

# **ARTICLE 15 COMMUNICATION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT**

**Crimes Against Humanity in Brazil: 2011 to the Present**

**Persecution of Rural Land Users and Defenders  
and Associated Environmental Destruction**

**9 November 2022**



**GREENPEACE**



CLIMATE COUNSEL



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'I'm always here. You politicians are the ones who change.' – *Anonymous Brazilian Business Owner*<sup>1</sup>

## I. INTRODUCTION

1. This communication (the 'Communication') is submitted to the Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC') pursuant to Article 15 of the Rome Statute. It is filed by [Climate Counsel](#) in conjunction with [Greenpeace Brasil](#) and [Observatorio do Clima](#) (the 'Filing Parties'), on behalf of rural land users in Brazil and their real and/or perceived defenders ('**Rural Land Users and Defenders**')—the alleged victims of the crimes against humanity alleged herein. The Communication is supported by several organizations: The **Comissão Pastoral da Terra** ('CPT'), **Instituto Zé Claudio e Maria**, **Global Witness**, and **Greenpeace International**. A Digital Evidence Platform accompanying this Communication is available here <https://brazil-crimes.org>.
2. For the purposes of this Communication, '**Rural Land Users**' means: traditional and indigenous communities, settlers, squatters, small landowners, *parceiros*, small tenants, rural workers/wage earners, miners, *caçaras*, *faxinalenses*, *geraizeiros*, shellfish gatherers, fishermen, *quilombolas*, retirees, artisanal fishermen and other riverside dwellers, rubber tappers, *vazanteiros*, extractivists (chestnut, palm, and coconut breakers), and others.<sup>2</sup> '**Defenders**' means persons defending the Rural Land Users through investigations, protests, and/or grievance mechanisms against commercial operations including agriculture, logging, and/or mining.<sup>3</sup>
3. Based on the material presented herein, there is a reasonable basis to believe that **crimes against humanity** have been committed in Brazil. As demonstrated by the Filing Parties, a widespread and systematic attack has been committed against the civilian population, comprising numerous Rome Statute Article 7 'underlying crimes', namely, **murder, persecution, and other inhumane acts**. This attack was committed over the last decade, against thousands of **Rural Land Users and Defenders**, pursuant to an **organizational policy to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law**. This policy promoted and/or encouraged the commission

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<sup>1</sup> The line is taken from a 2018 documentary film, *The Edge of Democracy*. The full quotation is as follows: 'Of course, there were also *those who never left*. At a party [following Dilma Rousseff's impeachment and Michel Temer's installment as interim president of Brazil], a politician asked the owner of a company: "What are you doing here?" And the owner answered: "I'm always here. You politicians are the ones who change."'

<sup>2</sup> This definition is taken from the Brazilian grass-roots organization Pastoral Land Commission (*Comissão Pastoral da Terra*, CPT). See para 44, *infra*; Annex II, para 2.

<sup>3</sup> This definition is the broad one generally used by the international NGO Global Witness. See Annex II, para 9.

of the underlying crimes set out in this Communication, which were perpetrated by public and private-sector actors, at the local, state, and federal levels.

4. The organizational policy evolved through the collusion of like-minded actors, **motivated** by the rapacious and unfettered economic development of Brazil's Amazon Rainforest. This organized group of actors (the '**Network**') is comprised of public and private-sector actors from multiple levels of Brazilian society, including (but not limited to) politicians, civil servants, law enforcement officers, representatives of private commercial interests, and a rogues' gallery of criminal actors. The Network resembles a kind of informal 'deep state'<sup>4</sup> or 'agro-industrial complex', with tacit but clear understanding among its participants, in which individual actors are well-aware of the parts they are expected to play. The Filing Parties are in no way claiming that the entirety of Brazil's gargantuan and diverse natural-resource industry is culpable. In Brazil, the problem is not capitalism *per se*, but rather a monstrous version of it—one that apparently leads to international crime.
5. The Network's **attack** has been enabled by the (corporate) capture and corruption of civic institutions, and through concerted acts or omissions by the executive and legislative branches of government. The architecture of this multi-tiered system is varied—certain aspects are open, others obscured, and still others mixed. The overall effect is compelling: the Network's many and varied members tacitly accept their common goal (never explicitly stated) and actively strive toward its achievement (always understood). Such remains the mechanism through which violence is systematically and deliberately perpetuated. Those responsible are rarely brought to justice.
6. The Network is best understood and assessed within the relevant **historical context**, beginning in the colonial period and culminating with the present administration. A common through line—competing claims for the country's rural land and persistent debates over its uses—has defined and dominated the Brazilian political, legal, economic, and cultural landscape (in the Amazon and in the halls of power) for centuries. In Brazil this tension has unfolded with much violence and bloodshed. Rural Land Users and Defenders have endured grave abuses at the hands of the Network, whose superior strength and devious machinations often prevail. At the end of this real-life story are real-life victims and real-life criminals. It is, in the final analysis, a case of (international) crime without punishment.
7. The mass human suffering described throughout this Communication has been accompanied by severe damage to the **Amazon Rainforest**. Despite certain legal protections, the implementation

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<sup>4</sup> The historical concept, dating back to the 1990s, connotes 'a body of people, typically influential members of government agencies or the military, believed to be involved in the secret manipulation or control of government policy'. New Oxford American Dictionary; see also Wikipedia ('A deep state [...] is a type of governance made up of potentially secret and unauthorised networks of power operating independently of a state's political leadership in pursuit of its own agenda and goals. In popular usage, the term carries overwhelmingly negative connotations [and ... refers] to a hidden organization seeking to manipulate the public state.')



of the Network's policy has led to severe and either widespread or long-term damage to Brazil's forest environment. Rather than protecting the natural environment, key members of the Network (including some at the highest levels of government) have encouraged increased environmental destruction and ensured that related acts of violence by criminal networks continue. Recent executive trends have weakened environmental law enforcement, further encouraging criminal networks (described by some as 'Rainforest Mafias') that drive land invasion and deforestation. Both have risen as a result. Brazil's complex and comprehensive system of environmental protection, albeit robust in theory, is vulnerable to concerted attempts to dismantle it. Death by a thousand cuts remains a distinct possibility for the Amazon.

8. Since late-2019, no fewer than six high-profile communications have been submitted to the OTP with respect to the situation in Brazil.<sup>5</sup> The Filing Parties take no position with respect to the various legal arguments advanced in these previously-filed documents. Nevertheless, where the various communications have identified specific Article 7 crimes, those allegations are hereby incorporated by reference. The Filing Parties note that each of the previous communications have been filed specifically *against* current President Jair Bolsonaro. This Communication's focus is much broader, addressing the systemic nature of land-related crime over the course of the last decade. That said, the Network—already influential for many years—has indeed succeeded in capturing the country's executive branch. And through tenacious and continuous effort, a crescendo of illegal activity in the Amazon has been reached under the current (Bolsonaro) administration. But while Brazil's sitting president and certain members of his administration are undoubtedly part of the Network, they are but the latest cogs in a large, complex, and durable machine—the existence and operation of which predates them and, if not curtailed, will continue long after they are gone. Brazil's history bears this out. The forces that threaten the country's Rural Land Users and Defenders did not arrive with Mr Bolsonaro, nor will they depart with him. They are the ones who remain.
9. In the interests of clarity and accessibility, the main body of this document is deliberately brief, with minimal citations, enabling the reader to better appreciate the overall case theory. The arguments and propositions set out herein are supported by four detailed annexes: (i) the first situates the Network within Brazil's historic and contemporary contexts and describes the Network's structure, membership, and operations in greater detail; (ii) the second is a

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<sup>5</sup> See Human Rights Advocacy Collective (CADHu) and the ARNS Commission, 'Informative Note to the Prosecutor: International Criminal Court pursuant to Article 15 of the Rome Statute requesting a Preliminary Examination into Incitement to Genocide and Widespread Systematic Attacks Against Indigenous Peoples by President Jair Messias Bolsonaro in Brazil', November 2019; *Associação Brasileira de Juristas Pela Democracia (ABJD)*, 'Complaint Before the International Criminal Court' (against Jair Messias Bolsonaro), April 2020; UNI Global, 'Untitled Submission', July 2020; Messrs Raoni Metuktire et Almir Surui, '*Communication au Titre de l'Article 15 du Statut de Rome, Contre Monsieur le Président de la République du Brésil Jair Bolsonaro, et tout auteur et complice que l'enquête permettra d'établir*', January 2021; *Articulação dos Povos Indígenas do Brasil (APBIB)*, 'Communication to the Prosecutor requesting a Preliminary Examination of Genocide and Crimes against Humanity perpetrated against the Indigenous Peoples of Brazil Committed by President Jair Messias Bolsonaro', August 2021; and 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', October 2021.

comprehensive catalog of relevant Article 7 crimes; (iii) the third explains why and how such crimes are intertwined with deforestation and climate change; and, (iv) the fourth (strictly confidential annex) identifies a handful of individuals recommended for further investigation by the OTP. The annexes contain the bulk of the relevant factual citations (in footnotes) and provide the necessary (albeit preliminary) forensic support for all of the claims herein. The Digital Evidence Platform contains additional forensic and non-forensic material related to the Communication, as well as links to other sources of relevant information.

10. All of this material—which is meant to be illustrative rather than exhaustive—is aimed at assisting the OTP in any inquiry it may undertake. The preliminary evidence presented herein provides the OTP with a solid basis to proceed with a further and more detailed investigation. Left unchecked, the crimes against humanity alleged below are likely to continue. And because it is clear that genuine justice will not be achieved domestically in Brazil, the Filing Parties hereby seek the intervention of the OTP.

\* \* \*

## II. CONTEXTUAL BACKGROUND

### A. Historic Marginalization: Discrimination and Abuse of Rural Populations<sup>6</sup>

11. From the establishment of Brazil as a Portuguese colony in the 16th Century to the country's present political incarnation as one of the world's largest liberal democracies, the commission of mass atrocity crime has been associated with the dispossession of land, the exploitation of natural resources, and the destruction of the environment. In nearly half a millennium of historical progress, when it comes to land and the complex rules and relationships that govern its possession and use, *plus ça change, plus c'est la même chose*.
12. Westward expansion began almost immediately during the Colonial Era (1533 to 1822), which established a privileged system of land-based fiefdoms and from which indigenous populations were systematically and often violently excluded. Commercial and political power remained in the hands of large rural landholders throughout the Empire (1822 to 1889). Under the Old Republic (1889 to 1930), rural lands, including those long inhabited by various indigenous populations, were considered *terras devolutas* (vacant land) and officially transferred to private companies. Brazil's official policies of expansionism and acculturation were epitomized during the Vargas Era (1930 to 1946) when the 'Great March to the West' facilitated massive inland settlement of non-indigenous people, accompanied by violent dispossession of indigenous inhabitants. Popular demand for development and the belief that Brazil was destined to become a world power during the Republic of 1946 (1946 to 1964) fueled ambitious infrastructure projects throughout the

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<sup>6</sup> Detailed citations in support of this subsection are contained at Annex I, paras 4–20.

country—especially in the interior, where the aim was to hasten settlement of undeveloped regions and exploit untapped resources. The succeeding Military Dictatorship (1964 to 1985) was marked by intense and often brutal commercialization of the country’s hinterland under the slogan ‘land without people, for people without land’. The current liberal-democratic system, the New Republic (1985 to present), eventually led to successful efforts at land and environmental reform under Presidents Fernando Henrique Cardoso (1995–2002) and especially his successor, Luiz Inácio Lula da Silva (2003–2011). However, increased backsliding on land and environmental issues—beginning under Mr Lula’s successor and culminating with the incumbent administration—has left Rural Land Users and Defenders at considerably higher risk in Brazil.

