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MASS DEFORESTATION AS A CRIME AGAINST HUMANITY?

PAULINE MARTINI, JOE HOLT AND MAUD SARLIÈVE*

Abstract This article examines whether mass deforestation could be prosecuted as a crime against humanity under Article 7 of the Rome Statute. It does so in respect of the situation in the Brazilian Legal Amazon in 2019–2021, where the unbridled exploitation and destruction of the rainforest had a disastrous impact at local, regional and global levels. The article covers three main aspects. First, it explores the existing limits of international criminal law for prosecuting mass deforestation as a crime against humanity, and the contours within which criminalization would be possible. Secondly, it discusses the challenges inherent in the anthropocentric nature of the chapeau requirement of Article 7 for the criminalization of mass deforestation under that provision. Thirdly, it analyses the extent to which mass deforestation could qualify as persecution and/or an 'other inhumane act' under Articles 7(1)(h) and (k) of the Rome Statute.

Keywords: deforestation, persecution, other inhumane acts, right to a healthy environment, environmental defenders, environmental dependents, Brazil, Amazon.

I. INTRODUCTION

On 12 October 2021, the non-profit organization All Rise filed a Communication with the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) pursuant to Article 15 of the Rome Statute[1] denouncing the commission of crimes against humanity in the Brazilian Legal Amazon (*Amazônia Legal*).[2]

* Doctoral Researcher, Queen Mary University of London, London, United Kingdom, p.f.b.martini@qmul.ac.uk; Barrister, Bar of Ireland, Dublin, Republic of Ireland, joe.holt@lawlibrary.ie; International Legal Expert, Paris, France, maudsarlieve@gmail.com.
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[1] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[2] All Rise, 'Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to Present, Perpetrated by Brazilian President Jair Messias Bolsonaro and Principal Actors of His Former or Current Administration' (12 October 2021) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211012_14633_na.pdf>.

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The Communication was based on two reports: a Legal Report, which argued that there was a reasonable basis to believe that crimes falling within Article 7 of the Rome Statute were being committed in Brazil[3] as a result of policies designed to facilitate the uncontrolled exploitation of the natural resources of the Brazilian Legal Amazon through logging, mining, land-grabbing, ranching, farming and other forms of exploitation of Indigenous territories and other protected lands, in the knowledge of the inevitable criminal consequences on local communities; and a scientific Climate Report, discussing the local, regional and global impacts of mass deforestation practices on climate change.[4] Annexed to the Legal Report were illustrative case studies examining the widespread environmental destruction and attacks against civilians dependent on the Brazilian Legal Amazon or defending it in the two Brazilian States of Pará and Roraima. While the Legal Report outlines the history of deforestation practices in Brazil, it focuses on the period of office of former President Jair Bolsonaro from 2019 to 2022, during which time the rate of deforestation and other environmental harms increased dramatically.

This article provides the opportunity to reflect on the approach adopted in the Legal Report, and discusses to what extent the conduct described, and mass deforestation practices more broadly, qualify as crimes against humanity pursuant to Article 7 of the Rome Statute.

There are, of course, various other legal fora and mechanisms available for considering such questions. The authors are also conscious of the difficulty of imposing individual criminal liability on senior government figures responsible for encouraging and facilitating the conduct in question. They do not consider that the legal approach set out in this article could be a panacea when it comes to addressing environmental wrongdoing through the prism of the Rome Statute, nor do they overestimate the capacity of international criminal law to deter any such future practices. Indeed, they acknowledge that some of the legal obstacles discussed would be, if not insurmountable, certainly very challenging from a prosecutorial perspective. Nonetheless, despite the availability of other potential avenues for addressing widespread deforestation, international criminal law has something to add. Ideally, it would not fall to international criminal law to protect the environment; however, in circumstances where other methods seem ineffectual in curtailing mass environmental harms of

[3] M Sarliève et al, 'Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to Present' (October 2021) <https://www.researchgate.net/publication/365201912_Legal_Experts'_Report_to_the_Office_of_the_Prosecutor_of_the_International_Criminal_Court> (Legal Report).

[4] RF Stuart-Smith et al, 'Global Climate Change Impacts Attributable to Deforestation Driven by the Bolsonaro Administration: Expert Report for Submission to the International Criminal Court' (August 2021) <https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/ICC_report_final-sept-2021.pdf> (Climate Report).

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this nature, it is to be hoped that potential liability under international criminal law might have some beneficial deterrent effect.

The aim of this article is to tease out the limits of Article 7 of the Rome Statute, as presently drafted, in order to determine whether it is possible to categorize the unavoidable consequences of mass deforestation as a 'crime against humanity' before the ICC. If, even in cases where the impact and damage caused by mass deforestation practices are of the scale described in the Legal Report, these limitations were insurmountable and this approach rejected, this would at least confirm the existence of a legal vacuum and the urgent need to amend the existing international legal framework accordingly.[5] This would support those advocating for the creation of instruments with sufficiently strong deterrent effects to prevent such practices and help address the exponential increase of environmental destruction taking place at local, regional and global levels. This could include—for example—an amendment to the Rome Statute to include ecocide as a fifth crime under the jurisdiction of the ICC, or the creation of an International Court for the Environment.[6]

Article 7 of the Rome Statute is the most obvious choice for the prosecution of mass deforestation practices in the Brazilian context. War crimes, and hence Article 8 of the Statute, are irrelevant given the absence of an armed conflict in Brazil.[7] Likewise, the absence of an act of aggression automatically excludes the application of Article 8*bis*. It was also decided not to develop the analysis based on Article 5, given the heavy evidential burden of proving the genocidal intent of the alleged perpetrators.[8] Article 7 is thus the sole legal basis that provides sufficient flexibility to allow for the inclusion of environmental crimes within its scope. As Gillett has noted, Article 21(1)(b) of the Statute leaves room for such flexibility.[9]

The prospects for such a creative interpretation of Article 7 will be tested in the light of the situation in the Brazilian Legal Amazon, which was identified in

[5] M Sarliève, 'Ecocide: Past, Present, and Future Challenges' in L Filho et al (eds), *Life on Land. Encyclopedia of the UN Sustainable Development Goals* (Springer 2021).

[6] See, eg, 'ICE Coalition, 'ICE Coalition: Creating the International Court for the Environment' <http://www.icecoalition.org/>.

[7] For a discussion on the inherent difficulties of Article 8 of the Rome Statute to allow for the prosecution of mass deforestation practices committed in the context of an internal armed conflict, see P Martini and M Sarliève, 'Fighting Deforestation in Non-International Armed Conflicts: The Relevance of the Rome Statute for Rosewood Trafficking in Senegal' (2022) 11(1) TEL 95.

[8] For developments on the alleged commission of genocide in the Brazilian Legal Amazon, see the Article 15 Communication filed by two Brazilian non-governmental organizations: Comissão de Defesa dos Direitos Humanos Dom Paulo Evaristo ARNS and Colectivo de Advocacia em Direitos Humanos, 'Informative Note to the Prosecutor: International Criminal Court pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into Incitement to Genocide and Widespread Systematic Attacks against Indigenous Peoples by President Jair Messias Bolsonaro in Brazil' (November 2019) <https://apublica.org/wp-content/uploads/2019/11/e-muito-triste-levar-um-brasileiro-para-o-tribunal-penal-internacional-diz-co-autora-da-peticao.pdf>.

[9] M Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (CUP 2022) 44–9.

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2018 as a situation that could fall under the jurisdiction of the ICC.[10] This case study aims to identify the legal obstacles that prevent the prosecution of mass deforestation as a crime against humanity, with a particular focus on persecution and other inhumane acts under Article 7(1)(h) and (k) of the Rome Statute. The analysis will highlight that the roots of these obstacles may lie in the anthropocentric nature of Article 7. Reflections on such a creative interpretation of Article 7(1)(h) and (k) will then be offered.

This approach allows a contribution to be made to existing scholarship on the prosecution of environmental harm before the ICC in three respects. First, as it focuses on mass deforestation practices exclusively and does not cover environmental harm as a whole, this article offers a unique, tailored reading of Article 7, which emphasizes the connection between deforestation and human suffering, and hence how such practices may constitute crimes against humanity. In this respect, the article provides the first comprehensive case study of the application of Article 7, and particularly of the crimes of persecution and other inhumane acts, to mass deforestation. Secondly, the application of Article 7 to a concrete set of events helps illustrate difficulties identified in the literature regarding the application of Article 7 to environmental harm, which result from the anthropocentric nature of the Rome Statute. Thirdly, the practical lens adopted allows going beyond existing scholarship in order to propose (and assess) a novel reading of Article 7 that permits the prosecution of mass deforestation as crimes against humanity and offers a detailed consideration of the elements of the crimes of persecution and other inhumane acts. This article is timely, given that the protection of the environment through the means of criminal law is on the agenda of various organizations including the European Union (EU),[11] the Council of Europe[12] and the Colombian Special Jurisdiction for Peace;[13] and at a time when new light is being shed on discussions concerning ecocide in the context of the war in Ukraine.[14] It thus has the potential to inform current debates.

The article is structured as follows. First, the inherent limits of international criminal law for the criminalization of mass deforestation as crimes against humanity are explored, and it is asked why individuals cannot be held

[10] T Caroccia, 'Rescuing the International Criminal Court: Crimes against Humanity and Environmental Destruction' (2018) 70 RutgersULRev 1167, 1189–92.

[11] European Parliament, Rapporteur Antonius Manders, 'Report on the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and replacing Directive 2008/99/EC (COM(2021)0851 – C9-0466/2021 – 2021/0422(COD)) Committee on Legal Affairs (28 March 2023) A9-0087/2023.

[12] Council of Europe, 'Negotiations Start in Strasbourg on a New Convention on the Protection of the Environment through Criminal Law' (Council of Europe Portal, 3 April 2023) <https://www.coe.int/en/web/human-rights-rule-of-law/-/negotiations-start-in-strasbourg-on-a-new-convention-on-the-protection-of-the-environment-through-criminal-law-2>.

