamber II, para. 435-6.

as such, that has to be ruptured in the name of prosperity. That is what Bolsonaro must know and want, because this rupture is a very prerequisite of the economisation of the forest, he is aiming at. Accordingly he persecutes indigenous people with a significant discriminatory intent.

The *mens rea* requirements are fulfilled.

Hence Bolsonaro is also criminally responsible for committing the crime of persecution.

f. Commission of other inhuman acts

The raison d'être of the ICC is to end impunity.[230] Likewise the provision of Art. 7 (1) (k) in its open textured manner criminalises "other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or the mental or physical health". Since we have already established the crimes of Bolsonaro as assisting in forcible transfers and the commission of persecution, this provision has little significance.[231] However, a brief summary of its plausibility seems beneficial as it is unpredictable whether the arguments presented here will convince the ICC or not.

Bolsonaro's hate-speech, deprivation of protection, and the equipment of the agribusiness industry with stronger legal rights could amount to such inhuman acts. That requires of those acts to **inflict great suffering, or serious injury to body or to mental or physical health and that those acts are of a similar character as the acts referred to in Art. 7 (1).**[232] The seriousness of the suffering and injury has to be "evaluated in light of all the circumstances, including nature of the act itself, the context in which it occurred and victim circumstances."[233]
With the arguments made before, it is conceivable that the acts of Bolsonaro alone exceed the threshold of such seriousness, because the data clearly indicate a growth of violence, harassment and displacement since Bolsonaro took office. Hence, at least *serious mental suffering* is

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[230] Preamble, para 5.

[231] *See* Schabas, "Art. 7 Commentary", 208: "Given the residual nature of 'other inhumane acts', the same conduct cannot also be prosecuted under one of the other headings of article 7".

[232] EoC, Art. 7 (1)(k), paras. 1 and 2.

[233] Prosperi and Terrosi, "Human Factor", 523.

a well-documented result of Bolsonaro's actions.[234] However, it might prove difficult to argue for those acts as being of *similar character*. The EoC points out that "character" is a reference to the "nature and gravity of the act".[235] Most acts require a somewhat physical component. Thus, legal acts are different in nature and might not suffice as "other inhumane acts". However, this conclusion is not imperative. For instance, Art. 7 (d) is explicitly not restricted to such physical acts, but includes the threat of force or coercion. Hence, an inclusion of non-physical acts is possible if they amount to a similar quality in gravity. This view is underpinned by the provisional focus on the result of an alleged act.[236] The effect Bolsonaro's policy has on the occurrence of deforestation and, closely linked, the murder, forcible transfer and other violence has been pointed out before. Therefore it is not farfetched to claim that they amount to such inhumane acts.

This can also be derived by means of an analogy to the ABJD Communication, mentioned earlier. The group of lawyers claimed that the fake news and the denial of accurate health measures in contradiction to the sound WHO standards in the wake of a deadly COVID-19 pandemic amounts to "other inhuman acts".[237] If that is true, the denial of accurate environmental protection measures despite the worldwide scientific consensus in the wake of a global and local HR crisis are so too.

Thus, it is possible to argue for the Bolsonaro handling of both COVID-19 and deforestation as being "other inhumane acts".

The subjective elements for the commission of other inhuman acts further requires the perpetrator to be aware of the factual circumstances that establish the character of the act and the **"intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim**."[238] Whether Bolsonaro really embodied this intent is not clear. One could argue that he knew of the risk and recklessly took it, or that he was just mindless, performing his sovereign power *bona fide* to develop the economy of the country. Anyway, the argument can be made if there is the ability to establish the evidence. For the time being, that will need to suffice.

In any case, aiding and abetting to other inhuman acts is very likely to apply according to the considerations made above.

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[234] CIMI, "2018, Violence against Indigenous", 9-10 and the increase in cases according to CIMI, "Executive Summary, 2019, Violence against Indigenous" 1-2, strongly support this assumption.

[235] EoC, Art. 7 (1)(k), para. 2, fn. 30.

[236] Prosperi and Terrosi, "Human Factor", 523.

[237] ABJD, "Complaint Before The ICC", 10-3.

[238] Prosperi and Terrosi, "Human Factor", 524.

Thus, a criminal liability for either the commission of other inhumane acts or the aiding and abetting in them appears tangible, but is dependent on the OTP and ICC's view on the existence of the *mens rea* conditions.

g. Justifications and Excuses

Bolsonaro certainly wanted his country to economically thrive and therefore, implemented his rhetorics and might have believed that he could do so, as a sovereign leader. However, this obviously does not fit any of the exceptional justifications or excuses under the Statute.[239] Any misconceptions Bolsonaro might have had towards this, represent an irrelevant mistake of law according to Art. 32 (2).[240]

h. Result

To sum it up, Bolsonaro is criminally liable under the Rome Statute for the aiding and abetting in forcible transfer of population, Art. 7 (1)(d), Art. 25 (3)(c); for the commission of persecution, Art. 7 (h), Art. 25 (3)(a); and - with the expressed limitations - for the commission of other inhumane acts, Art. 7 (k), Art. 25 (3)(a).