13. And so it is apparent that the postures of the past have generated, and continue to inform and inflame, many of the country’s persistent contemporary conflicts related to land and its various uses. Never far from Brazilian society’s central concern, the problem crystalized as the country emerged from dictatorship to democracy: competing claims to land would lead to further bloodshed. It is no surprise that various historically excluded social groups have struggled to assert their rights, especially in the rural world where they are directly or indirectly connected to questions of land. Brazil’s early and enduring system of what today can only be called ‘land-grabbing’ enabled and entrenched the widespread dispossession of Rural Land Users. The country’s contemporary landscape continues to be marked by the exploitation of natural resources, the dispossession of land, and the destruction of the environment—irrespective of law. Now as then, such activity has resulted in mass crime. As one man put it: ‘The past is never dead. It’s not even past.’<sup>7</sup>

## **B. The Domestic Legal Landscape<sup>8</sup>**

14. Despite continued and increased tension associated with land use, there exists today a somewhat dizzying array of laws, regulations, and agencies on the recognition-of-rights side of Brazil’s land ledger (‘Mosaic’). The Mosaic is perhaps the most complex system of forest protection in the world, with no fewer than eight unique tenure regimes, batched into three general types, each providing a significant measure of community rights to forest resources: conservation unit areas; agrarian reform settlements; and formalized Indigenous and *Quilombola* communities. Indigenous peoples have considerable rights under Brazil’s 1988 constitution (the ‘Constitution’). However, as demonstrated throughout this Communication, such rights in Brazil are very often honored in the breach: there is a vast gulf between the recognition of rights and their enjoyment and/or enforcement. While Brazil’s domestic legal system recognizes environmental crime, the Network’s insidious power and reach has ensured that inconvenient laws are undermined or unenforced.

<sup>7</sup> William Faulkner, *Requiem for a Nun* (Random House 1951).

<sup>8</sup> Detailed citations in support of this subsection are contained at Annex I, paras 21–31.



### C. Corporate Capture of Government Institutions by Economic Interests<sup>9</sup>

15. 'Corporate capture' is a phenomenon whereby private industry uses its political influence to take control of the decision-making apparatus of the state, such as regulatory agencies, law enforcement entities, and legislatures.<sup>10</sup> Brazil's agro-industrial sector is a powerhouse (both domestically and internationally), accounting for an outsized share of the country's economy and, therefore, its available material resources.<sup>11</sup> As a result, the agribusiness sector 'has built tremendous financial and political clout, which is reflected in its power to shape Brazilian politics'.<sup>12</sup> The openness of certain Brazilian institutions to corruption provides the conditions for economic elites to increase their power and, consequently, their control and influence over politicians and segments of the government itself. The corporate capture of institutions has secured favorable policy-making and political favors. Actors within the agribusiness sector have been instrumental in creating and maintaining the Network, and in promoting its policy.
16. Recent political action threatens to open up disputed lands to excessive exploitation, risking further violence by the (so-called) Rainforest Mafia and other members of the Network. This has been facilitated through the capture and manipulation of certain government institutions by powerful corporate actors and large-scale landowners. In the case of agribusiness, the prime mover at the national level is the parliamentary group *Frente Parlamentar da Agropecuária* (Parliamentary Front for Agriculture and Livestock), or simply the *Ruralistas*. An alliance of lawmakers (deputies and senators) from different political parties that seeks to promote the Network's policy, its reach extends deep into the Brazilian hinterland. In some cases, agribusiness appears to coordinate with organized criminal groups responsible for much of the land invasion and associated crimes against Rural Land Users and Defenders. Representative of entrenched institutional forces and key actors in the Network, the *Ruralistas* are indeed 'those who never left'. Ever present, they have become ascendant under the current (Bolsonaro) administration.

### D. Current Administration Action Promoting and Encouraging the Network<sup>13</sup>

17. Brazil's current president, Jair Bolsonaro, took office in January 2019. He came to power on a stridently anti-land reform and anti-environmental platform, brazenly touting his martial pedigree and pro-business credentials. As many have noted, the bombast of the current administration

<sup>9</sup> Detailed citations in support of this subsection are contained at Annex I, paras 32–44.

<sup>10</sup> Center for Constitutional Rights, Corporate Capture (<https://ccrjustice.org/corporate-capture>).

<sup>11</sup> 'Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples', Part I, *Amazon Watch*, 11 September 2018

<sup>12</sup> 'Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples', Part I, *Amazon Watch*, 11 September 2018.

<sup>13</sup> Detailed citations in support of this subsection are contained at Annex I, paras 45–64.

harkens back to the abuses of the military dictatorship and overtly seeks to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law. While Mr Bolsonaro's attempts to further deface the Mosaic through new legislation have not always been successful, executive action within the limits of presidential authority has been used to advance the Network's policy. Campaign promises—themselves reflective of longstanding discriminatory aspirations—have taken shape as actual state policies aimed at sidelining (at a minimum) rural populations, their land, their rights, and their defenders. Notably, there has been a significant increase in land invasion. Commentators see a clear link between the crimes and abuses on the ground and the administration's public messaging, policy preferences, cabinet appointments, staffing choices, administrative restructurings, funding cuts, curtailment of inspections and fines, and legislative efforts. In July 2021, a federal oversight body found that the administration's actions have undoubtedly undermined environmental law enforcement and contributed to attacks on forest defenders. International and domestic human rights organizations concur with this view.

#### **E. Violence Against Rural Land Users and Defenders<sup>14</sup>**

18. The Brazilian Amazon has long been a target of intensifying economic development. Sustained and increased commercial activities—cattle ranching, agriculture, fires lit deliberately to make way for additional ranch and crop land, logging, and mining—are the direct drivers of Amazon deforestation. A significant proportion of these operations are both illicit and violent, much connected with illegal land-grabbing (known as *grilagem*). Structural issues, including and especially unresolved questions of land tenure affecting peasant groups, lead in many cases to rampant land invasion pursuant to the Network's policy, such as organized criminal groups. The resulting environmental damage—largely brought under control in the first decade of the 20th Century—has been staggering in recent years, threatening the very existence of the Amazon Rainforest.
19. The foundation of this filing is data collected by Brazilian and international organizations over the course of the last decade, documenting innumerable land-related conflicts. The violence associated with such conflict generally takes two forms:
  - a. **violence against persons:** several hundred cases of murder and several thousand cases of attempted murder, death threats, torture, assaults, consequential deaths, and (unlawful) arrests; and
  - b. **violence against occupation and possession:** expulsions, evictions, destruction of homes, gardens, and other assets, threats, and invasions.

<sup>14</sup> Detailed citations in support of this subsection are contained at Annex I, paras 65–82 and Annex II (entirety).

As Article 7 crimes, these various acts of violence are discussed in greater detail elsewhere in this Communication.<sup>15</sup>

20. This violence touches all corners of the so-called Legal Amazon and is driven by all manner of unrestrained commercial activity: primarily, agriculture, ranching, logging, and mining. The Rural Land Users and Defenders victims have been legion, including members of each and every group that relies on the forest: indigenous and *quilombola* communities have been particularly affected. Many of the crimes and abuses are linked to Network's policy to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law.

#### **F. Shortcomings of Brazil's Criminal Justice System<sup>16</sup>**

21. Impunity for killings linked to land and environmental issues is a major concern in Brazil, with fewer than 10 percent of cases taken to court and just over one per cent resulting in a conviction. This includes: failure to investigate killings and threats, police negligence, indifference, or collusion. In furtherance of the Network's policy, the impunity is secured in three stages: the creation (via media coverage and other means) of a social environment that favors commercial interests at the expense of indigenous and traditional people's rights; the lack of adequate/timely response to violence against threatened communities; and the further lack of prosecution and/or punishment of those responsible for the violence. Impunity begins by shifting public opinion against the struggle for land rights. Indigenous and traditional peoples are seen as invaders and foreigners on their own land, and their struggles are de-legitimized by certain members of the media. Impunity continues with the lack of adequate response to the threats that indigenous peoples report to authorities. The cycle of impunity closes with the lack of punishment of those truly responsible for attacks.

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### **III. ICC COMMUNICATIONS**

22. The OTP is responsible for determining whether a particular case meets the legal criteria established by the Rome Statute to warrant an official investigation. To this end, the OTP—however apprised of the matter<sup>17</sup>—will conduct a preliminary examination of all communications

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<sup>15</sup> See paras 28 *et seq.* *infra*; see also Annex II (entirety).

<sup>16</sup> Detailed citations in support of this subsection are contained at Annex II, paras 94–99.

<sup>17</sup> Such preliminary examination may be initiated on the basis of: (i) information sent by individuals or groups, intergovernmental or non-governmental organizations, or states; (ii) a referral from a state party to the Rome Statute or the United Nations Security Council; or (iii) a declaration lodged by a non-state party to the Rome Statute accepting the exercise of the ICC's jurisdiction in a particular case. ICC-OTP Website, 'Preliminary Examinations'.

that come to its attention based on the statutory criteria and the available information.<sup>18</sup> If the Prosecutor reaches a positive determination according to the ‘reasonable basis’ standard under Articles 15(3) and 53(1) of the Rome Statute, he ‘*shall submit* to the [Pre-Trial] Chamber a request for authorization of the investigation’.<sup>19</sup>

23. The central consideration of any case is the ICC’s subject-matter jurisdiction; that is to say, whether *international crimes* (war crimes, crimes against humanity, genocide, or aggression) have been committed. While a number of other factors, including context, are relevant to the overall assessment, without the commission of international crimes there can be no case. In other words, forensic considerations are paramount.
24. One consideration for the OTP is the question of the *impact* of any demonstrable criminal behavior on the natural environment. According to the OTP’s 2016 Policy Paper on Case Selection and Prioritization:

[t]he impact of the crimes may be assessed in light of, *inter alia*, [...] the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land.<sup>20</sup>

In other words, the OTP should consider contextual information on land grabbing and environmental destruction as part of its ‘gravity’ assessment in relation to the commission of Article 7 crimes.<sup>21</sup> This is particularly pertinent given the formulation of the Network’s policy in this case.