[13] See Section IV.

[14] See L Neyret, 'Réveiller l'écocide' (2022) 4 RSC 767. See also his work on ecocide in L Neyret, 'From Ecocrimes to Ecocide. Protecting the Environment through Criminal Law, C-EENRG Report 002' (C-EENRG 2017) <https://www.ceenrg.landecon.cam.ac.uk/report-files/report-002>.

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criminally responsible for the regional and global impacts caused by such practices. Secondly, the main challenge arising from the contextual element of Article 7 of the Rome Statute for establishing individual criminal responsibility for the local impacts is discussed, namely how to establish that a civilian population was a primary target of the attack against the environment rather than being an incidental victim of such an attack. Thirdly, the article examines whether the crimes of persecution under Article 7(1)(h) and other inhumane acts under Article 7(1)(k) can be used to prosecute mass deforestation, focusing on its resulting severe violations of the fundamental right to a healthy environment for the purpose of Article 7(1)(h), and the great suffering caused by the destruction of the environment for the purpose of Article 7(1)(k). Finally, a brief conclusion is offered reflecting on these suggested approaches in light of the existing legal framework.

II. Inherent Limits of International Criminal Law and the Criminalization of Mass Deforestation as a Crime Against Humanity

Although mass deforestation has tragic impacts[15] on civilian populations in Brazil and elsewhere, individuals cannot be found criminally liable under the Rome Statute. It is argued that mass deforestation and other cases of environmental destruction involving similar widespread and long-lasting effects could and should lead to criminal liability for certain (local) consequences of their acts, but not for other regional and global consequences. This results from two of the most basic requirements of criminal law, which impose a high standard of proof on the prosecution.[16] The first relates to one of the material elements (*actus reus*) of result-crimes, the existence of a nexus between the act and the harm allegedly arising from that act; the second relates to the mental element (*mens rea*) of the offences considered.

A. The Local, Regional and Global Impacts in Cases of Environmental Destruction

The destruction of the Brazilian Legal Amazon, and deforestation more generally, cause a series of impacts that can be categorized as local, regional and global.

At the local level, the destruction of the Brazilian Legal Amazon, driven by mining, logging, resource diversion and cattle-ranching, affects populations living in the rainforest or along the rivers in numerous ways. These activities severely impair their access to water, food and economic subsistence; their

[15] Please note that the terms 'impacts', 'effects', 'consequences' and 'harms' are used interchangeably.

[16] L Prosperi and J Terrosi, 'Embracing the "Human Factor". Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes against Humanity?' (2017) 15(3) JICJ 509, 517.

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health; their cultural, spiritual and traditional life; and their physical integrity.[17] These same drivers generate negative effects on a regional scale, reportedly causing air pollution and a decrease in rainfall across the whole South American subcontinent and disrupting the electricity supply and agricultural productivity, which in turn affects energy and food security throughout South America.[18] Finally, the consequences of mass deforestation impacts climate change globally, and will continue to increase—as shown by, for example, extreme weather, sea-level rise and glacial retreat, all of which threaten human life, health and socio-economic security on a global scale.[19] In the summers of 2022 and 2023, unprecedented numbers of heatwaves and wildfires occurred throughout Europe, North Africa and the Middle East, whilst other parts of the world also experienced heavy rainfall, flooding and landslides, accompanied by a global rise in temperature.

The number of people directly or indirectly impacted by mass deforestation is therefore significant. Under the Rome Statute, however, criminal responsibility cannot be imposed in respect of all these potential victims. International criminal law requires evidence of causation between one's act(s) or conduct and the resulting harm, as well as evidence of one's intent to cause the resulting harm. Even if, with a healthy dose of legal creativity, these challenging requirements might be met for those impacted locally, causation and intent are too remote for the entire populations generally affected on a regional and global levels, as shown below.

B. Causation

Just as there can be clear obstacles to establishing a cause-and-effect relationship between a given act and 'its environmentally harmful outcome', difficulties arise when establishing the requisite nexus between the act and the harm caused to human populations. Proving causation in respect of regional and global harms resulting from environmental destruction poses acute challenges from scientific and evidential perspectives.[20] To prosecute individuals successfully for the regional and global impacts resulting from environmentally destructive practices such as mass deforestation, one would have to demonstrate: the criminal nature of the acts attributed to the individual; how and to what extent these acts have contributed to mass deforestation; how and to what extent mass deforestation has had regional and global impacts; and how and to what extent these regional and global impacts have contributed to the harm inflicted on human populations.

The causal link between environmental harm and the resulting death that is required to establish the *actus reus* for the purposes of the crime of murder under

[17] Legal Report (n 3) paras 123–207.
[18] ibid, paras 208–220; Climate Report (n 4) 63–9.
[19] Climate Report ibid 26–61.
[20] See Gillett (n 9) 161–201.

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Article 7(1)(a) applies to any other crimes defined under the Rome Statute.[21] This high threshold renders unlikely the successful prosecution of individuals for regional and global effects resulting from environmental destruction.

In the example of the Brazilian Legal Amazon, the first step would be to establish that the policies designed and implemented during the Bolsonaro administration removed obstacles to mass deforestation, encouraged all the well-known factors that drive deforestation, and, ultimately, contributed to climate change, knowingly or not.[22] For instance, in order to prove criminal liability for deaths resulting from heatwaves—and thus be able to bring charges of murder under Article 7(1)(a) of the Rome Statute, assuming that the contextual elements of the provision were met—the OTP would have to demonstrate that the deaths were the result of the policies designed and implemented. This would be impossible, as not only is the link too remote, but such climate change-generated events cannot be attributed exclusively to deforestation and even less so to deforestation of the Brazilian Legal Amazon during a given period of time. Indeed, climate change results from excessive greenhouse gas emissions, some of which *are* caused by mass deforestation, but not in such proportion as would warrant holding individuals criminally responsible for it. Whilst the Climate Report demonstrated that the policies adopted during Bolsonaro's four-year term led to an increased volume of greenhouse gas emissions and the catastrophic impact that this could have if continued,[23] this is just one factor amongst many others that contribute to global warming. In other words, the responsibilities for climate change in general and heatwaves in particular are diluted, precisely because they involve various actors and a combination of factors.

The same is true for impacts at a regional level. For example, re-routing a river in one area of the country may lead to drought in another; this in turn could result in deaths due to starvation, disease or lack of sanitation, yet by any measurement the link between the disruption of the river and the subsequent deaths would be too remote to yield a successful prosecution.

This high threshold means that individuals who are direct or indirect victims of the effects of mass deforestation practices at the regional and global levels will not qualify as victims for the purpose of the Rome Statute and will not be able to obtain reparations before the ICC.[24]

[21] *Prosecutor v Jean-Pierre Bemba Gombo* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009) para 132.

[22] Climate Report (n 4) 14–15. As discussed in detail in the Legal Report (n 3), mass deforestation and other harmful environmental practices increased dramatically during Bolsonaro's term in office.

[23] ibid 13–23.

[24] See ICC, *Rules of Procedure and Evidence* (2013) Rule 85(a); *Prosecutor v Thomas Lubanga Dyilo* (Annex A to Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 Order for Reparations (amended)) ICC-01/04-01/06-31-AnxA (7 August 2012) para 59. See also *Prosecutor v Thomas Lubanga Dyilo* (Corrected Version of the 'Decision Setting the Size of the Reparations Award for which Thomas

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C. Intent

Another obstacle to there being criminal liability for regional and global consequences resulting from mass deforestation lies in the difficulty of demonstrating the requisite *mens rea*.

Article 30 of the Rome Statute specifies the *mens rea* element to be attached to the consequence element of the *actus reus* in cases of result-crimes such as murder (Article 7(1)(a)), persecution (Article 7(1)(h)) and other inhumane acts causing great suffering (Article 7(1)(k)). Article 30 distinguishes between the intent and the knowledge of the accused, both being necessary for a conviction.

For these purposes, the accused must intend to cause the consequences or be aware that they will occur in the ordinary course of events.[25] This has been interpreted as setting a standard of virtual certainty—also known as oblique or indirect intention—which is higher than a mere likelihood or possibility.[26] It means that

> [T]he person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur.[27]

As regards knowledge of such consequence, Article 30(3) perhaps redundantly states that the accused must be aware that the consequence will occur in the ordinary course of events. So, for someone to be found liable for causing a consequence such as death, great suffering or serious injury, it must be proven the person intended that consequence or was aware that their acts would necessarily bring about that particular unintended result, and that they decided to act regardless. This standard applies irrespective of the mode of liability under Article 25 of the Rome Statute.

This standard of *mens rea* is too stringent to permit the successful prosecution of individuals for regional and global harms resulting from mass deforestation. The situation in Brazil will now be considered again, where the policies designed and implemented removed all obstacles and encouraged the causes of deforestation. As mentioned above, deforestation contributes to climate change, which causes heatwaves, which result in the death of individuals. To hold the author of such policies responsible for these deaths, one would have to demonstrate not only a clear causal link between those policies and these deaths, but also that those policies either intended these deaths by heatwaves

Lubanga Dyilo is Liable') ICC-01/04-01/06 (21 December 2017) para 42; *Prosecutor v Germain Katanga* (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07 (24 March 2017) para 162; N Milaninia, 'Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm' (2019) 50(2) ColumHumRtsLR 116, 129.

[25] Rome Statute (n 1) arts 30(2)(b), 30(3).

[26] *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) paras 775–776 (*Katanga* Judgment).

[27] ibid, para 777.

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to happen, or that they were anticipated as being a virtually certain consequence of them.

Just as with the nexus between the act and the harm, the nexus between the harm and the policy maker's intention to cause such harm or knowledge that such harm could occur in the ordinary course of events as required by Article 30 is too remote to secure a criminal conviction. Even if it could be proved that there was awareness of the risk, and thus it was anticipated that such policies *might* result in the death of individuals at some point due to climate change, it would remain (at best) a likelihood rather than a virtual certainty from the perpetrator's point of view. And, in the extremely rare situation where oblique intention might possibly be established, the issue of the nexus would remain, regardless of the mode of liability envisaged.