V. CONCLUSION

In conclusion, Jair M. Bolsonaro can be held criminally responsible for the deforestation of the Brazil Amazon rainforest under the Rome Statute. In particular, the offences of aiding and abetting in forcible displacement, persecution and other inhuman acts seem fertile for an inclusion of the environmental harms in the Brazil Amazon rainforest caused by its president.

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[239] Art. 31; Cassese and Gaeta, *ICL*, 209

[240] *Ignorantia legis non excusat;* Cassese and Gaeta, *ICL*, 219.

The Rome Statute does have the principal capacity to include environmental harms.

An "assault on the environment" consequently does exist as an international crime. However, this notion is bound to profound limitations. With regard to the presented case, this thesis indicated three interconnected problems that arise when trying to make a sound argument about environmental crimes:

First, there is the *conceptual* narrowness of ICL, as it traditionally occupies an anthropocentric point of view. That makes the notion of assault on the *environment* somewhat ambiguous as it still does not entail harms or offences on the environment but on people. This is somewhat plausible since law, as a human construct, naturally serves the interest of humans. However, it is problematic that its conception draws humans distinct from their surroundings, and is almost blind to their intimate dependency on a healthy environment. The outcome of clinging to that approach is a lack of capacity for ICL to the issue of climate change and likely many other harms where it is hard to establish a cohesive "human factor". A revival of debates up to negotiations about an international environmental criminal law seems to be the only solution to this issue.[241]

The second problem is of *evidential* nature. In the context of environmental harms, the multiplicity of actors and the complexity of circumstances make it hard to establish certain facts in support of important preconditions of criminal liability, such as intent and causality between particular acts and their result. Here, an even more sophisticated documentation and communication between national-, international, state- and non-state organisations could help to better inform the public and aspiring prosecutors.

The last issue is of *political* nature and brings the other two together: a stronger acceptance of ICL, particularly the work of the ICC and more generally a reinforced momentum for international cooperation on the global challenge of environmental degradation is much needed. The question is, which role the ICC is willing the take? The political thresholds of indicting an in-office-leader remain high, but it is not the first time that ICL took that plunge.[242] In charging Bolsonaro and with applying the necessary finesse towards the "Global South", the ICC could align itself with other international instruments, addressing the problem of environmental degradation and dissociate itself from the accusation of biases by contributing to environmental and overall international justice. As a fundamental source of ICL, it could boldly take on the challenge and widen its scope for perpetrators that are not the usual "born criminals" from the "Global South" but turn its focus more on the misdemeanours in the in-

[241] There actually have been historical attempts by the International Law Commission to criminalise offences against the environment, *compare* Pereira, "After the ICC 2016 Policy Paper", 185-90.

[242] Prosecutor v. Al Bashir, Decision on Arrest Warrant, ICC Pre-Trial Chamber I.

dustrialised world. Following the general definition, "[a]n international crime is such act **universally recognised** as a crime, which is considered a **grave matter** of international concern and for some valid reason **cannot be left** within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances"[243], it would have valid reason to do so, as all conditions seem to be fulfilled. Solely the universal recognition requirement remains questionable. Yet, as "Crimes against Humanity […] was meant to expand and grow with the consciousness of the global community"[244], this thesis has shown, at the very least, that this consciousness is growing.

Whether the ICC is ready to end impunity for grave environmental crimes and to follow the views advocated in this paper remains unclear. The 2016 Policy Paper surely gives hope, but since its publication, four years have passed without a perceivable change in practice. Nevertheless, it has led to a vivid academic debate about its implication and nurtured the already existing discourses that go beyond. As these voices become more sophisticated, the pressure to finally let deeds follow words is growing. Notably, it was also two academics who came up with and relentlessly promoted Crimes against Humanity and Genocide, until their adoption in or short after the Nuremberg trials, and to the very core of ICL. Like then, times are challenging and unprecedented problems demand a reinforced effort in international collaboration. Therefore, the author dares to be cautiously optimistic, that things are on the cusp of change. It might be only a matter of time before we see the first "green-case" before the ICC. Conscious of the significance of ending impunity for deliberate widespread environmental destruction, the OTP might then reflect on the legacy of past international criminal tribunals. If chance will have it, they might stumble across the timeless opening statement for the Nuremberg trials of U.S. Chief Prosecutor Robert H. Jackson and find it appealing to open his or her plea in Den Hague:

"*The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honors."*[245]

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[243] Hostages case, Judgment, US Military Tribunal, Nuremberg, 1241.

[244] Durney, "Crafting a Standard", 429.

[245] Robert H. Jackson Center, "Opening Statement before the International Military Tribunal".

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