25. The factors set out in Article 53(1)(a)–(c) of the Rome Statute clearly establish the legal framework for a preliminary examination. This article provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into a situation, the OTP shall consider three main issues: (i) **jurisdiction**: *subject-matter*, either *territorial* or *personal*, and *temporal*; (ii) **admissibility**: both *complementarity* and *gravity*; and (iii) the **interests of justice**. This has been acknowledged by the ICC Appeals Chamber.<sup>22</sup>

<sup>18</sup> *Nb.* While ‘information sent by individuals or groups’ to the OTP requesting a preliminary examination into a particular matter need not adhere to any specific format, the term ‘communication’ has come into common usage; and such documents have become formalized to a certain extent.

<sup>19</sup> ICC-01/09, *Situation in the Republic of Kenya*, PTC II, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’, 31 March 2010 (‘Kenya Article 15 Decision’), para 20 (emphasis added) (internal quotations omitted).

<sup>20</sup> ICC-OTP, Policy Paper on Case Selection and Prioritization, 15 September 2016, para 41 (citing Rome Statute, Articles 8(2)(b)(ix) and 8(2)(b)(iv)).

<sup>21</sup> As discussed below, both the ‘manner of commission’ and the ‘impact’ of crimes are relevant to the larger issue of gravity—a key element to be addressed when considering any communication. See Section IV.B.2, *infra*. However, it is very important to note that the policy paper itself does not create any new crimes *per se*; the OTP must still prove the underlying crimes currently listed in the Rome Statute (for example, murder, torture, or forcible transfer of population as crimes against humanity). Nevertheless, the stated shift in policy is encouraging because it recognizes that environmental issues should be considered as part of the overall context in which many atrocity crimes are committed and, therefore, may impact the OTP’s approach to the cases it pursues.

<sup>22</sup> ICC-02/17, *Situation in the Islamic Republic of Afghanistan*, ‘Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan’, Appeals Chamber, 5 March 2020 (the ‘Afghanistan Appeal Decision’), para 28; see also Myanmar Article 15 Decision, para 40 (citing Kenya Article 15 Decision, para 39; Burundi Article 15 Decision, para 31); see also ICC-OTP, Report on Preliminary Examination Activities

26. Notably, for present purposes, the ‘reasonable basis’ standard of review sets *an extremely low evidentiary threshold* for the initial assessment of communications.<sup>23</sup> Such assessment, pursuant to the ICC’s specific legal framework, is dealt with in the following section.

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## IV. LEGAL FRAMEWORK AND ASSESSMENT

### A. Jurisdiction

27. In accordance with Article 53(1)(a) of the Rome Statute, the OTP must determine whether there is a reasonable basis to believe that crimes within the jurisdiction of the ICC have been, or are being, committed.<sup>24</sup> Under the Rome Statute Article 7, crimes against humanity means the commission of listed underlying acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (the listed acts include murder, persecution and other inhumane, amongst others). As set out below, there is a reasonable basis to believe that multiple crimes against humanity have been committed on the territory of Brazil by various perpetrators.<sup>25</sup> Brazil ratified the Rome Statute in June 2002.<sup>26</sup> Accordingly, the ICC may exercise its jurisdiction over Article 7 crimes committed on the territory of Brazil from July 2002 onwards.<sup>27</sup>

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2019, 5 December 2019, para 4; ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 36; Rome Statute, Article 5(1); Rome Statute, Article 11; Rome Statute, Article 12(2).

<sup>23</sup> For purposes of assessing the strength of a communication, the applicable evidentiary standard can be no higher than a ‘reasonable basis to believe’, which—as set out in Article 53(1)(a)—is the lowest such standard provided for in the ICC Statute. See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 34 (‘The requisite standard of proof of “reasonable basis” has been interpreted by the Chambers of the Court to require “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”.’); see also ICC-OTP, Report on Preliminary Examination Activities 2019, 5 December 2018, para 3 (citing ICC Rules of Procedure and Evidence, Rule 48) and para 11 (‘It should be recalled that the [OTP] does not possess investigative powers at the preliminary examination stage. [...] The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. [...] In this context, PTC II has indicated that all of the information need not necessarily “point towards only one conclusion”. This reflects the fact that the reasonable basis standard under Article 53(1)(a) “has a different object, a more limited scope, and serves a different purpose” than other higher evidentiary standards provided for in the Statute. In particular, at the preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in Article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’.”)

<sup>24</sup> As noted above, the jurisdiction assessment requires an analysis of three distinct sub-issues: (i) *subject-matter jurisdiction* as defined in Article 5 of the Rome Statute (genocide, crimes against humanity, war crimes, or aggression); (ii) either *territorial* or *personal jurisdiction*, which entails that the crime has been or is being committed on the territory of, or (as well as or in the alternative) by a national of, a state party to the Rome Statute; and (iii) *temporal jurisdiction*—in this case, 1 July 2002 onwards. ICC-OTP, Report on Preliminary Examination Activities 2018, 5 December 2018, para 4.

<sup>25</sup> See Section IV.A.3, *infra*.

<sup>26</sup> See ICC website: Brazil signed the Rome Statute on 7 February 2000. Brazil deposited its instrument of ratification of the Rome Statute on 20 June 2002. The Rome Statute entered into force on 1 July 2002.

<sup>27</sup> The Rome Statute entered into force on 1 July 2002.

## 1. Subject-Matter Jurisdiction – Crimes Against Humanity

### a. Contextual/Chapeau Elements

28. Contextual (also known as *chapeau*) elements are the factual requirements that distinguish international crimes from domestic crimes and human rights violations. The most recent ICC decision to comprehensively and authoritatively deal with these contextual issues is Trial Chamber III's judgment in the Bemba case.<sup>28</sup> The various tests articulated in that decision (the 'Bemba Test(s)') are stated and applied throughout this section. (*Mens rea* requirements are premature at the communication stage of ICC proceedings).<sup>29</sup>
29. As demonstrated below, there is a reasonable basis to believe that much of the illicit conduct described throughout this document qualifies as three enumerated crimes against humanity—murder, persecution, and other inhumane acts—under the Rome Statute.<sup>30</sup> The following subsections demonstrate that such conduct additionally satisfies the corresponding contextual elements. In other words, the situation described herein qualifies as a widespread or systematic attack on the civilian population of Brazil pursuant to and/or in furtherance of an organizational policy (by the Network) to commit such an attack.<sup>31</sup>
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30. The Bemba Test separates the contextual requirement of crimes against humanity into four distinct elements: (i) the existence of an attack directed against any civilian population; (ii) the widespread or systematic nature of the attack; (iii) acts committed as part of the attack (nexus); and (iv) knowledge of the attack.<sup>32</sup> Notably, the OTP will be 'permitted to consider facts which fall outside [the Court's] jurisdiction in order to establish [...] the contextual elements of the alleged crimes'.<sup>33</sup> Each of the Bemba Test's four elements will be dealt with in turn.

<sup>28</sup> ICC-01/05-01/08, Situation in the Central African Republic, *Prosecutor v Bemba*, Trial Chamber III, 'Judgment pursuant to Article 74 of the Statute', 21 March 2016 (the 'Bemba Trial Judgment'); see also ICC-01/05-01/08, Situation in the Central African Republic, *Prosecutor v Bemba*, Appeals Chamber, 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"', 8 June 2018 (the 'Bemba Appeal Judgment'). *Nb.* While Mr Bemba was acquitted on appeal, there was no reversal of the Trial Chamber's findings relevant to the contextual standards. Indeed, the Appeals Chamber implicitly endorsed these findings and made a further refinement discussed below. See n 46, *infra*. With only four convictions to date at the ICC, this remains the best articulation by a trial chamber.

<sup>29</sup> Questions of *mens rea* do not properly arise until the point at which the OTP has identified suspects and sought confirmation of actual charges against those specific individuals from a PTC—well after the opening of an investigation into a situation pursuant to Article 15. See, e.g., ICC-01/19, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, PTC III, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar', 14 November 2019 (the 'Myanmar Article 15 Decision'), fn 99 ('The Chamber considers that the requirement that the perpetrator had knowledge of the attack cannot be addressed at the current stage of the proceedings as there is no suspect before the Court at this point.') (citing Kenya Article 15 Decision, para 79).

<sup>30</sup> See ICC Statute, Articles 5, 7, and 8.

<sup>31</sup> According to Article 7 of the Rome Statute, a crime against humanity means any of the enumerated criminal acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. ICC Statute, Article 7(1).

<sup>32</sup> Bemba Trial Judgment, paras 148 *et seq.*

<sup>33</sup> Myanmar Article 15 Decision, para 93 ('In this regard, the Chamber wishes to make the following clarification: while the Court is not permitted to conduct proceedings in relation to alleged crimes which do not fall within its jurisdiction, it "has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence". [...] In other words, although the Court does not have jurisdiction over [certain] alleged crimes *per se*, it



### i. An Attack Directed Against Any Civilian Population

31. The Bemba Test further separates this element into three separate sub-requirements: (1) a course of conduct involving the multiple commission of acts referred to in Article 7(1); (2) directed against any civilian population; and (3) pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>34</sup>

#### (1) A Course of Conduct Involving the Commission of Multiple Article 7(1) Acts

32. Law: The 'course of conduct' requirement aims to capture 'a series or overall flow of events as opposed to a mere aggregate of random acts'.<sup>35</sup> Such course, involving the multiple commission of Article 7(1) acts, is a quantitative threshold requiring 'more than a few', 'several', or 'many' acts.<sup>36</sup> The number of the individual types of acts referred to in Article 7(1) is irrelevant, provided that each of the acts fall within the course of conduct and cumulatively satisfy the required quantitative threshold.<sup>37</sup> While only those acts enumerated in Article 7(1)(a) to (k) may be relied upon to demonstrate the 'multiple commission of acts',<sup>38</sup> broad claims of such acts—even *those ultimately found to fail on evidentiary grounds at trial or on appeal*—may suffice regarding the contextual element of crimes against humanity, 'which operates at a higher level of abstraction'.<sup>39</sup>
33. Analysis: According to reliable sources, a significant number of various Article 7(1) acts have been committed in Brazil during the last decade. These include hundreds of unlawful killings, thousands of persecutory acts, and an untold number of other inhumane acts. The demonstrable criminal activity has specifically targeted Rural Land Users and Defenders. Moreover, most of the crimes are linked to the illegal dispossession of land, the illegal exploitation of natural resources, and the destruction of the environment, irrespective of the law.