This, then, leads to the same conclusion as in respect of causation. Under the current state of international criminal law, it is very difficult to imagine how a defendant could be found criminally responsible for regional and global harms resulting from mass deforestation, including climate change. That, however, is not to say that the regional and global harms resulting from environmental destruction are entirely irrelevant as far as the Rome Statute is concerned.

D. Gravity: The Relevance of Regional and Global Harms when Prosecuting Mass Deforestation Practices as Crimes against Humanity

As part of its preliminary examination, and prior to opening an investigation, the OTP is required to examine whether potential cases concern matters sufficiently grave to justify their admissibility before the Court,[28] 'within the context of the situation at hand'.[29] This includes conducting a gravity assessment, which bears upon the determination of whether the opening of an investigation would be contrary to the interests of justice.[30]

The assessment is fact-sensitive,[31] and based on different criteria, including the scale and nature of the crimes likely to be investigated; the manner in which they were carried out, assessed by considering the vulnerability of victims, the existence of discriminatory motives, and whether the crimes resulted from a plan or organized policy; and the impact of the crimes, measured by reference to, inter alia, the suffering endured by the victims, their increased vulnerability, and, notably, whether environmental damage was inflicted.[32] It

[28] Rome Statute (n 1) arts 53(1)(b), 17(1)(d).

[29] *Situation in the Republic of Kenya* (Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) para 48.

[30] Rome Statute (n 1) art 53(1)(c).

[31] OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia* (Final decision of the Prosecutor concerning the 'Article 53(1) Report') ICC-01/13-6-AnxA (6 November 2014), as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019.

[32] OTP, 'Policy Paper on Preliminary Examinations' (November 2013) paras 62–65.

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is worth stressing that the crucial role of an accused in the adoption and implementation of a policy to carry out an attack has previously been recognized as an important factor.[33] As Gillett has noted, 'anthropocentric interests have been the primary focus of gravity assessments', thus leaving it unclear 'how environmental harm *per se* would be measured in terms of gravity, given that environmental harm will not necessarily involve individual human victims'.[34] Relying on the *Al Mahdi* case, where the Prosecutor connected the seriousness of the destruction of cultural heritage with the infliction of 'irreparable damage to the human persons in his or her body, mind, soul and identity',[35] Gillett has argued that such an emphasis on human suffering could prevent environmental harm from meeting the gravity threshold 'except in the most extreme cases'.[36]

However, the situation in the Brazilian Legal Amazon demonstrates that the above factors do not necessarily prevent a situation involving environmental harm from meeting the gravity threshold established in the Rome Statute. This is for two reasons. First, the criteria focus on the crimes per se and how they were committed, rather than on the 'type' of harm that resulted from them. Secondly, environmental harm cannot be—nor should it be—separated from its intrinsic impact on human beings, and particularly on local populations who rely on the environment, hence linking that environmental harm to human suffering. On this basis, it is argued that the situation in the Brazilian Legal Amazon satisfies the gravity threshold set in the Rome Statute given, inter alia, the geographical and temporal scale of the alleged crimes; the role of those responsible for the adoption and implementation of the State policy, acting in an official capacity; the discriminatory nature of the acts, being anti-Indigenous and anti-traditional populations; and the particular vulnerability of 'Environmental Dependents and Defenders'—a category of persons considered in the section that follows, and whose rights and interests are not protected efficiently in Brazil.[37] Additionally, the ICC must interpret the Rome Statute in accordance with internationally recognized human rights,[38] violations of which have been found by domestic courts when States breach their treaty obligations in relation to climate change.[39] It is important to recall, in this context, that Brazil ratified the Framework Convention on Climate Change in 1994 and the Paris Agreement on Climate Change in 2016, which commits States to limiting the global average temperature increase to 1.5°C or at most 2.0°C.

[33] *Prosecutor v Charles Blé Goudé* (Decision on the Defence Challenge to the Admissibility of the Case against Charles Blé Goudé for Insufficient Gravity) ICC-02/22-02/11 (12 November 2014) para 20.

[34] Gillett (n 9) 69–70.

[35] *Prosecutor v Ahmad Al Faqi Al Mahdi* (Prosecutor Fatou Bensouda, 'Arguments for Prosecution at Confirmation Hearing in case of Prosecutor v. Al Mahdi') ICC-01/12–01/15 (1 March 2016).

[36] Gillett (n 9) 71.

[37] Legal Report (n 3) paras 282–417, esp 352–400.

[38] Rome Statute (n 1) art 21(3).

[39] Legal Report (n 3) paras 460–468.

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III. Prosecuting Mass Deforestation as a Crime Against Humanity under Article 7 of the Rome Statute

Prosecuting individuals under the Rome Statute for local harms caused by mass deforestation as crimes against humanity also raises difficulties. This is because Article 7 of the Rome Statute requires evidence of an attack against a civilian population, which should be the primary target of such attack. The anthropocentric core of Article 7 appears to subordinate environmental harm to human suffering, requiring a link between the two in order for conduct to fall within the scope of the provision, therefore leading to a de-prioritization of environmental harm when compared with human suffering.[40] However, it has not yet been discussed in the academic literature how this difficulty arises in the context of concrete scenarios and how it could be overcome, which will be addressed below.

A preliminary point concerns the use in this article of the term 'Environmental Dependents and Defenders' to define the civilian population under attack. 'Environmental Dependents' refer to individuals whose survival depends on the environment, whilst 'Environmental Defenders' encompasses 'individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna'.[41] This is based on the connection between the population and the environment which, in the absence of a reconceptualization of the anthropocentric character of the Rome Statute, has the advantage of not only showing the intrinsic connection between environmental harm and human suffering, but also places environmental harm at the centre of the analysis. It is also in line with a recent article by Neyret, who presents the concept of planetary habitability as a universal value, which this proposed approach would also support.[42] The jurisprudence of the ICC does not oppose this approach; the 'civilian population' requirement has always been understood broadly, as shown in the *Situation in Afghanistan* case.[43]

A. *Determining against Whom an Attack Has Been Directed*

Under Article 7, a series of acts including murder, persecution and other inhumane acts may qualify as crimes against humanity if they take place within the context described in Article 7(1) and further defined in Article 7(2)(a), also referred to as 'the chapeau requirement'. The 'chapeau requirement'

[40] Gillett (n 9) 79.

[41] UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Michel Forst' (3 August 2016) UN Doc A/71/281, para 7.

[42] Neyret (n 14).

[43] See *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 (12 April 2019) para 64.

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may be divided into three main elements.[44] First, there must be an attack directed against any civilian population 'pursuant to or in furtherance of a State or organizational policy'.[45] Secondly, the attack must be of a widespread or systematic character; the former characteristic 'adverts to the large-scale nature of the attack', and the latter 'reflects the organised nature of the acts of violence'.[46] Thirdly, a nexus must be established between the widespread or systematic attack and an act within the ambit of Article 7, which means that acts enumerated under Article 7(1) must be part of such an attack.[47] Moreover, the perpetrator of the act must 'knowingly participate in the attack directed against a civilian population'.[48] The perpetrator does not need to know the specific details of the attack; knowledge of the attack as a whole is sufficient.[49]

This article will focus on the first element of the chapeau requirement. It requires the prosecution to establish the existence of an attack directed against any civilian population, which has been defined as a 'course of conduct involving the multiple commission of acts referred to in [Article 7 (1)] … pursuant to or in furtherance of a State or organizational policy to commit such attack'.[50] This requirement may be divided into three component parts, which require the OTP to demonstrate the existence of: (i) the multiple commission of acts enumerated under Article 7(1); (ii) a civilian population against whom such acts are directed; and (iii) a State or organizational policy pursuant to or in furtherance of which such acts are committed.

The first and the third components of this first element of the chapeau requirement do not raise difficulties that are worth detailing here. As has been argued elsewhere, '[e]nvironmental destruction such as the pollution of drinking water or destruction of a food source caused as a side effect of an entity's action could amount to an attack' on the ground that:

> An 'attack' can encompass any type of mistreatment of civilians listed under Article 7, not just an armed or violent attack. This is because the language 'course of conduct' that describes this action under Article 7 does not limit an 'attack' to a certain type of behaviour.[51]

In Brazil, numerous acts endangering human life and health were documented by local media and human rights non-governmental organizations, amounting, in the view of the authors, to murder, persecution and other inhumane acts. Although the qualification of the conduct as particular crimes for the purpose

[44] *Katanga* Judgment (n 26) paras 1097–1099.
[45] Rome Statute (n 1) arts 7(1), 7(2).
[46] *Katanga* Judgment (n 26) para 1098.
[47] ibid, para 1124.
[48] ibid, para 1125.
[49] ibid. See also *Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014) para 214; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para 167.
[50] Rome Statute (n 1) art 7(2).
[51] C Lambert, 'Environmental Destruction in Ecuador: Crimes against Humanity under the Rome Statute' (2017) 30 LJIL 707, 721.

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of Article 7(1)(a), (h) and (k) sometimes appears challenging, as is addressed below, the existence per se of multiple acts that could qualify as those enumerated under Article 7(1) is not a problem at this stage.

Similarly, there seems to be a sufficient connection between the exponential growth in deforestation rates in Brazil and the commencement of Bolsonaro's tenure to show that the attack is committed pursuant to and in furtherance of a State policy. As set out in detail in the Legal and Climate Reports, the numbers started increasing shortly after the adoption of a series of measures simultaneously aimed at allowing for the unbridled destruction of the rainforest and exploitation of its natural resources and undermining institutions and norms protecting the rainforest and the populations depending upon it, such as Indigenous Peoples.[52]

By contrast, the second component is more problematic. Article 7(1) requires the attack to be 'directed against any civilian population'. This requirement was long interpreted as meaning that '[t]he civilian population must be *the primary target and not the incidental victim* of the attacks'.[53] Whilst the ICC Appeals Chamber recently found that it does not necessitate 'a separate finding that the civilian population was the primary object of the attack',[54] it remains important to demonstrate that an attack was indeed directed against a civilian population.

This requirement poses difficulties in cases involving environmental destruction, as it may be complicated to escape the conclusion that the attack is primarily directed against the environment and that the suffering of the civilian population is merely an incidental consequence. Indeed, the acts facilitating or causing environmental destruction (such as land-grabbing, logging, mining, resource diversion, cattle-ranching, and wildlife trafficking, to name but a few) show that the primary target *is* the environment, and that it is the exploitation of the natural resources which is intended. Thus, in this context, the mental and physical suffering of the population dependent upon that environment for survival—'Environmental Dependents'—could be seen as collateral effects, meaning that the attack in question falls outside the ambit of the Rome Statute. *A fortiori*, victims of regional and global impacts caused by mass deforestation would also be excluded from the scope of Article 7. It must also be conceded that, at least in respect of some of such activities, there are arguable economic and development justifications, which may go to the issue of whether there is an 'attack' at all.

This situation has to be distinguished from that of those termed 'Environmental Defenders' such as, in Brazil, Indigenous leaders and federal agents, who have allegedly been killed and subjected to death threats because

[52] Legal Report (n 3) esp paras 67–80; Climate Report (n 4) 5–6.

[53] *Katanga* Judgment (n 26) para 1104 (emphasis added).

[54] *Prosecutor v Bosco Ntaganda* (Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled 'Judgment') ICC-01/04-02/06 A A2 (30 March 2021) para 418.

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of their opposition to the full exploitation and destruction of the rainforest. If such Environmental Defenders constituted the primary target of the attack, it would then have to be conceptually limited to a campaign of intimidation and murder against this much smaller set of individuals and disregard the practices against the environment as such. It is questionable, though, whether the gravity threshold could be satisfied if the focus was on Environmental Defenders only, and not also on Environmental Dependents.

However, the situation of populations similar to that of Environmental Dependents in Brazil should not be excluded from the scope of Article 7, given the disastrous and deadly impacts of environmental destruction on particularly vulnerable civilian populations.[55] It is therefore possible to argue that attacks directed against the environment are also directed against people depending upon that environment.

Yet such argument cannot stand on its own if the third chapeau requirement —the perpetrator's knowledge that their acts are part of the attack—is to be satisfied. This is because these elements are interrelated. Indeed, whilst the existence of the attack per se is not subordinated to this third element, there cannot be any prosecution for such an attack if it is not established that the accused knew that their acts were part of that attack, which necessarily implies that they knew about the attack as a whole. Thus, if one were to consider that an attack against the environment is an attack against a civilian population, the question arises whether the requisite knowledge of the accused could be limited to knowledge that their acts formed part of an attack against the *environment alone*, or whether it must extend to knowledge that their acts were an attack against the environment, *which in turn implied* that that attack was also directed at a civilian population.

Two different ways to address these issues have been identified, depending on whether one considers that an attack against the environment is an attack against a civilian population from an objective or subjective point of view.

B. Establishing an Objective Knowledge Requirement

The first option is to look at the characterization of the attack from an objective, material standpoint, as adopted in the Legal Report. The ground for doing so is that an attack against a given environment is an attack against the civilian population depending upon that environment *because of* objective, material factors such as the fact that the population depends on it for its socio-economic and cultural survival and history; in the same way the fate and faith of Indigenous peoples and ethnic or traditional communities living in the Brazilian rainforest are tied to that of the Amazon.

If this interpretation is adopted and allows for the prosecution of crimes against nature as crimes against humanity, then the knowledge requirement

[55] Climate Report (n 4).

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would also need to follow a similar path. In this respect, Lambert argued that objective knowledge could be set as a standard:

> In peacetime, the human costs of environmental damage are an unwanted 'side effect of cost-effective production methods', but this does not prohibit the Prosecutor from establishing that the accused knew that his or her acts were contributing to the environmental destruction that constitutes the overarching attack. The accused does not need to 'want' an inhumane act, but only know of the broader attack. Thus, it is enough that the accused was aware of the environmental destruction. As such, the element of objective knowledge is a low bar that the Prosecutor can establish in situations where the accused knows about the environmental destruction that constitutes the attack.[56]

This approach has the advantage of simplicity and swiftness of application because it does not touch upon the current structure of the chapeau requirement of Article 7. The knowledge requirement would be maintained as the general intent of the perpetrator rather than a specific subjective element of the offence.[57]

C. Shifting the Focus from 'Primary' Victim to 'Intentional' Victim?

The second option for considering attacks against the environment as crimes against a civilian population is to adopt the approach taken by ICC Judge Chile Eboe-Osuji, who argued that the test under Article 7(1) should not be whether a civilian population is the primary target of the attack, but 'whether the civilian population was *intentionally* targeted in the attack, notwithstanding that they may not have been the *primary* object of the attack', which he contended 'is consistent with the classic theory of *mens rea* in criminal law'.[58] Intention would need to be read in the light of Article 30, meaning that the accused would need to intend to target a civilian population, or would be aware that a civilian population will be targeted in the ordinary course of events. It is argued that this could be proven in cases such as that of Brazil, where the environmental destruction and its consequences for local populations are well known, addressed in national laws and decrees, broadly covered by national and international media, and reflected in the institutional structure of the State.[59]

[56] Lambert (n 51) 725.

[57] See K Ambos, *Treatise on International Criminal Law*, vol 1: *Foundations and General Part* (OUP 2013) 280; G-JA Knoops, Mens Rea *at the International Criminal Court* (Brill 2016) 122.

[58] C Eboe-Osuji, 'Crimes against Humanity: Directing Attacks against a Civilian Population' (2008) 2 AfrJLegalStud 118, 122.

[59] Legal Report (n 3) paras 282–293 (local communities in general) and 161–168 (Indigenous communities in particular). In a case concerning the Ogiek Community in Kenya, the African Commission on Human and Peoples' Rights has recently ruled that 'the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples. As confirmed, the right to property includes not only the right to have access to one's property and not to have one's property invaded or encroached upon but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.' *African*

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This approach would be compatible with the knowledge requirement, which would then be as follows. Under Article 30(3), 'knowledge' means awareness that a circumstance exists or that a consequence will occur in the ordinary course of events. In the current scenario, the attack against the civilian population is a consequence of an attack against the environment rather than a 'circumstance'; as stated previously, the environment itself is the primary target of the attack. Thus, one would need to ask whether the accused was aware that the civilian population would be targeted in the ordinary course of events. This would echo the additional layer of *mens rea* proposed in this interpretation, which focuses on whether the civilian population was an intentional victim of the attack.

Whilst this second interpretation would slightly modify the structure of the chapeau by introducing an additional *mens rea* requirement and would further burden the OTP, the introduction of an additional subjective element within the chapeau requirement offers greater protection for the accused.

Discussion will now turn to the substantive crimes against humanity which, it is argued, are being committed in the context of the destruction of the Brazilian Legal Amazon. In this respect, the Legal Report[60] focused primarily on persecution and other inhumane acts, as these are the offences which have arguably occurred on the largest scale, and which also offer the potential to link the destruction of the environment to the substantive offence more directly than many of the other categories of crimes against humanity can.

IV. Prosecuting Specific Conduct under the List of Crimes in Article 7(1)

As noted, the focus of this discussion is on two crimes against humanity: persecution and other inhumane acts.[61] Although there have undoubtedly been murders and other acts of violence committed in the context of the destruction of the Brazilian Legal Amazon, against both Environmental Dependents and Defenders, it is not clear that these are of a sufficiently widescale nature to satisfy either the chapeau requirement of Article 7(1) or a gravity assessment. On the other hand, it appears that the destruction of the rainforest has led to widespread deprivation of the enjoyment of all fundamental rights falling under the scope of the right to a healthy environment by Indigenous, traditional and ethnic communities.[62] For this

Commission on Human and Peoples' Rights v Republic of Kenya App No 006/2012 (African Court on Human and Peoples' Rights, 23 June 2022) paras 109ff.

[60] See Legal Report (n 3).

[61] H Brady and D Re, 'Environmental and Cultural Heritage Crimes: The Possibilities under the Rome Statute' in M Böse et al, *Justice without Borders: Essays in the Honour of Wolfgang Schomburg* (Brill 2018) 131–3.

[62] These communities include the *Quilombolas* (the descendants of Afro-Brazilian slaves who escaped from slave plantations that existed in Brazil until abolition in 1888), *Ribeirinhos* (self-dependent communities who live along the riverbanks), *Extrativistas* or *Seringueiros* ('rubber tappers', communities who remove non-timber forest products without felling the trees) and landless rural workers and their families, who have been marginalized by the intense

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reason, the possible relevance of the crime of persecution needs to be considered.[63]

One obstacle to prosecuting under the crime of persecution, however, is the need for an act of persecution to have been committed 'in connection with' another crime against humanity under Article 7: given that there has been a comparatively small number of such crimes, this reduces the potential crime-base in respect of the offence of persecution. To circumvent this, it might be asked whether the great suffering caused by the destruction of the forest could constitute an 'other inhumane act' under Article 7(1)(k), because, if it could, the pool of crimes against humanity 'in connection with' which the crime of persecution could be committed would expand significantly.

A. Article 7(1)(h): Persecution

Leaving aside the chapeau and *mens rea* requirements, the Elements of Crimes, which pursuant to Article 9 of the Rome Statute assist the ICC in the interpretation and application of the crimes falling under its jurisdiction,[64] provide that the elements of persecution under Article7(1)(h) are: (i) that the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (ii) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; and (iv) the conduct was committed in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the Court.