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considered them in order to establish whether or not the contextual elements of crimes against humanity may have been present.') (citing Comoros Article 53 Decision, para 17); see also Bemba Appeal Judgement, para 117.

<sup>34</sup> Bemba Trial Judgment, para 148. ICC Statute, Article 7(2); see also ICC Elements of Crimes: Article 7, Crimes against humanity, Introduction, para 3 ("Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.')

<sup>35</sup> Bemba Trial Judgment, para 149 (citing Katanga Trial Judgment, para 1101; Tadić Trial Judgment, para 644). *Nb.* The attack refers to a 'campaign or operation carried out against the civilian population' and need not constitute a 'military' attack. Bemba Trial Judgment, para 149 (citing ICC Elements of Crimes, Introduction to Article 7, para 3; Bemba Confirmation Decision, para 75; Katanga Trial Judgment, para 1101); see also Kenya Article 15 Decision, para 80.

<sup>36</sup> Bemba Trial Judgment, para 150 (citing Bemba Confirmation Decision, para 81).

<sup>37</sup> Bemba Trial Judgment, para 150 (citing Kunarac et al Appeal Judgment, paras 96, 100; Kupreškić et al Trial Judgment, para 550).

<sup>38</sup> Bemba Trial Judgment, para 151. *Nb.* This is without prejudice to acts not listed in Article 7(1) being considered for other purposes, such as, for example, in determining whether the attack was directed against a civilian population or was pursuant to or in furtherance of a State or organizational policy.

<sup>39</sup> Bemba Appeal Judgment, para 117 ('In the view of the Appeals Chamber, this did not amount to an error. While the Trial Chamber could not convict Mr Bemba of these criminal acts, they could nevertheless be taken into account for the finding regarding the contextual element of crimes against humanity, which operates at a higher level of abstraction. The Appeals Chamber also notes in this regard that Mr Bemba has not argued that he has not received sufficient notice of the allegations regarding these criminal acts and there is no unfairness arising from the Trial Chamber having relied on these criminal acts for the purpose of the contextual element of crimes against humanity.')

*Nb.* On appeal, Bemba had argued that, among other things, the contextual elements of crimes against humanity had not been established. *Ibid*, para 29.

34. Since its creation in 1975, the Pastoral Land Commission (*Comissão Pastoral da Terra*, CPT) has been documenting conflicts in the Brazilian countryside and the serious problem of systemic violence against what are conventionally described as ‘land workers’ (*trabalhadores da terra*), a term that encompasses several distinct peasant categories, including traditional communities, indigenous people, and others—generally, those who live in rural areas and rely on the use of land and/or water as their system of survival and human dignity.<sup>40</sup>
35. CPT data for the period 2011 to 2021 indicates that a tremendous amount of ‘violence against persons’ and related ‘violence against occupation and possession’ have occurred in the context of more than 10,000 land-related conflicts (11,057 recorded) and more than 2000 water-related conflicts (2290 recorded). According to the same data and for the same period, this general trend has resulted in the following specific instances:
  - a. **Violence Against Persons:** 430 murders; 554 attempted murders; 2290 death threats; 87 cases of torture; 1559 arrests (many of them unlawful); 2072 assaults; and 259 consequential deaths;
  - b. **Violence Against Occupation and Possession:** 14,889 expulsions; 96,028 evictions; destruction of 31,463 homes; destruction of 33,185 gardens/cultivation plots; destruction of 44,730 other assets; and 163,956 firearm-related threats.

Most of this violence has taken place within the broader concept of ‘land invasion’, whereby some portion of public, private, or contested land is illegally occupied (by force or otherwise) by actors intending to use the land for commercial purposes.<sup>41</sup> While CPT does not maintain comprehensive records of perpetrators, all of the Article 7(1) acts catalogued above have been committed in the context of conflicts over the use of land and resources in the Amazon. Many of these conflicts involved adherents to the Network, involved in illegal deforestation, logging, mining, agribusiness and/or related activity.

36. According to Global Witness, which has been tracking the situation of land defenders around the world for over a decade, at least 346 murders have taken place during roughly the same period. In Global Witness’ 2022 annual report, it recorded 26 murders of environmental activists within Brazil the previous year.<sup>42</sup> Global Witness uses a different metric than CPT, reflecting the two organizations’ distinct mandates and motivations.<sup>43</sup> Other organizations (each with its own

<sup>40</sup> See Annex II. (‘Since the beginning, [CPT] collects data on resistance struggles for land, for the defense and conquest of rights, and denounces, through various means, especially through its Bulletin, the violence suffered by peoples and communities.’)

<sup>41</sup> *Nb.* ‘Land invasion’ is a term much used with respect to the Amazon but not one with an accepted technical definition. It is not necessarily a crime but often is. It could refer only to an administrative offence or, in certain cases, to legal activity. It is also the subject of decades of legislation (in place and proposed) aimed at normalizing/regularizing long-standing land claims. See Annex II. Per the CPT’s formulation, all violence against persons/property constitutes land invasion, but not all land invasion is violent.

<sup>42</sup> ‘Decade of defiance’, Global Witness, 29 September 2022.

<sup>43</sup> Using a metric different from (but complementary to) CPT, Global Witness tracks ‘those killed in targeted attacks and violent clashes as a result of protests, investigating or taking grievances against mining operations, logging operations, intensive

mandate and motivation)—such as Brazil’s Indigenist Missionary Council (*Conselho Indigenista Missionário*, CIMI), the Brazilian Attorney General’s Office (*Advocacia-Geral da União*, AGU), and the US Department of State—have documented a number of cases that are likely subsumed by the more comprehensive analyses of CPT and Global Witness.<sup>44</sup>

37. The course of conduct can be broadly (but loosely) sub-divided into five categories of activity targeting Rural Land Users and Defenders:
  - a. The **specific massacres** (with multiple murder victims) at Baião, Pará State, in 2019; Colniza, Mato Grosso State, in 2017; and Pau d’Arco, Pará State, in 2017;<sup>45</sup>
  - b. The **long-term targeting of particular groups**, including systematic violence against: the Guarani-Kaiowa People, Mato Grosso do Sul State, from 2011–2021; the ‘Guardians of the Forest’, Maranhão State, from 2013–2020 (including the Governador, Tenetehara, and Guajajara Guardians); the Gamela People, Maranhão State, in 2017; the Uru-Eu-Wau-Wau People, Rondônia State, from 2019–2020; and the Mundukuru People, Pará and Amazonas States, from 2019–2021;<sup>46</sup>
  - c. The **geographic ‘hotspots’** of Areia, Pará State, from 2011–2018; Alto Turiaçu, Maranhão State, from 2014–2018; Terra Nossa Sustainable Development Project, Pará State, from 2017–2018; and Anapu, Pará State, from 2018–2020;<sup>47</sup>
  - d. The **targeting of individual Rural Land Users and Defenders** throughout the country, for example, the murder of José Cláudio Ribeiro da Silva and his wife Maria do Espírito Santo da Silva, Nova Ipixuna, State of Pará, in 2011;<sup>48</sup> and
  - e. **Violence and intimidation against public officials**—themselves ‘Defenders’ when acting in the interests of ‘Rural Land Users’—including agents of ICMBio, IBAMA, and FUNAI.<sup>49</sup>

As these cases demonstrate, hundreds of Rural Land Users and Defenders have been victimized in a sustained course of conduct, in furtherance of the Network’s policy, over the last decade.

38. Moreover, the course of conduct has been marked by brutality and viciousness. Common methods have included: execution-style killing, stabbing, throat slitting, drive-by shooting, hacking with machetes, beating with sticks, mutilation and/or burning of bodies, and binding and gagging of victims. In one notable act of depravity, Ze Cláudio had one of his ears torn off by his killers as proof of his execution. Death threats against adults and children have been carried out by

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agriculture including ranching, tree plantations, hydropower dams, urban development and poaching’. ‘A Hidden Crisis: Increase in killings as tensions rise over land and forests’, Global Witness, 19 June 2012.

<sup>44</sup> See Annex II, paras 11–15.

<sup>45</sup> See Annex II, paras 17–20.

<sup>46</sup> See Annex II, paras 21–42.

<sup>47</sup> See Annex II, paras 43–63.

<sup>48</sup> See Annex II, paras 64–88.

<sup>49</sup> See Annex II, paras 89–93; see also Annex I, paras 28–31.

brandishing various weapons: rifle shots, pistols held to heads, waving sticks and machetes, and exploding bottles of gas (Molotov cocktails). Terror has been spread through the use of arson, disappearances, abductions (prior to killings), reprisals against forest guardians, ambushes, forced evictions, raiding and ransacking property, and simulated graves. A common tactic is the employment of hired gunmen and thugs to suppress resistance.<sup>50</sup> In one especially chilling case, an attempt was made to silence a dying man in his hospital bed.<sup>51</sup>

39. This body of preliminary evidence from various reliable Brazilian and international sources (most of which have been tracking such criminal activity for the entirety of the current century) is the central foundation of this Communication. Indeed, CPT's entire archive—dating back to 1975—is hereby incorporated by reference.<sup>52</sup>
40. In summary, the Network has been engaged in a course of conduct including the commission of Article 7(1) acts throughout Brazil's Amazon during the last decade, in particular: unlawful killing;<sup>53</sup> persecution;<sup>54</sup> and other inhumane acts.<sup>55</sup> The factual record demonstrates a longstanding campaign, marked by innumerable operations, carried out against portions of Brazil's civilian population—in particular, Rural Land Users and Defenders. Rather than a collection or aggregation of individual or isolated acts, the course of conduct amounts to a coherent and consistent flow of criminal events raging unabated for the last decade (and longer). The character of such acts indicates a sustained and collective effort on the part of the perpetrators in furtherance of the Network's policy. This demonstrable commission of Article 7(1) acts—far more than a few and undoubtedly many<sup>56</sup>—satisfies the Bemba Test's quantitative threshold.<sup>57</sup>
41. The continuous flow of criminal acts illustrated by the CPT and other data amounts to a course of conduct for present purposes. Accordingly, there is a reasonable basis to believe that this sub-element is satisfied.

## (2) Directed Against Any Civilian Population

42. Law: The term 'civilian population' denotes a collective, as opposed to individual civilians.<sup>58</sup> The requirement that the attack be 'directed against' the civilian population means that the civilian

<sup>50</sup> See 'Seeds of Conflict: How global commodity traders contribute to human rights abuses in Brazil's soy sector', Global Witness, 23 November 2021; see also 'Amazon palm', Global Witness, 26 September 2022.

<sup>51</sup> See Annex II, para 87..

<sup>52</sup> The relevant material is available at CPT's website: [www.cptnacional.org.br/](http://www.cptnacional.org.br/).

<sup>53</sup> See Section IV.A.1.b.i, *infra*, alleging the crime against humanity of murder under Rome Statute, Article 7(1)(a).