Elements (ii) and (iii), while not without their complications, are conceptually straightforward when applied to the targeted population in the Brazilian Legal Amazon. There would not appear to be any reason why Environmental Dependents and Environmental Defenders could not constitute an identifiable group for the purposes of the crime of persecution and it is arguable that such groups have been targeted on prohibited discriminatory grounds. Certainly, the Indigenous and traditional populations targeted by the offences in the Amazon represent an easily identifiable group, in respect of whom discrimination is prohibited under international law.[65] As outlined in the Legal Report, these groups depend on the ecosystems of the Brazilian Legal Amazon for water, food, shelter, and often for their religious,

mechanization of agriculture and are often resettled on the fringes of the forest and prevented by the weak system of land governance from owning the land they farm.

[63] In respect of the crime of persecution in the context of environmental harm generally, see Gillett (n 9) 83–6.

[64] ICC, *Elements of Crimes* (2011) <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (Elements of Crimes).

[65] See, eg, UN Declaration on the Rights of Indigenous Peoples: UNGA Res 61/295 (13 September 2007) UN Doc A/Res/61/295, art 2.

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cultural or traditional identities.[66] Any attacks directed against these ecosystems necessarily and intrinsically also constitute attacks against the population dependent upon them. Together with the Brazilian Federal agents willing and able to enforce the rule of law, these groups are responsible for protecting the ecosystems of the Amazon and are therefore viewed as obstacles to be removed by those seeking to gain from the unsustainable exploitation and destruction of the forest and its natural resources. While proving that such a group was 'targeted' is likely to give rise to some of the same issues as in respect of the 'attack' requirement, discussed above, there is no reason to think that this would prove an insurmountable hurdle.

Elements (i) and (iv), however, are potentially more problematic. Element (i) requires that '[t]he perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights'. For the reasons discussed below, the analysis is focused on the right to a healthy environment. Although the precise contours of the right to a healthy environment remain uncertain (a fact that could prove problematic in a criminal trial), it would seem to encompass, at a minimum, the right to a safe and clean environment and the protection of the elements of the natural environment upon which a safe and healthy life depends. In this respect the right is interconnected with the protection of basic human rights such as the right to life, safe water and food, and clean air.[67]

While other, broader formulations of the right are available, the present analysis is based on this reasonably narrow conceptualization of the right. It is notable, however, that regional human rights courts are increasingly identifying the right to property and the right to cultural life as related to, and even as elements of, the right to a healthy environment, and have continued to reaffirm that the protection of rights to land and natural resources remain fundamental for the survival of Indigenous peoples.[68] For example, the Colombian Special Jurisdiction for Peace, a transitional justice tribunal established after the 2016 peace agreement concluded between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC-EP), recently found that a series of acts committed on the lands of

[66] Legal Report (n 3) paras 58–64.

[67] See, eg, A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) EJIL 613, 617, 628; UN Human Rights Council, 'Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Report of the Special Rapporteur' (8 January 2019) UN Doc A/HRC/40/55, para 17.

[68] See, eg, *Advisory Opinion OC-23/17 on State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17 (Inter-American Court of Human Rights, 15 November 2017); *The Indigenous Communities of the Lhaka Honhat Association v Argentina*, Judgment (Merits, Reparations and Costs) (Inter-American Court of Human Rights, 6 February 2020); *Turgut and others v Turkey* App No 1411/03 (European Court of Human Rights, 8 July 2008) para 90; *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 59) paras 109ff.

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Indigenous and Afro-descendant communities affecting the harmonious relationship of the communities with their territory or denaturalizing their ancestral use constituted a grave violation of their fundamental rights, including their right to remain on their territory.[69]

However, centring the analysis on the right to a healthy environment is not without its drawbacks. The first question is whether the ICC could consider such a right to be a 'fundamental right' for the purposes of Article 7(1)(h). In many respects it is of a different nature to the other rights which have previously been considered as such. In *Ntaganda*, the Trial Chamber provided an illustrative list of fundamental rights which included: 'the right to life, liberty and the security of person, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right not to be subjected to arbitrary arrest, detention or exile'.[70]

This list is non-exhaustive. However, it is illustrative of the types of rights considered in connection with the crime of persecution. It does not appear that violation of *any* right could ground a conviction for persecution. Moreover, it can immediately be seen that the violation of many of the rights listed would inherently give rise to another crime under Article 7(1) (eg murder, imprisonment, severe deprivation of physical liberty, torture, etc). This is not necessarily the case as regards the right to a healthy environment and the constituent rights within it, such as the fundamental rights to property or cultural life. This is an important distinction between that right and the rights listed in *Ntaganda*.

Nonetheless, it is argued that the right to a healthy environment is a fundamental right of the nature referred to in Article 7(1)(h). A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights and is therefore essential to the health, well-being and dignity of all human beings, as recently stated by the United Nations (UN). On 8 October 2021, the UN Human Rights Council adopted Resolution 48/13 recognizing 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'.[71] On 28 July 2022, the UN General Assembly (UNGA) adopted (by a recorded vote of 161 in favour and none against, with eight abstentions) a landmark resolution recognizing the right to a clean, healthy and sustainable environment as a human right and calling for greater global efforts to ensure that this principle is upheld.[72]

[69] *Situación Territorial en la Región del Norte del Cauca y del Sur del Valle del Cauca (Auto de Determinación de Hechos y Conductas dentro del Caso No. 05 (Situación Territorial en la Región del Norte del Cauca y del Sur del Valle del Cauca) frente al Primer Grupo de Comparecientes de las CM Jacobo Arenas y Gabriel Galvis)* (Special Jurisdiction for Peace of Colombia, 1 February 2023) Auto No 01 de 2023, 9002794-97.2018.0.00.0001, para G.1.3.4.

[70] *Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019) para 991. See also *Prosecutor v Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15 (4 February 2021) para 2733.

[71] UN Human Rights Council, 'The Human Right to a Clean, Healthy and Sustainable Environment' (18 October 2021) UN Doc A/HRC/RES/48/13.

[72] UNGA Res A/76/L.75 (28 July 2022) UN Doc A/76/L.75.

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The relevance of this right for Indigenous peoples is embedded in both the UN Declaration on the Rights of Indigenous Peoples[73] and the American Declaration on the Rights of Indigenous Peoples.[74] The latter specifies that it includes 'the right to be protected against the introduction, abandonment, dispersion, transit, indiscriminate use, or deposit of any harmful substance that could adversely affect [their] communities, lands, territories and resources', as well as 'right to the conservation and the protection of the environment, as well as of the productive capacities of Indigenous lands or territories and resources'.[75]

The right to a healthy environment has its origins in the 1972 Stockholm Declaration.[76] It is protected at regional and national levels,[77] with the Human Rights Council acknowledging that more than 155 States have recognized this right in some form, inter alia, in international agreements or their national constitutions, legislation or policies. In Brazil, such protection is enshrined in Article 225 of the Constitution, which provides that:

> Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations.

Given that the right to a healthy environment is recognized as a fundamental right for the purposes of Article 7(1)(h), there would seem to be little doubt that the facts outlined in the Legal Report amount to a violation, given the widespread deforestation of the rainforest upon which so many people rely for, inter alia, their food, their water, their lands, their homes and their traditional way of life. The poisoning and re-routing of rivers, contamination of soil, destruction of hunting grounds, depletion of fish stocks and toxification of the air all point to severe violations of this fundamental right.

[73] UN Declaration on the Rights of Indigenous Peoples (n 65) art 29.

[74] American Declaration on the Rights of Indigenous Peoples (OAS, 15 June 2016) AG/RES.2888 (XLVI-O/16) art XIX.

[75] ibid, art XIX(3).

[76] The First Principle of the Stockholm Declaration provides, inter alia, that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being' (United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972); see UN Conference on the Human Environment (15 December 1972) UN Docs 2994/XXVII, 2995/UVII, 2996/XXII.

[77] See, eg, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 24; UN Office of the High Commissioner for Human Rights and League of Arab States, 'Arab Charter on Human Rights' (2004) UN Doc [ST/HR/]CHR/NONE/2004/40/Rev.1, art 38; OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador (17 November 1988) art 11; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (signed 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, preamble. The European Parliament, in its June 2021 resolution on the EU biodiversity strategy for 2030, considered that the right to a healthy environment should be recognized in the EU Charter and that the EU should take the lead on the international recognition of such a right. European Parliament, 'Resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing Nature Back into our Lives' (2021) P9_TA(2021)0277, para 143.

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However, a further difficulty arises in relation to Element (iv), which requires that the persecutory acts are committed 'in connection with' any act referred to in Article 7(1). This is a problem, given the (relatively) small number of reported crimes potentially falling under Article 7 committed against Environmental Dependents and Defenders in the Brazilian Legal Amazon. Although it would appear that many crimes go unreported, reports publicly available suggest that there have been a number of murders (ranging between ten and 30, depending on reports consulted) and possibly forcible transfers, enforced disappearances, enslavement, deprivation of liberty and/or enforced prostitution. The practical difficulty this gives rise to, from a prosecutorial perspective, is that although widescale violations of the right to a healthy environment have been taking place, relatively few of those have been committed 'in connection with' other enumerated crimes against humanity such as murder. Without a connection to such an offence, the violations of the right to a healthy environment do not, of themselves, amount to a crime under Article 7(1)(h).

Persecution is seldom prosecuted as a stand-alone crime. Typically, it is prosecuted when acts of persecution are committed in the context of other widespread crimes against humanity (eg murder, rape, etc) which themselves clearly fall within the jurisdiction of the Court, even if the context of persecution is absent. It is not clear how the Court would view the crime of persecution if the Article 7(1) acts which it was 'committed in connection with' would themselves be inadmissible or fall outside the jurisdiction of the Court (eg because the number of murders fell short of the threshold of a 'widespread' attack or would fail the test of gravity pursuant to Article 17(1)(d)).

In addition, in the *Ntaganda* judgment each of the findings of persecution made by the Trial Chamber related to acts which were themselves 'connected to crimes within the jurisdiction of the Court'.[78] This finding was logically required in order to satisfy Element (iv). However, the Court expressly declined to consider the crime of persecution in situations where no other crime was found to have been committed.[79] This is significant because of the need for a direct link with another crime within the jurisdiction of the Court: the fact that other crimes against humanity were committed by or on behalf of the defendant in *other locations* is insufficient to support a count of persecution in respect of situations where no other crimes against humanity have been committed. Thus, for example, in the Brazilian context, the fact that there were some murders in Roraima will not be sufficient to support charges of persecution in respect of conduct in Pará: this would not satisfy the requirement that the conduct was 'committed in connection with' another crime under the Rome Statute.[80]

[78] *Ntaganda* (n 70) para 1024.

[79] ibid, para 989.

[80] This is not to say that a finding of persecution could not be made in connection with such acts; as the *Ntaganda* (n 70) judgment makes clear, a defendant may be convicted for persecution as a

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This appears to confine the scope of the offence to acts of persecution committed in connection with murder, forced disappearance and similar crimes. It fails to criminalize much of the underlying conduct (eg the destructive impacts of mining, logging, intensive agriculture, etc) and would not effectively address their impact on the environment. It would also reduce the potential crime-base in respect of acts of persecution to such a degree that it may fail to satisfy the 'widespread attack' requirement of Article 7(1) or the gravity threshold of Article 17(1)(d).

It is, then, necessary to consider whether the residual category of crimes against humanity of 'other inhumane acts', provided for in Article 7(1)(k) of the Statute, is potentially applicable.

B. Article 7(1)(k): Other Inhumane Acts

Article 7(1)(k), which prohibits 'other inhumane acts', provides that it is an offence to intentionally inflict 'great suffering' or 'serious injury to body or to mental or physical health' by means of an inhumane act of a character similar to any of the other offences mentioned in Article 7(1).[81]

Because of its open formulation, this has been interpreted as evidencing the intent of the drafters of the Rome Statute 'that Article 7 evolve and expand beyond the drafters' then understanding of the scope of crimes against humanity', allowing for prosecutorial and/or judicial creativity and thus potentially allowing the criminalization of peacetime environmental destruction.[82]

Given the anthropocentric nature of the existing categories of crimes against humanity, it is not suggested that the destruction of the Amazon (and particularly of Indigenous lands) would be a crime against humanity per se, but rather that the great suffering caused by such activities arguably gives rise to a crime against humanity. Of course, successfully establishing that the suffering caused by the environmental destruction of the rainforest could constitute an 'other inhumane act' within the meaning of the Rome Statute would not be without its legal difficulties, and it may be that considerable creativity would be needed to demonstrate that all of the elements of the Article 7(1)(k) offence are met.

direct perpetrator for the killing of *one* man (paras 745–752). Similarly, in *Kupreškić*, the Trial Chamber refused to exclude the possibility that a single act can constitute persecution, provided this act occurred within the necessary context. See *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000) paras 550, 624. The problem, however, is that the need to link the persecution to another offence in this way would give rise to very few potential instances of persecution relative to the extent of the deprivation of the right to a healthy environment.

[81] In respect of the crime of other inhumane acts in the context of environmental harm generally, see Gillett (n 9) 87–8.

[82] Lambert (n 51) 728–9. See also M Saif-Alden Wattad, 'The Rome Statute & Captain Planet: What Lies between "Crimes against Humanity" and the "Natural Environment"?' (2009) 19(2) FordhamEnvtlLRev 265, 273–5, 282.

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However, there does not seem to be any reason in principle why this could not be achieved. While the approach may appear novel, it would require only an incremental development of the existing case law in respect of Article 7(1)(k). In this respect, it is significant that a Pre-Trial Chamber (PTC) has accepted (at least implicitly) that the suffering caused by the destruction of property can amount to an 'other inhumane act'.[83]

Recognizing the suffering caused by environmental destruction (even if only in certain limited contexts) as a crime against humanity would have two principal advantages. First, if the great suffering caused by the destruction of forests and rivers were recognized as a crime against humanity, this would significantly expand the crime-base and the number of potential offences which might fall within the ICC's jurisdiction. This would be relevant both for an assessment of its gravity and also when considering the chapeau requirement of whether there has been a widespread or systematic attack against a civilian population. It would also greatly enhance the number of offences in respect of which the offence of persecution could be considered to have been 'committed in connection with'.

Secondly, utilizing Article 7(1)(k) in this way would have the benefit of placing the environmental damage at the forefront of the Court's analysis, as an element of the crime. Rather than discussing murders and other crimes which happen to have taken place against the backdrop of illegal mining, deforestation and land-grabbing, those very activities would become central to the Court's consideration of crimes against humanity, as being the acts causing the great suffering. This approach therefore offers the advantage of putting environmental destruction at the heart of the crime, albeit the offence would still require the 'great suffering' of a human person before it could be made out.

1. General considerations

In *Kupreškić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) thought that a residual category of crimes against humanity was required because exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.[84] Article 7(1)(k) is narrower in scope than its antecedents in the ICTY and International Criminal Tribunal for Rwanda (ICTR) Statutes,[85] but its purpose is fundamentally the same. The ICC PTC II has recognized Article 7(1)(k) as a residual category, but has held that it 'must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against

[83] *Prosecutor v Muthaura, Kenyatta and Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012) para 279.

[84] *Kupreškić* (n 80) para 563.

[85] *Prosecutor v Katanga and Ngudjola* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) para 450.

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humanity'.[86] Similarly, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) noted that an over-broad interpretation of the residual category of other inhumane acts 'will certainly infringe the rule requiring specificity of criminal prohibitions'.[87]

Article 22 of the Rome Statute, which sets out the principle of *nullum crimen sine lege*, must also be considered. In *Stakić*, the ICTY Appeals Chamber observed that the notion of 'other inhumane acts' is not in itself inconsistent with the principle of *nullum crimen sine lege*, as the latter forms part of customary international law.[88] Nonetheless, it is clear from the Elements of Crimes, Article 22 and the PTC's call for a conservative interpretation of Article 7(1)(k) that there are limits to what might be recognized as an 'other inhumane act' under the Rome Statute, notably through the requirement that the 'act' in question be of a similar nature and gravity to any of the enumerated crimes against humanity as set out in Article 7(1). The need for the underlying act to be a similar *nature* to an existing crime against humanity gives rise to particular difficulties in the context of offences against the environment, given that the focus of Article 7 is on offences committed against human beings.

2. *'Great suffering or serious injury to body or to mental or physical health'*

The first aspect of the first Element requires that '[t]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health'. This is broadly drafted and provides scope to prosecute a much wider array of conduct under Article 7(1) than simply the acts listed in Article 7(1)(a)–(j). There are at least two possible ways in which this could be satisfied in the context of the Brazilian Legal Amazon: (i) that the contamination of waterways, soil and food chains has caused serious injury to body or physical health; and (ii) that the destruction of the forest (particularly on Indigenous lands) has caused 'great suffering' or serious injury to the mental health of Indigenous persons and others who depend on the forest.

First, this Element includes conduct which inflicts 'serious injury to body or to … physical health'. This crime has on occasion been used to prosecute the infliction of serious non-fatal injuries (eg in respect of the victims of deliberate mutilation).[89] In the context of the Amazon, the possibility arises of using, for example, mercury poisoning caused by the contamination of rivers to demonstrate 'serious injury to … physical health'. The health consequences

[86] *Muthaura* (n 83) para 269.

[87] *Prosecutor v Brima et al* (Appeals Judgment) SCSL-2004-16-A (22 February 2008) para 185.

[88] *Prosecutor v Milomir Stakić* (Judgment) IT-97-24-A (22 March 2006).

[89] *Prosecutor v Charles Blé Goudé* (Decision on the Confirmation of Charges against Charles Blé Goudé) ICC-02/11-02/11-186 (11 December 2014) para 120.

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of chemical poisoning are well known,[90] albeit they would require a substantial amount of scientific evidence in order for them to be proved. From a causal and an evidential perspective, it might well be difficult to prove causation and attribute responsibility in respect of pesticide or mercury poisoning of large numbers of the Indigenous population and other Environmental Dependents. In principle, however, it could be demonstrated that mining, intensive agriculture and the consequent pollution of rivers and soil cause serious injury to the physical health of Environmental Dependents.[91] For example, the Second Arrest Warrant for former Sudanese President Omar Al Bashir noted that there were reasonable grounds to believe that forces under the President's control had contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked.[92] While this was in the context of a charge of genocide, involving the deliberate infliction of conditions of life calculated to bring about the group's physical destruction, it is a recognition of the fact that the systematic poisoning of drinking water sources in Darfur constituted a means by which a crime within the jurisdiction of the Court could be committed.

Secondly, and perhaps more ambitiously, it could be argued that the destruction of the Brazilian Legal Amazon (and, in particular, the destruction of Indigenous lands) is causing 'great suffering' to the people who depend on the rainforest. It does not appear that any international criminal tribunal has previously recognized an 'other inhumane act' arising as a result of suffering caused by virtue of the destruction of the environment. However, the ICC has implicitly recognized that the suffering caused by the destruction of property can provide the basis for 'other inhumane acts'[93] and has also, albeit in the context of war crimes, commented upon the harm that can be inflicted on local communities by the destruction of buildings of cultural and religious importance.[94] Moreover, cases before the ICTR and the ICC have established that the offence can be made out where a third party witnesses a perpetrator committing inhumane acts against others and endures great suffering as a result of having witnessed these acts.

Building on this case law, the great suffering caused to Indigenous persons (and perhaps also other Environmental Dependents) by the destruction of their homes, their ancestral lands, their sacred sites and the natural environment upon which they depend for their way of life should satisfy this

[90] See US Environmental Protection Agency, 'Health Effects of Exposures to Mercury' <www.epa.gov/mercury/health-effects-exposures-mercury>.

[91] Such an approach would also meet the defence objection that the acts giving rise to the pollution and contamination are not 'inhumane', as is required for art 7(1)(k). This aspect of the offence is considered in further detail below.