<sup>54</sup> See Section IV.A.1.b.ii, *infra*, alleging the crime against humanity of persecution under Rome Statute, Article 7(1)(h).

<sup>55</sup> See Section IV.A.1.b.iii, *infra*, alleging the crime against humanity of other inhumane acts under Rome Statute, Article 7(1)(k).

<sup>56</sup> See Section VI, *infra*.

<sup>57</sup> See para 32, *supra* (Bemba Test).

<sup>58</sup> Bemba Trial Judgment, para 152. *Nb.* Article 50 of Additional Protocol I provides a definition of a 'civilian population', considered to be customary in nature and therefore relevant to the consideration of crimes against humanity. Additional Protocol I, Article 50; see also Katanga Trial Judgment, para 1102; Blaškić Appeal Judgment, paras 110, 113–114; Kordić & Čerkez Appeal Judgment, para 97; Mrkšić & Šljivančanin Appeal Judgment, para 35; and ECCC Case 002 Trial Judgment, para 185.

population must be the primary, as opposed to incidental, target of the attack. It does not mean, however, that the entire population of a particular geographic area was targeted. Rather, something more than the targeting of a limited number of specific individuals is required.<sup>59</sup>

43. Analysis: According to available evidence, the attack described above has specifically targeted Land Users and Defenders. All of the victims have been civilians.
44. CPT takes a broad and inclusive approach to its work, with the following categories of peasants coming under its expansive definition of 'land workers' (as defined above): traditional and indigenous communities, settlers, squatters, small landowners, *parceiros*, small tenants, rural workers/wage earners, miners, *caçaras*, *faxinalenses*, *geraizeiros*, shellfish gatherers, fishermen, *quilombolas*, retirees, artisanal fishermen and other riverside dwellers, rubber tappers, *vazanteiros*, extractivists (chestnut, palm, and coconut breakers), and others. As noted, the Global Witness tallies include 'those killed in targeted attacks and violent clashes as a result of protests, investigating or taking grievances against mining operations, logging operations, intensive agriculture including ranching, tree plantations, hydropower dams, urban development and poaching'.<sup>60</sup> All of these groups—Rural Land Users and Defenders—have been victimized to varying degrees by the violence described in the previous sub-section.
45. Rather than incidental victims, these civilians have been targeted primarily to serve specific goals. And while there is no numerical threshold required, the well-documented statistics set out above—indicating many thousands of victims—refer to a portion of Brazil's civilian population much greater than a limited number of specific individuals.
46. Accordingly, there is a reasonable basis to believe that this sub-element is satisfied.

### (3) Pursuant to or in Furtherance of a State or Organizational Policy

47. Law: The relevant caselaw defined an **organization** as 'an organized body of people with a particular purpose'.<sup>61</sup> A 'policy' requires the active promotion or encouragement of an attack

<sup>59</sup> Bemba Trial Judgment, para 154 (citing Bemba Confirmation Decision, paras 76–77, fn 99; Katanga Trial Judgment, para 1104–1105, fn 2630; Kunarac et al Appeal Judgment, para 90; Stakić Trial Judgment, para 627; Naletilić & Martinović Trial Judgment, para 235; ECCC Case 002 Trial Judgment, para 182).

<sup>60</sup> At the time of filing, Brazil's population was roughly 213 million, with approximately 28 million living in rural areas and 24 million in the Amazon. Of the Amazon inhabitants, well over 2/3 live in urban areas. It is estimated that the country's *Quilombola* population is ~16 million, *Ribeirinhos* ~7 million, and Indigenous ~900,000. Significant portions of these populations live outside of protected areas in Brazil's various urban centers, presumably for economic and other personal reasons.

<sup>61</sup> Bemba Trial Judgment, para 158; see also Katanga Trial Judgment, para 1119 ('It therefore suffices that the organization have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organization concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State).

against a civilian population by such organization.<sup>62</sup> While it may be of evidential value, a motive or purpose underlying the policy to attack the civilian population is not required.<sup>63</sup> Such policy need not be formalized and may be inferred from a variety of factors taken together, including: (i) the attack was planned, directed, or organized; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of organizational forces in the commission of crimes; (v) statements, instructions, or documentation attributable to the organization condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.<sup>64</sup>

48. Moreover, the course of conduct must reflect a link to the organizational **policy**, in order to exclude random acts perpetrated by isolated and un-coordinated individuals acting on their own.<sup>65</sup> This is satisfied where a perpetrator either deliberately acts to further the policy or engages knowingly in conduct envisaged by the policy.<sup>66</sup> There is no requirement that the perpetrators necessarily be motivated by the policy, or that they themselves be members of the organization.<sup>67</sup> In exceptional circumstances, a policy may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.<sup>68</sup>
49. Analysis: This legal element is satisfied by evidence of an organizational policy (rather than a state policy), namely, to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law. This policy actively promotes or encourages the attack described above.
50. In Brazil, like-minded actors aiming to foster the rapacious and unfettered economic development of Brazil's Amazon Rainforest have been seeking (and obtaining) a significant increase in the corporate capture of government institutions, particularly in the legislative and executive branches—a perennial problem in Brazil and one long driven by the *Ruralistas*. In January 2019, the Network found their most unapologetic champion to date comfortably installed in Brazil's presidential palace.
51. This **organizational group** (the Network) comprises various state and private-sector actors from multiple levels of Brazilian society. To simplify, there appear to be roughly three tiers of participants within the Network:

<sup>62</sup> Bemba Trial Judgment, para 159 (citing ICC Elements of Crimes, Introduction to Article 7, para 3; Katanga Trial Judgment, para 1108). *Nb.* 'A policy which has a civilian population as the object of the attack would be implemented by state or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.' *Ibid.*, n 6.

<sup>63</sup> Bemba Trial Judgment, para 159.

<sup>64</sup> Bemba Trial Judgment, para 160 (citing Bemba Confirmation Decision, para 81; Katanga Trial Judgment, paras 1109–1110; Blaškić Trial Judgment, para 204).

<sup>65</sup> Bemba Trial Judgment, para 161.

<sup>66</sup> Bemba Trial Judgment, para 161.

<sup>67</sup> Bemba Trial Judgment, para 161 (citing Katanga Trial Judgment, para 1115).

<sup>68</sup> Bemba Trial Judgment, para 159 (citing ICC Elements of Crimes, Introduction to Article 7, fn 6; Katanga Trial Judgment, para 1108).



- a. Policy Makers and Influencers: The tone, as it were, is set at the top. The organizational strings are largely, though subtly, pulled by individuals of considerable national influence, whose entrenched views reflect a rigid conception of how rural land is to be used: for commerce and commerce only. These puppet-masters include federal-level politicians in the executive branch and congress, corporate executives, key industry players and their lobbyists, a kind of Amazon ‘deep state’ or ‘agro-industrial complex’. In the case of agribusiness, the corporate capture of institutions (key sections of congress and the justice system, in particular) has secured favorable policy-making and political favors through aggressive lobbying. The consistent congressional influence of the *Ruralistas* is augmented by exertions of the executive branch (depending on the occupant of the office), which has been ascendant in recent years. Action at this level provides signals—some blatant, some coded, many mixed—to the Network’s various associates around the country.
- b. Middle Management: The rough outline filters and extends throughout state- and local-level systems where it finds a natural affinity in those particular locales whose economic sectors and interests stand to reap the most benefit. This is reflected in the fact that most crime occurs in states where those sectors thrive. The players at this level include state and local officials, mid-level business executives, criminal network bosses and their lieutenants, and any number of shadow operators and contractors. Criminal networks provide the capital required for large-scale operations and hire workers or facilitate the hiring of workers through associate *fazendeiros* (ranchers, large farmers). It is not uncommon for members of the crime groups involved in illegal commerce to assume positions as council members, mayors, and even state representatives.
- c. Bottom Dwellers: A crucial level of the organizational network are the armed men who terrorize rural populations and their defenders. In some cases, they are similar to ‘militias’ (the violent criminal organizations that operate in Rio de Janeiro and other urban centers); and they commonly include active and/or former policemen. Some *fazendeiros* employ such armed men to protect themselves and to intimidate and harm those who obstruct their activities and threaten their interests.

Disarmingly and deliberately informal in outward appearance, but ruthlessly effective in messaging and execution, the Network is ‘organization’ personified.

52. Motivated by a desire to ensure rapacious and unfettered Amazon development—hyper-commercial agriculture, ranching, mining, and logging operations—the Network’s policy evolved over time. While never formalized, the policy’s **particular purpose** is to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law. Inevitably, the policy actively promotes or encourages the attack against a civilian population, described above.

53. The policy may be inferred from a variety of factors taken together, from the planning, direction, and organization of the various attacks: the similar and recurrent patterns of violence cataloged by CPT and others; the use of organizational resources to commit crimes; ‘instructions’ attributable to certain individuals condoning and encouraging crimes; deep-seated and persistent discrimination; and the aggressive and destructive influence and encouragement of special interest groups within the Network, such as the *Ruralistas*.
54. The **promotion and encouragement** of the Network’s particular purpose (and the resulting attack against the civilian population) has been accomplished both directly and subtly, by way of what has been described by human rights organizations as a ‘green light’ process: (1) at the top, the articulation of preferences and frameworks through attempts to pass new legislation, use of existing legislation and discretionary executive action, and official statements issued in a reckless and/or coded manner; (2) at the mid-level, provision of capital and logistics, implementation of systems and mechanics, direction of personnel; (3) at the bottom, execution and enforcement (i.e. direct commission of crimes). All of this has been set out, shaped, and accomplished over time by the actions of successive governments acting in coordination with other economic and political elites. Perhaps most notable have been recent executive branch attempts to defund existing protection mechanisms by circumventing longstanding safeguards designed to protect the environment and those who benefit from it—the attempted ‘weaponization’ of executive action. All of this has resulted in the attack against Rural Land Users and Defenders.
55. Importantly, the criminal conduct on the ground reflects a link to the Network and its policy. Far from random, isolated, and/or uncoordinated behavior, the Article 7 acts set out in this Communication have been deliberately undertaken in furtherance of something more than mere personal or professional gain. Rather, the perpetrators—and the Network they represent and serve—appear to have been highly motivated by their larger cause: the rapacious and unfettered Amazon development.
56. Accordingly, there is a reasonable basis to believe that this sub-element is satisfied.

#### ii. Widespread or Systematic Nature of the Attack

57. Law: These disjunctive conditions serve as qualifiers that characterize the nature of the ‘attack’ itself.<sup>69</sup> The term ‘widespread’ connotes the large-scale nature of the attack and the large number of targeted persons.<sup>70</sup> Such assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts; nor does the temporal scope of the attack

<sup>69</sup> Bemba Trial Judgment, para 162 (citing Bemba Confirmation Decision, para 82).

<sup>70</sup> Bemba Trial Judgment, para 163 (citing Bemba Confirmation Decision, para 83; Katanga Trial Judgment, para 1123).

have an impact on this specific analysis.<sup>71</sup> The term 'systematic' refers to the organized nature of the underlying crimes and the improbability of their random occurrence.<sup>72</sup>

58. Analysis: There is a reasonable basis to believe that the Network have engaged in attacks of both a widespread and systematic nature. According to the available data, all states of the Legal Amazon are affected with Pará, Maranhão, and Mato Grosso bearing the brunt. As the violence is linked to the various economic sectors that drive it, this adds to the geographic reach: large-scale agriculture, ranching, mining, and logging operations are scattered throughout the Amazon. The Rural Land Users and Defenders victim groups—collated by CPT and others (see above)—are legion, with the top five categories being landless, squatters, indigenous, *quilombolas*, and *assentados* (occupiers whose rights are in the process of being normalized).
59. As demonstrated throughout this Communication, the perpetrators have frequently targeted a large number, and particular type, of victims in multiple locations throughout the Brazilian Amazon since 2011 (and before). Often, the attacks have been precisely targeted and carried out with considerable coordination. Civilian victims have included men, women, and children—anyone considered to be, in one way or another, an obstacle to the Network's policy. Never random, the attacks described herein have been marked by their sophisticated organization and intensity of purpose.<sup>73</sup>
60. Accordingly, this element is satisfied for present purposes.

### iii. Acts Committed as Part of the Attack (Nexus)

61. Whether the requisite nexus exists is determined by an objective assessment, considering, in particular, the characteristics, aims, nature, and/or consequences of the act. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of Article 7(1).<sup>74</sup> However, at the communication stage, it is unnecessary to demonstrate a nexus between individual criminal acts and the larger attack.<sup>75</sup> In any case, the pattern of criminality in this case is clear. The characteristics, aims, nature, and consequences of the specific acts canvassed herein are sufficiently similar in their context and circumstances for present purposes. Accordingly, there is a reasonable basis to believe that those acts are part of

<sup>71</sup> Bemba Trial Judgment, para 163.

<sup>72</sup> ICC-01/04-01/07-717, Situation in the Democratic Republic of the Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the confirmation of charges', Pre-Trial Chamber I, 30 September 2008, para 394.

<sup>73</sup> See Annex II.

<sup>74</sup> Bemba Trial Judgment, para 165 (citing Bemba Confirmation Decision, para 86; Katanga Trial Judgment, para 1124; Kunarac et al Appeal Judgment, para 100; Kajelijeli Trial Judgment, para 866; Semanza Trial Judgment, para 326).

<sup>75</sup> Kenya Article 15 Decision, para 135 ('The [Pre-Trial] Chamber—in considering whether to authorize an OTP investigation—] points out that the issue of whether an act was committed as part of a widespread or systematic attack needs to be analyzed on a case-by-case basis with regard to each particular act. At the current stage of the proceedings, the Chamber merely considers the situation as a whole without focusing beyond what is necessary for the purpose of the present decision on specific criminal acts.')

the 'situation as a whole', such that a *prima facie* nexus between them and the larger attack has been demonstrated.

#### iv. With Knowledge of the Attack

62. As with the nexus requirement, it is not presently necessary (nor even possible) at the communication stage to engage in any meaningful *mens rea* analysis.<sup>76</sup> Nevertheless, there is very likely a reasonable basis to believe that the perpetrators of the crimes alleged herein have been, and continue to be, well aware of the relevant circumstances described throughout this Communication. In any case, this is a complex matter for the OTP to consider at a much later stage of any eventual proceedings.

#### b. *Underlying Crimes*

##### i. Crime Against Humanity of Murder – Rome Statute, Article 7(1)(a)

63. Law: The killing of persons as part of a widespread or systematic attack on the civilian population may be qualified as the crime against humanity of murder.<sup>77</sup> In such cases, 'killing' is interchangeable with the term 'caused death',<sup>78</sup> which can be committed by either an act or a fault of omission.<sup>79</sup> In murder cases, the OTP must establish that the victim's death was 'the result of the conduct of the accused in such a way that a causal link is established between the conduct and the result'.<sup>80</sup>
64. Analysis: As demonstrated elsewhere in this Communication, there is credible evidence that certain members of the Network have engaged in numerous acts of unlawful killing: more than 400 confirmed cases (and likely more) over the period under consideration.<sup>81</sup> The specific instances documented by CPT and other credible organizations indicate that such killings are part of a widespread and systematic attack against Rural Land Users and Defenders. The available evidence suggests that such unlawful killings have been committed pursuant to the Network's policy.

<sup>76</sup> See para 61, *supra*. *Nb.* The same holds for identifying perpetrators and/or modes of liability. See paras 75–77, *infra*.

<sup>77</sup> Rome Statute, Article 7(1)(a); see also ICC Elements of Crimes, Article 7(1)(a), Crime against humanity of murder, Elements: (1) The perpetrator killed one or more persons. (2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population. (3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. FN7: The term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts.

<sup>78</sup> See ICC Elements of Crimes, nn 2 and 7.

<sup>79</sup> ICTY, *Prosecutor v Delalic et al*, Judgment, IT-96-21-T, 16 November 1998, para 424; see also ICTY, *Prosecutor v Kordic & Cerkez*, Judgment, IT-95-14/2-T, 26 February 2001, para 229; ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, para 589.

<sup>80</sup> ICC, Situation of the Democratic Republic of Congo, *Prosecution v Germain Katanga*, Judgment, ICC-01/04-01/07, 7 March 2014, para 767 (citing ICTY, *Prosecutor v Delalic et al*, Judgment, IT-96-21-T, 16 November 1998, para 424; ICTY, *Prosecutor v Kordic & Cerkez*, Judgment, IT-95-14/2-T, 26 February 2001, para 229).

<sup>81</sup> See paras 33–41, *supra*; see also Annexes I and II.

65. Accordingly, there is a reasonable basis to believe that the acts described in greater detail herein amount to the crime against humanity of murder for present purposes.

ii. Crime Against Humanity of Persecution – Rome Statute, Article 7(1)(h)

66. Law: As part of a widespread or systematic attack on the civilian population, '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court' may be qualified as a crime against humanity.<sup>82</sup> At the ICC, persecution 'means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.<sup>83</sup>
67. The targeted group or collectivity must be identifiable by any of the characteristics mentioned in Article 7(2)(g) of the Rome Statute. The notion of persecution on **political grounds** includes the targeting of civilians on the basis of their political opposition, whether *actual or perceived*, to a particular regime or its leader.<sup>84</sup> Victims of political persecution are not required to be members of a political party or group.<sup>85</sup> The notion of persecution on **cultural grounds** has not yet been clarified in ICL caselaw.<sup>86</sup> Notably, however, the OTP (in a separate context) has 'broadly construed' the idea of 'cultural heritage' to denote a particular 'community's sense of identity and belonging' and to refer to (among other things) 'the practices and attributes of a group or society that are inherited from past generations, maintained in the present, and bestowed upon future generations for benefit and continuity'.<sup>87</sup> This understanding is instructive for present purposes, where the group in question is Rural Land Users and Defenders in Brazil's Amazon.

<sup>82</sup> Rome Statute, Article 7(1)(h); see also ICC Elements of Crimes, Article 7(1)(h), Crime against humanity of persecution, Elements: 1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. 2. 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. 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

<sup>83</sup> Rome Statute, Article 7(2)(g).

<sup>84</sup> Ivory-Coast Article 15 Decision, paras 204–206 (In the Ivory-Coast Case, ICC PTC I determined that at least 316 victims of murder, rape, and other inhumane acts committed by pro-incumbent forces 'were targeted by reason of their identity as perceived political supporters of [the opposition]'. Such targeting was found to have been based on political and other grounds.); *ibid*, para 274 (As the Chamber put it: 'The victims of these crimes were targeted because they were perceived to be members of Alassane Ouattara's political groups or his supporters or because they lived in neighborhoods of Abidjan believed to be Ouattara strongholds. [...] Laurent Gbagbo and other members of the common plan perceived all members of the abovementioned political [and other] groups as supporters of Alassane Ouattara.')

<sup>85</sup> Gerhard Werle, *Principles of International Criminal Law*, 2nd Ed, 2009, para 907.

<sup>86</sup> See ICC-01/12-01/15, Situation in the Republic of Mali, *Prosecutor v Ahmad Al Faqi Al Mahdi*, 'Judgment and Sentence', Trial Chamber VIII, 27 September 2016 (which addressed the destruction of cultural heritage sites in Timbuktu as a war crime of attacking protected objects under Article 8(2)(e)(iv) of the ICC Statute and not as persecution as a crime against humanity).

<sup>87</sup> ICC-OTP, Policy Paper on Cultural Heritage, June 2021; see also Yao Li, University of Potsdam, 'Persecution in International Criminal Law and International Refugee Law', *Zeitschrift für Internationale Strafrechtsdogmatik* (Journal of International Criminal Law Doctrine), ZIS 6/2020, p 306 ('The concept of "culture" within the persecution definition can be interpreted as all grounds related to "customs, arts, social institutions".')

68. In assessing whether a group is identifiable, a mixed approach may be adopted, considering both objective and subjective criteria.<sup>88</sup> As regards the subjective criteria, the perception of the group by the perpetrator as well as the perception and self-identification of the victims may be considered.<sup>89</sup> Where the perpetrator's *subjective* identification of the group or collectivity is at issue, this would include those 'defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies'.<sup>90</sup>
69. Persecution is committed either through a single act or a series of acts.<sup>91</sup> Not every infringement of human rights amounts to persecution, but only a 'severe deprivation' of a person's 'fundamental rights contrary to international law'. Fundamental rights may include a variety of rights, whether derogable or not, such as the right to life; the right not to be subjected to torture or cruel, inhuman, or degrading treatment; and freedom of expression, assembly, and association.<sup>92</sup>
70. Analysis: As demonstrated above, there is a reasonable basis to believe that, over the past decade, certain members of the Network have engaged in numerous acts of persecution against Rural Land Users and Defenders, on **cultural and/or political grounds**.
71. The 'violence against persons' and 'violence against occupation and possession' described above includes thousands of cases (collectively) of murder, attempted murder, death and other threats, torture, arrests (many of them unlawful), assaults, consequential deaths, expulsions, evictions, and destruction of homes, cultivation areas, and other meaningful assets.<sup>93</sup> The specific instances documented by CPT and other credible organizations describe severe deprivations of fundamental rights that can be linked to a widespread and systematic attack against Rural Land Users and Defenders, pursuant to the Network's policy. Such acts manifest, in many cases, as torture, severe beating and wounding, violent land invasions, indiscriminate shooting at people and property, hate speech and incitement to violence, and destruction of means of shelter and subsistence. The apparent goal is to create/inflict an environment of terror and fear on affected communities. The result is both physical and mental suffering—those who endure the attacks as well as those who are forced to witness the suffering of their fellow community members.