[92] *Prosecutor v Omar Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010).

[93] *Muthaura* (n 83), discussed below.

[94] *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016).

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element of the offence under Article 7(1)(k). Significantly, this approach would be in line with the Inter-American Court of Human Rights' jurisprudence, which has repeatedly underlined the particular connection between Indigenous and Tribal Peoples and their ancestral lands.[95] Recognizing their suffering resulting from the destruction of their lands and natural resources as sufficiently grave to merit criminalization of the conduct from which this suffering originates would, moreover, allow for the effective protection of the right to communal property over their lands and natural resources, which encompasses both the use and enjoyment of these resources.

In *Muthaura, Kenyatta and Ali*, the OTP sought to bring charges concerning 'other inhumane acts' on the basis, inter alia, of the anguish caused as a result of damage to property.[96] In particular, the OTP referred to 'destruction or vandalizing of property and businesses' and 'destroying homes and businesses through acts of arson and looting personal properties'.[97] However, the PTC was not satisfied that the evidence established the requisite 'great suffering' necessary to constitute an 'other inhumane act' because it failed to establish that the acts of destruction caused 'serious injury to mental health', and because nothing was presented 'to the effect of establishing the occurrence, the type and the intensity of the alleged mental suffering caused, in itself, by the loss of property'.[98]

It is significant that the PTC did not rule out the possibility, in principle, that the suffering caused by the destruction of property *could* amount to an 'other inhumane act'. Its finding was clearly driven by the lack of evidence of the effect of such destruction of property on the facts of that case. This highlights the need to present evidence of 'great suffering' or 'serious injury to mental health'. Clearly, the PTC was unwilling to infer this from the mere fact of the destruction of the property, even where the property was the victim's home.[99] It might be that the Court would be even less willing to infer any such harm where the suffering had allegedly been caused by damage to the natural environment. Nonetheless, there is no reason why, if sufficient evidence was adduced, such 'great suffering' could not be proved in respect of the suffering inflicted on Indigenous people and other ethnic or traditional communities whose life, culture, traditions, etc, depend on the environment.

While not a direct comparator, the comments of the ICC in the *Al Mahdi* judgment demonstrate that the Court is alive to the harms that can be inflicted on local communities by the destruction of sacred sites.[100] The defendant had pleaded guilty to a sole count of the war crime of intentionally directing attacks

[95] See Inter-American Court of Human Rights, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources' (2009) <https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>.
[96] *Muthaura* (n 83).
[97] ibid, paras 267–268.
[98] ibid, para 279.
[99] By comparison, the Court has been much more ready to infer that acts of serious physical violence (eg mutilation) against a person's family members will cause great suffering to the person watching the act (see below).
[100] *Al Mahdi* (n 94).

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against ten buildings of a religious and historical character (mausoleums and a mosque) in Timbuktu, Mali. Trial Chamber VIII noted that the buildings in question were 'an integral part of the religious life' of the inhabitants, that they constituted 'a common heritage for the community', and that they were 'frequently visited by the residents' as places of prayer and of pilgrimage.[101] The Chamber noted witness evidence to the effect that the mosques and mausoleums 'were of great importance to the people of Timbuktu', 'reflected their commitment to Islam' and were 'among the most cherished buildings of the city'.[102]

The Chamber therefore considered that 'the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed'.[103] It also observed the status of the sites as UN Educational, Scientific and Cultural Organization (UNESCO) World Heritage Sites[104] and commented that 'UNESCO's designation of these buildings reflects their special importance to international cultural heritage, noting that 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern'.[105] Finally, the Chamber held that the attack appeared to be of particular gravity as the sites' destruction not only affected the direct victims of the crimes, but also people throughout Mali and the international community, and that 'the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place'.[106] Having regard also to the religious motive underlying the crime, the Chamber concluded that 'the crime for which Mr Al Mahdi is convicted is of significant gravity'.[107]

While the context is undoubtedly different, it is not a big leap to recognize that the great suffering caused by such destruction could also ground a charge under Article 7(1)(k), as the protected cultural values referred to in this case may be considered analogous to values which underlie the protection of the natural environment, *a fortiori* in the context of Indigenous and other populations for whom the environment in question has a particular cultural, religious or social value.

It is, moreover, well established that acts of mutilation of, and sexual violence against, close relatives or dead bodies are capable of causing great suffering to the civilian population who witness these acts, and can therefore constitute 'other inhumane acts'.[108] While there is obviously a substantial difference

[101] ibid, para 34. [102] ibid, para 78. [103] ibid, para 79.

[104] It is worth noting that the Central Amazon Conservation Complex (Jaù National Park) in Brazil is on UNESCO's World Heritage list of protected sites. See UNESCO, 'Central Amazon Conservation Complex' <https://whc.unesco.org/en/list/998>.

[105] *Al Mahdi* (n 94) para 46. [106] ibid, para 80. [107] ibid, para 82.

[108] See, eg, *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) para 153; *Prosecutor v Elikzer Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) paras

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between witnessing the destruction of the natural environment and witnessing the killing of a relative or the desecration of a corpse, this case law does at least establish the principle that great suffering can be inflicted *indirectly*, as where a third party witnesses a perpetrator mutilate a family member and endures great suffering as a result of having witnessed this.

Therefore, following the reasoning in these cases and the implicit acceptance of property destruction as an inhumane act in *Muthaura*, it could be argued by analogy that the destruction of Indigenous lands causes great suffering to (or serious injury to the mental health of) Indigenous communities and others affected by such activities. There is no reason to think that this element of the offence could not be established, provided that an evidential basis for a finding of 'great suffering' was put before the Court. This approach finds echoes in the jurisprudence of the Colombian Special Jurisdiction for Peace. In Macro Case No 05 (*Macro Caso 05*), the Tribunal recognized that the policy of social and territorial control maintained by the FARC-EP constituted a progressive and continuous violation of the rights of ethnic communities, including their freedom of movement and right of ancestral development on their territory.[109]

3. *An 'inhumane act' of a character similar to the other acts listed in Article 7(1)—nature and gravity*

The next aspects of the crime are more problematic. The great suffering/serious injury described above must have been inflicted 'by means of an inhumane act',[110] and such act must have been 'of a character similar to any other act referred to in article 7, paragraph 1, of the Statute'.[111]

Both of these requirements present potential difficulties for the use of Article 7(1)(k) to prosecute environmental crimes. On one view, it may be considered that criminalizing deforestation/destruction of the rainforest as an 'other inhumane act' is too big a departure from the other crimes enumerated in Article 7(1), even if it does inflict great suffering on Indigenous populations and others who depend on the forest.

The ICTY and ICTR produced a substantial list of conducts constituting other inhumane acts; this included forcible transfer,[112] sexual and physical violence

462–465; *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003) paras 934–936; *Muthaura* (n 83) para 280. For example, in *Kayishema and Ruzindana*, the Trial Chamber of the ICTR stated there was 'no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends'. In *Kajelijeli*, the Trial Chamber held that the perpetration of gross acts of sexual violence upon a dead woman's body 'would clearly cause great mental suffering to any members of the Tutsi community who observed them'.

[109] *Situación Territorial en la Región del Norte del Cauca y del Sur del Valle del Cauca* (n 69) para G.1.3.5.

[110] Elements of Crimes (n 64) art 7(1)(k), Element 1.

[111] Elements of Crimes ibid, art 7(1)(k), Element 2. Pursuant to footnote 30 of the Elements of Crimes, it is understood that character 'refers to the nature and gravity of the act'.

[112] See, eg, *Stakić* (n 88) para 317.

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perpetrated on dead human bodies,[113] forced undressing of women and marching them in public,[114] forcing women to perform exercises naked,[115] and forced disappearance, forced prostitution, beatings, mutilation, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.[116] The ICC, SCSL and Extraordinary Chambers in the Courts of Cambodia have recognized forced marriage as an 'other inhumane act'.[117]

What is striking about the acts listed is that they are (for the most part) deliberate acts of violence or abuse *directly against* other human beings, and *inherently* inhumane. It is difficult to conceive of any way of committing mutilation, sexual violence, violence on dead bodies or beatings which would not be described as 'inhumane': the nature of the act renders it so. By contrast, that is not necessarily true of activities such as mining, logging or deforestation for agriculture, where the position is more nuanced. While there may well be an argument that such activities have caused great suffering to those who depend on the Amazon rainforest, such great suffering must have been caused by an 'inhumane' act and this requirement may be the biggest legal obstacle to holding that the activities in the Amazon are crimes against humanity.

On the one hand, it is difficult to see the Court recognizing intensive grazing, mining and logging as 'inhumane' acts. On the other hand, it may be that such a characterization would be appropriate in the case of, for example, the destruction of a sacred site or a location of particular cultural importance to Indigenous persons and other ethnic or traditional communities, even where the underlying activity (eg mining) was not inherently inhumane in itself. Moreover, certain activities may be easier to characterize as 'inhumane' than others: for example, the label seems apt to describe the diversion of a river for an infrastructure project, resulting in a severe deprivation of water for communities downstream. This element of the offence therefore presents an obstacle, but not necessarily an insurmountable one, particularly in light of the position adopted by the OTP in respect of the poisoning of drinking water sources in Darfur[118] and in Mali as regards the destruction of cultural and religious property as a war crime.[119]

In addition, the requirement that the acts be of a similar 'character' (ie nature and gravity) to the other acts listed in Article 7(1)(a)–(j) poses a further hurdle. The 'acts' in the Amazon largely relate to the environment: the 'great

[113] *Kajelijeli* (n 108) para 936; *Niyitegeka* (n 108) para 465.
[114] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 697.
[115] ibid, para 697.
[116] *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) paras 206–209.
[117] *Ongwen* (n 70) para 2752; *Prosecutors v Nuon Chea and Khieu Samphan* (Judgment) 002/19-09-2007-ECCC/TC (16 November 2018) paras 740–749; *Prosecutor v Alex Tamba Brima et al* (Judgment) SCSL-2004-16-A (22 February 2008) paras 197–201.
[118] *Al Bashir* (n 92).
[119] *Al Mahdi* (n 94).

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suffering' is inflicted on humans, but the underlying acts (of mining, etc) are not. The enumerated crimes against humanity are concerned solely with harm inflicted on human persons. The anthropocentric nature of the crimes in Articles 7(1)(a)–(j) renders it unlikely that the destruction of property could ever be recognized as an 'other inhumane act' under Article 7(1)(k) in its own right; the requirement that the 'character' of the offence be akin to that of one of the listed Article 7(1) crimes, which are all human-centric, would likely preclude a purely property offence from satisfying that Element. Moreover, acts such as mining, infrastructure projects, etc are not *inherently* inhumane, which again suggests that they are of a different character/nature to the listed crimes.

If this is unduly pessimistic, the *Al Bashir* Arrest, *Al Mahdi* judgment, and the Confirmation of Charges decision in *Muthaura*, discussed above, present more cause for optimism.[120] There, the Chambers appeared willing to accept, in principle, that property damage to homes and businesses could cause great suffering such as to constitute an 'other inhumane act'. Of course, the destruction of homes and businesses is arguably of a different character to the destruction of the rainforest. The property damage at issue in *Kenyatta* seems to have been inflicted with the intention of causing suffering to the owners of the property. By contrast, the destruction of the rainforest for mining, agriculture and other purposes is not necessarily, or solely, an act intended to cause harm: at least on one view, there are some economic justifications for such activity. There may, therefore, be a distinction, in terms of the character of the conduct, between the unjustifiable destruction of homes/businesses and the potentially justifiable destruction of the forest for economic development.

While this is undoubtedly a challenge, it is contended that, given the particular connection between the Indigenous populations of Brazil and the Amazon rainforest that is being destroyed, it requires only a small further step to build on the implicit acceptance of property destruction as an 'inhumane act' in *Muthaura* to hold that the destruction of the lands of Indigenous persons (and, in particular, any sites of special cultural, spiritual or societal value) constitutes an inhumane act. However, in a different context, this approach was adopted by the Colombian Special Jurisdiction for Peace. It relied on the jurisprudence of the Inter-American Court of Human Rights to stress that the deprivation of Indigenous peoples' right to exercise their right to collective property (which, in that case, was caused by the impossibility of ethnic communities moving freely on their territory due to policies implemented by the FARC-EP) generated an impact and suffering falling within the scope of Article 7(1)(k). This is because the breach of their right had, as a consequence, the irreparable loss of their identity, cultural heritage, and existence as a community.[121]

[120] *Muthaura* (n 83).
[121] *Situación Territorial en la Región del Norte del Cauca y del Sur del Valle del Cauca* (n 69) para 756.

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Article 7(1)(k) is the only potentially viable route to criminalizing peacetime environmental offences within the existing core offences in the Rome Statute. From the perspective of affording protection to the environment, there would be clear advantages to recognizing the great suffering caused to Indigenous persons and ethnic or traditional communities, and others, by the destruction of the rainforest as an 'other inhumane act'. Yet that is not to say that there would not be significant obstacles with such an approach. However one looks at it, the offences in Article 7(1) are anthropocentric. The approach suggested in this article would not criminalize the destruction of the environment in itself; it would only amount to an offence where it had the consequence of inflicting great suffering on a human population. At the level of principle, this keeps the focus on the human experience and fails to accord any value to the protection of the environment as an end in itself.

More significant, perhaps, are the practical consequences. There may well be evidential difficulties in proving the great suffering of the civilian population. This may not present an obstacle in the particular context of Indigenous persons and ethnic or traditional communities who rely on the natural environment for their way of life, but it may be difficult to establish 'great suffering' where the environmental destruction takes place in an entirely different context. For example, where widescale deforestation was taking place in an area of a country without an Indigenous population, it may well be difficult to demonstrate that great suffering had taken place in the absence of the evidence of those who depend on, and have a particular connection to, the land. It is certainly far from clear that the evidence of any ordinary, environmentally conscious member of the public that they were upset by the destruction of the forest could ever be accepted as 'great suffering' within the meaning of Article 7(1)(k). Even in the context of what is happening in the Brazilian Legal Amazon, while it does not seem unreasonable to posit that the Court might accept that the destruction of a sacred site or burial ground might meet the requisite threshold, it may be open to question whether the more general destruction of the environment would suffice.

It must also be recognized that the Court might have a difficulty, in principle, with the characterization of deforestation as an 'inhumane act' at all, because this might have unintended consequences for legitimate development projects. The inhumanity of other acts under Article 7(1) is apparent on their face, and there is never a context in which such acts could be permissible. However, the case surely could not be made that all mining, all ranching or all logging are inhumane acts, and it then becomes a difficult question of where, and how, to draw the line.

V. CONCLUSION

This article has highlighted the difficulties that the ICC may face in seeking to establish its material jurisdiction over mass deforestation practices and its

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consequences on peoples protecting forests and their ecosystems, as well as on peoples depending on such environments. It is contended that despite these challenges, an innovative interpretation of Article 7 may be able to fill the void left by the drafters in the Rome Statute and permit the prosecution of environmental cases before the ICC, and therefore to implement the OTP's 2016 Strategy aimed at focusing on crimes against the environment.[122]

First, it was demonstrated that, should the ICC be willing to exercise its jurisdiction over such practices and their detrimental effects, it could only do so with regard to the *local* impacts of mass deforestation practices, rather than with their regional and global impacts. This is because the connection between these practices and regional and global impacts is too remote to establish a causal link between them as well as the intention and knowledge of the perpetrator to cause such consequences, as required under criminal law. It is posited, however, that regional and global consequences could remain relevant for the purposes of the ICC's gravity assessment.

Secondly, it was shown that the anthropocentric nature of Article 7 has subordinated the establishment of crimes against humanity to the existence of an attack directed primarily against a civilian population. This creates difficulties for the prosecution of mass deforestation practices as crimes against humanity, where the civilian population is often an incidental victim of an attack against the environment, rather than the main target. This article suggests that an amendment of the current test could overcome this difficulty, including the creation of an objective knowledge requirement under Article 7, and shift the focus from 'primary' victims of the attack to 'intentional' victims of the attack.

Thirdly, it was explored whether mass deforestation practices could amount to the crimes of persecution or 'other inhumane acts' under Article 7(1)(h) and (k). As regards persecution, the authors have outlined their view that the widespread deprivations of the Environmental Dependents and Defenders' right to a healthy environment satisfy the first Element of Article 7(1)(h). However, the further hurdle of the requirement that the persecutory act to be committed 'in connection with' another crime against humanity poses a potential difficulty in the context of the relatively small number of reported murders, forcible transfers, etc. For this reason, the article also considered whether the 'great suffering' inflicted on local populations as a result of the destruction of the natural environment upon which they depend for their shelter, their sustenance and their way of life might be recognized as an 'other inhumane act' under Article 7(1)(k). While acknowledging that there are legal obstacles to this approach and that it requires a broader interpretation of that residual clause than has previously been adopted by the ICC, it is argued that this is a permissible reading of the provision. It has the advantage both of putting the destruction of the environment at the heart of

[122] OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) para 41.

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one of the elements of the Article 7(1)(k) offence and of expanding the crime-base of offences that persecution could be said to have been committed in connection with.

Thus, although the approach suggested undoubtedly raises a number of practical and evidentiary obstacles, it is contended that two of the most effective ways by which the destruction of the natural environment could (even if not directly) be criminalized within the existing confines of the Rome Statute are, first, recognizing the suffering caused by the destruction of the environment as an 'other inhumane act', and, secondly, recognizing that the deprivation of the right to a healthy environment can ground a charge of persecution. Both approaches are somewhat novel but, it is argued, do not impermissibly extend the Statute, and require only a reasonably modest development of existing case law. If both suggestions were adopted by the ICC, then the Court's possible consideration of crimes against humanity in the context of the situation in the Brazilian Legal Amazon could potentially be based upon the considerable evidence concerning two existing offences under Article 7(1), rather than being limited to a small number of murders.

This would not amount to criminalizing the destruction of the environment per se. This is not achievable within the existing Rome Statute, and, in keeping with the anthropocentric nature of crimes against humanity, the essence of the offending would remain the harm inflicted on the local populations by the environmental destruction. However, this innovative approach of utilizing Article 7(1)(h) and (k) in this way is as close as one can come to capturing, through the Rome Statute as presently drafted, the true extent of the harms being inflicted by the destruction of the Brazilian Legal Amazon and is perhaps the best option for holding perpetrators to account for the human suffering caused by these destructive acts.

The authors do not argue that prosecuting individuals before the ICC is the best method to achieve accountability for environmental crimes. To the contrary, this article shows that, should the ICC become the forum for environmental destruction-related cases, amendments to the Rome Statute would be necessary to facilitate their prosecution, either through the inclusion of the crime of ecocide, through the explicit inclusion of environmental destruction under Article 7, or through the establishment of a special chamber and a special section of the OTP dedicated to the investigation and prosecution of environmental crimes.[123] Nor would the adoption of such modifications resolve all challenges associated with the prosecution of environmental cases; others would also have to be addressed, such as the question of corporate criminal liability for environmental damage, or evidentiary issues concerning the establishing of facts and the proving of such damage.[124]

[123] See Caroccia (n 10) 1181; Gillett (n 9) 309–48.
[124] See ET Cusato, 'Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC' (2017) 15(3) JICJ 491.

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Nevertheless, the authors believe that the situation in Brazil merits investigation by the OTP. A reasoned decision either way will clarify the views of the Prosecutor regarding the limits of the Rome Statute in respect of prosecuting environmental crimes, which will itself help to clarify the way forward regarding environmental offences under international criminal law. Whilst waiting for the OTP's position on the matter and pending better legislation, it is hoped that this contribution will help pave the way for greater accountability for environmental harm, in Brazil and elsewhere.

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