<sup>88</sup> Myanmar Article 15 Decision, para 102 (citing relevant ICL).

<sup>89</sup> Myanmar Article 15 Decision, para 103 (citing relevant ICL). *Nb.* Where individuals are targeted, it must be specifically because of their *actual or perceived* association with the particular group or, simply, their *actual or perceived* political opinions. See Gerhard Werle, *Principles of International Criminal Law*, 2nd Ed, 2009, paras 890, 899; ICC-01/11-12, *Situation in Libyan Arab Jamahiriya*, Pre-Trial Chamber I, 'Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', 27 June 2011, para 65; *ibid*, paras 42–64 (Those who were described by the PTC as targeted persons included activists and demonstrators against the Abo Sleem massacre, writers and journalists perceived as dissidents, recipients of banned television frequencies, protestors against arrests of activists, and members of a funeral procession for murdered dissidents.)

<sup>90</sup> *Prosecutor v Naletilić and Martinović*, Trial Chamber, 'Judgment', 31 March 2003, para 636.

<sup>91</sup> Burundi Article 15 Decision, para 130.

<sup>92</sup> Myanmar Article 15 Decision, para 101 (citing Burundi Article 15 Decision, para 132).

<sup>93</sup> *Nb.* Many of these persecutory acts have been committed in connection with unlawful killing (murder), a crime within the jurisdiction of the Court, as set out above. See Section IV.A.1.b.i.



72. Rural Land Users and Defenders (a 'broad church' in terms of composition) amount to a common cultural group also characterized by certain political aspects, especially with respect to the way in which the victims—in particular, their affiliations and/or sympathies—have been and continue to be perceived by the alleged perpetrators. The traditional uses of land practiced by the various groups, and the defense of such use, is a way of life. Preservation of this way of life is contrary to the goals of the Network. In any case, identifying perpetrators and the *mens rea* (discriminatory intent) is premature and relevant here only to the issue of perceived group membership.<sup>94</sup>
73. Accordingly, there is a reasonable basis to believe that the acts described in greater detail herein amount to the crime against humanity of persecution.

iii. Crime Against Humanity of Other Inhumane Acts – Rome Statute, Article 7(1)(k)

74. Intentionally causing great suffering, or serious injury to body or to mental or physical health, as part of a widespread or systematic attack on the civilian population may be qualified as the crime against humanity of other inhumane acts.<sup>95</sup> As demonstrated, based on the same facts and arguments outlined above (additionally and/or in the alternative), there is a reasonable basis to believe that the acts described in greater detail herein amount to the crime against humanity of other inhumane acts for present purposes.

c. *Acts and Conduct of Possible Perpetrators*

75. As with matters relating to *mens rea*,<sup>96</sup> there is no requirement to address the acts and conduct of any specific perpetrators at this stage. Questions related to Modes of Liability ('MOLs') are primarily ones for the OTP to address in preparation for an application for confirmation of charges *following a full investigation into a situation* (which only occurs after a preliminary examination). It is simply too early to engage in this process at this stage in any conclusive way. However, a number of individuals likely connected to the alleged crimes against humanity raised in this Communication have been identified in Annexes I and II, and a selection of these have been named in Annex IV. The Filing Parties invite the OTP to scrutinize their activity.

<sup>94</sup> See para 67, *supra*; paras 75–77, *infra*. Regarding the *mens rea* (discriminatory intent) of any alleged individual perpetrators, such matter is prematurely addressed at this preliminary stage. That said, the OTP is invited to look closely at any statements and/or other actions that are relevant to the issue of (perceived) group membership.

<sup>95</sup> Rome Statute, Article 7(1)(k); see also ICC Elements of Crimes, Article 7(1)(k), Crime against humanity of other inhumane acts, Elements: (1) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. (2) Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. (3) The perpetrator was aware of the factual circumstances that established the character of the act. (4) The conduct was committed as part of a widespread or systematic attack directed against a civilian population. (5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. FN30: It is understood that "character" (in Element 2) refers to the nature and gravity of the act.

<sup>96</sup> See para 62, *supra*.

76. On the issue of ‘individual criminal responsibility’, Article 25 of the Rome Statute provides a smorgasbord of possibilities in terms of MOLs.<sup>97</sup> In this case, given the distinct plausibility of the Network described in this Communication,<sup>98</sup> the following Article 25 scenarios may best describe various levels of participation along the hierarchy set out and discussed above:<sup>99</sup>

- a. Bottom Feeders: For those individuals actually engaged in the perpetration of crimes on the ground, the most likely MOL *might* be some form of direct commission;<sup>100</sup>
- b. Middle Management: For any individuals actually directing the commission of those crimes, the most likely MOL *might* be ordering and/or instigating;<sup>101</sup> and for any individuals actually providing some form of material support amounting to a substantial contribution to those crimes, the most likely MOL *might* be aiding and abetting;<sup>102</sup> and
- c. Policy Makers and Influencers: For any individuals actually providing encouragement (instigation/incitement) to those crimes from a distance, the most likely MOL *might* be soliciting or inducing.<sup>103</sup>

It is also possible that sufficient evidence might emerge from a preliminary examination (and any subsequent investigation) supporting the theory of co-perpetration (aka common plan).<sup>104</sup> This could potentially ensnare individuals at all three levels of the Network.

77. These potential scenarios may be clarified and detailed following a full OTP investigation.

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<sup>97</sup> Pursuant to Article 25(3) of the Statute, ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; [...] (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’ *Nb.* Each of these various modes of liability have been the subject of extensive discussion and decision. The body of relevant jurisprudence is massive. For the reasons stated above, there is no reason to address any case law here.

<sup>98</sup> See Annex I.

<sup>99</sup> See para 51, *supra*.

<sup>100</sup> Rome Statute, Article 25(3)(a).

<sup>101</sup> Rome Statute, Article 25(3)(b).

<sup>102</sup> Rome Statute, Article 25(3)(c).

<sup>103</sup> Rome Statute Article 25(3)(b). *Nb.* While the Rome Statute does not contain an explicit definition for the modes of liability of ‘instigation’ or ‘incitement’ (except with respect to genocide), these concepts are well-developed under international-criminal jurisprudence and arguably fall under Article 25(3)(b)’s conception of solicitation or inducement.

<sup>104</sup> Co-perpetration at the ICC is rooted in judicial interpretations of Article 25(3)(a). See, e.g., Ntaganda Article 61 Decision, para 104 (The objective elements (*actus reus*) of co-perpetration as a mode of liability under Article 25(3)(a) of the [Rome] Statute have been defined as follows: ‘(a) the suspect must be part of a common plan or an agreement with one or more persons; (b) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (c) the suspect must have control over the organization; (d) the organization must consist of an organized and hierarchical apparatus of power; (e) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.’) *Nb.* The Rome Statute does not explicitly provide for what is known as Joint Criminal Enterprise (JCE) as a mode of liability. However, according to some commentators, JCE could be read into the modes of liability in Article 25(3)(a) which provides for criminal responsibility for anyone who commits a crime jointly with another person or through another person. It has also been argued that Article 25(3)(d) incorporates JCE as it refers to crimes committed by groups acting with a common purpose.

## **2. Territorial or Personal Jurisdiction**

78. According to the Rome Statute, the ICC 'may exercise its jurisdiction if one or more of the following states are parties to this Statute [...]: (a) the state on the territory of which the conduct in question occurred [...]; (b) the state of which the person accused of the crime is a national'.<sup>105</sup> As demonstrated, the crimes alleged herein (the 'conduct in question') have been, or are being, committed on the territory of Brazil, a state party to the Rome Statute. Additionally, as set out herein, it is believed that all of the alleged perpetrators (direct and/or otherwise) of such conduct are nationals of Brazil. Accordingly, both territorial *and* personal jurisdiction are satisfied for present purposes.

## **3. Temporal Jurisdiction**

79. According to the Rome Statute, the ICC has jurisdiction with respect to crimes committed after its general entry into force on 1 July 2002. Where states become parties to the Rome Statute at a later date, the ICC has jurisdiction from such time.<sup>106</sup> Brazil ratified and became a party to the Rome Statute in 2002.<sup>107</sup> The alleged crimes outlined herein have all occurred after 2002 and therefore fall within the temporal jurisdiction of the ICC.

## **B. Admissibility<sup>108</sup>**

### **1. Complementarity**

80. According to the principle of complementarity, ICC prosecutions are foreclosed in cases that are, or have been, subject to genuine proceedings by other competent authorities.<sup>109</sup> The key question is whether there are any relevant and genuine investigations or prosecutions in relation to the criminal conduct in question.<sup>110</sup> The assessment must be case specific, namely, whether existing national proceedings encompass the same persons, for the same conduct, as are being proposed

<sup>105</sup> Rome Statute, Article 12(2) (regarding the '[p]reconditions to the exercise of jurisdiction').

<sup>106</sup> Rome Statute, Article 11 (regarding '[j]urisdiction *ratione temporis*') ('(1) The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. (2) If a state becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state, unless that state has made a declaration under article 12, paragraph 3.')

<sup>107</sup> See ICC Website: Brazil signed the Rome Statute on 7 February 2000. Brazil deposited its instrument of ratification of the Rome Statute on 20 June 2002.

<sup>108</sup> The admissibility assessment includes two components: complementarity and gravity. ICC Statute, Article 17(1) ('Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.');

<sup>109</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, paras 42 *et seq*; ICC-OTP, Report on Preliminary Examination Activities 2019, 5 December 2019, para 5.

<sup>110</sup> ICC Statute, Article 17(1)(a)–(c).

<sup>110</sup> ICC-01/04-01/07, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, 'Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', 25 September 2009 ('Katanga Appeal Decision'), para 78.

for investigation and prosecution by the OTP. The ICC Appeals Chamber has confirmed that this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time. The absence of any national proceedings is sufficient to render a case admissible.<sup>111</sup> Only if there are relevant national proceedings, shall the OTP then assess 'whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings'.<sup>112</sup> In any case, prior to the identification of specific suspects or charges, the inquiry is premature.<sup>113</sup>

81. Based on the information available at the time of filing, there are no known completed, pending, or planned domestic investigations or prosecutions by any competent authority *related to the particular allegations raised in this Communication*. To the extent that any proceedings in Brazil might have been undertaken in relation to any of the victims discussed at Annex II, it is likely that such inquiries have dealt with insufficient and/or inappropriate charges and/or have not been sufficiently genuine. In any case, the matter does not arise at the communication stage.
82. Accordingly, the issue of complementarity currently presents no obstacles to the OTP proceeding with the inquiries proposed in this Communication.

## 2. Gravity

83. A case may be inadmissible at the ICC when it is 'not of sufficient gravity to justify further action by the Court'.<sup>114</sup> An assessment of gravity is based on the scale, nature, and manner of commission of crimes, as well as their impact.<sup>115</sup> Scale refers to the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread. The nature of the crimes refers to the types of crimes committed and to specific elements of each offence. The manner of commission requires an examination of the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims and any discriminatory motives. The impact of crimes refers to the suffering endured by

<sup>111</sup> Katanga Appeal Decision, para 78 ('It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from academic writers who have commented on the provision and on the principle of complementarity.')

<sup>112</sup> ICC-01/11-01/11, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', Pre-Trial Chamber 1, 11 October 2013, para 210; see also ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 49.

<sup>113</sup> See Myanmar Article 15 Decision, para 115 ('Given the open-ended nature of the Request—there are at present no specific suspects or charges—and the general nature of the available information, the Chamber sees no need to conduct a detailed analysis, as this would be largely speculative.')

<sup>114</sup> ICC Statute, Article 17(1)(d).

<sup>115</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 61; Situation in Darfur, Sudan, ICC-02/05-02/09-243-Red, *Prosecutor v Bahar Idriss Abu Garda*, Pre Trial Chamber I, 'Decision on the Confirmation of Charges', 8 February 2010, para 31.

the victims, their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.<sup>116</sup> As noted above, just as the OTP will be permitted to consider extra-jurisdictional matters with respect to its assessment of the contextual elements,<sup>117</sup> events falling outside the ICC's jurisdiction may also be considered for purposes of the gravity determination.<sup>118</sup>

84. The crimes alleged in this Communication—unlawful killing; persecution; and other inhumane acts—are all grave ones. The scale, nature, manner, and impact of these crimes are considerable. One purpose of the crimes has been to terrorise Rural Land Users and Defenders, with a conservative estimate of 400 killings and thousands of persecutory acts over ten years of persistent attacks. As discussed above and in greater detail at Annex II, the means and methods have been deliberately brutal, and such techniques have been designed to deter civilians from utilizing their lands in the ways they see fit. The impact has been devastating—leaving many civilians dead, wounded, and otherwise traumatized; depriving them of homes, other property, and means of subsistence; and exposing them to constant fear of further attacks.<sup>119</sup> In some cases, the entire way of life is under threat.
85. The associated environmental is stark. Deforestation rates in the Amazon peaked in the mid/late-1990s through early/mid-2000s, with the worst years (1995 and 2004) registering nearly 30,000 km<sup>2</sup> razed. Between 1988 and 2004, an average of 20,000 km<sup>2</sup> of forest was cut each year. A significant and consistent decline began only towards the end of Lula's second term in office (2009); and this general decrease (under 10,000 km<sup>2</sup> annually) remained nearly constant until 2018. New peaks (relative to current trends) have been reached under Bolsonaro. Both 2019 and 2020 saw numbers in excess of 10,000 km<sup>2</sup>, while 2021 appears to have been close to 13,000 km<sup>2</sup>—the worst data in well over a decade.<sup>120</sup> Given the putative priorities asserted by the OTP,<sup>121</sup> these factors ought to be considered.
86. Accordingly, the gravity of the conduct satisfies the requirements of Article 17(1)(d) of the Rome Statute for present purposes.

### C. Interests of Justice

87. Article 53(1)(c) of the Rome Statute provides that the OTP shall consider whether, 'taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. Unlike jurisdiction

<sup>116</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013.

<sup>117</sup> See para 30, *supra*.

<sup>118</sup> Comoros Article 53 Decision, ICC-01/13-34, para 17 ('[T]he Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence *as well as their gravity.*') (emphasis added).

<sup>119</sup> See Annex II.

<sup>120</sup> See Annexes I and III.

<sup>121</sup> See para 24, *supra*

and admissibility, which require an affirmative finding, the ‘interests of justice’ is a countervailing consideration: the OTP must assess whether there are substantial reasons to believe that an investigation *would not* serve the interests of justice.<sup>122</sup> According to the OTP’s stated practice, ‘there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional’.<sup>123</sup> In making a determination, the OTP ‘will consider, in particular, the interests of victims, including the views expressed by the victims themselves as well as by trusted representatives and other relevant actors’.<sup>124</sup>

88. Until very recently, this issue had been a straightforward and uncontroversial one at the ICC. Following a brief appellate interval triggered by a PTC ruling that sought to alter the OTP approach,<sup>125</sup> the status quo ante has been restored.<sup>126</sup> In reaffirming the OTP’s historical methodology, the ICC Appeals Chamber found that when proceeding *proprio motu* pursuant to Article 15, the OTP has great discretion.<sup>127</sup> In such cases, its determinations regarding the interests of justice shall not be subject to PTC review.<sup>128</sup> Moreover, the Appeals Chamber took the opportunity to emphasize a number of points,<sup>129</sup> two of which are worth noting: (i) As Article 53(1) is formulated in the negative, the Prosecutor ‘need not affirmatively determine that an

<sup>122</sup> ICC-OTP, Report on Preliminary Examination Activities 2019, 5 December 2019, para 8. See also ICC Statute, Article 53(1) (regarding ‘[i]nitiation of an investigation’) (‘The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’); Kenya Article 15 Decision, paras 60, 63.

<sup>123</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 71.

<sup>124</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, para 68. *Nb.* Such actors include community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations. *Ibid.*

<sup>125</sup> For many years, the OTP had operated under a highly permissive approach. See ICC-02/17, Situation in the Islamic Republic of Afghanistan, PTC II, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan’, 12 April 2019 (the ‘Afghanistan Article 15 Decision’), para 87 (‘The Prosecution, consistently with the approach taken in previous cases, does not engage in detailed submissions on the matter and simply states that it has not identified any reason which would make an investigation contrary to the interests of justice.’) Nevertheless, Pre-Trial Chamber II introduced a measure of ambiguity in a major departure from previous practice, imposing additional tests where none had previously existed. Afghanistan Article 15 Decision. However, in the ICC’s most recent confirmation decision, a different PTC adhered to the previous OTP practice without even a passing mention of PTC II’s Afghanistan decision. In the more recent case, PTC III accepted the OTP’s submission that it had ‘identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice’ and simply found ‘no reason to disagree’. Myanmar Article 15 Decision, para 119 (internal citations omitted). Notably, PTC III stated that its ‘view [was] reinforced by the fact that, according to the Registry’s Final Consolidated Report, “all victims representations state that the victims represented therein want the Prosecutor to start an investigation in the Situation”’. *Ibid.* The Afghanistan Article 15 Decision was appealed by the OTP.

<sup>126</sup> ICC-02/17, Situation in the Islamic Republic of Afghanistan, Appeals Chamber, ‘Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan’, 5 March 2020 (the ‘Afghanistan Appeal Decision’).

<sup>127</sup> Afghanistan Appeal Decision, paras 30–31.

<sup>128</sup> Afghanistan Appeal Decision, paras 34–46.

<sup>129</sup> Afghanistan Appeal Decision, para 48 (‘Having determined in relation to the Prosecutor’s first ground of appeal that the Pre-Trial Chamber erred in considering the ‘interests of justice’ when deciding on the Prosecutor’s Request, the Appeals Chamber sees no need to address the Prosecutor’s second ground of appeal. However, the interpretation given to the term ‘interests of justice’ as it appears in article 53(1)(c) of the Statute by the Pre-Trial Chamber has been the subject of extensive submissions before the Appeals Chamber and has provoked much commentary from the academic community and civil society. The concept of the ‘interests of justice’ is of significance under the Statute, particularly for the Prosecutor who remains obliged to consider it in her assessment under articles 15(3) and 53(1) of the Statute. For this reason, the Appeals Chamber is of the view that it is appropriate to provide some observations on the Pre-Trial Chamber’s approach to this concept.’)



investigation would be in the interests of justice'.<sup>130</sup> (ii) A key aspect of the assessment is 'the gravity of the crimes and the interests of victims as articulated by the victims themselves'.<sup>131</sup>

89. To the Filing Parties' best knowledge, there is no reason to believe that an investigation into the conduct described in this Communication would not serve the interests of justice. In fact, there is every reason to believe that accountability for the violence and ruthlessness perpetrated pursuant to the Network's policy against Rural Land Users and Defenders, is long overdue. The impact of this conduct has serious and enduring ramifications on the lives of individual victims as well as groups and communities residing in the Amazon.
90. Relevant stakeholders—including representatives of the victims, as well as international and domestic civil-society organizations in Brazil—support a full investigation into responsibility for the crimes against humanity alleged herein, with a view to bringing the perpetrators to justice before the ICC. Moreover, to the extent the OTP can attempt to tackle contemporary issues related to the unlawful dispossession of land, exploitation of natural resources, and destruction of the environment, the greater, and indeed global, interests of justice would be well served.<sup>132</sup>


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## V. CONCLUSION AND REQUEST


91. For all of the reasons set out herein, there is a reasonable basis to believe that the crimes against humanity of murder, persecution, and other inhumane acts have been committed in Brazil. Accordingly, the Filing Parties hereby request the OTP to open a preliminary examination along the lines suggested in this Communication.

Done at São Paulo (Brazil), Den Haag (Netherlands), and Lisbon (Portugal),  
9 November 2022:


### LAWYERS FOR FILING PARTIES



Paulo Busse,  
Greenpeace Brasil  
and Observatorio do Clima



Richard J Rogers,  
Climate Counsel



Suely Araújo  
Observatorio do Clima

<sup>130</sup> Afghanistan Appeal Decision, para 49.

<sup>131</sup> Afghanistan Appeal Decision, para 49.

<sup>132</sup> See Annex III.

[Climate Counsel](#) is a non-profit foundation based in the Hague, Netherlands. We are a team of former United Nations lawyers dedicated to environmental and climate justice. With decades of experience at the UN international criminal tribunals, we use our expertise in war crimes and crimes against humanity to tackle the environmental crisis. We investigate situations involving destruction of the natural environment and harm to dependent communities. We litigate on behalf of affected communities to bring perpetrators to justice. We advocate for a new 'ecocide' laws alongside global partners. Climate Counsel was founded by **Richard J Rogers**, a UK and US qualified lawyer who was a senior UN lawyer at several UN war crimes tribunals and is the founding Partner of [Global Diligence LLP](#).

[Greenpeace Brasil](#) is part of a global network of independent campaigning organizations that use peaceful protest and creative communication to expose global environmental problems and promote solutions that are essential to a green and peaceful future. Greenpeace Brasil stands with Indigenous Peoples and Environmental Human Rights Defenders and is committed to protecting the environment, biodiversity, and all forms of life. Greenpeace Brasil is represented by Brazilian lawyer, **Paulo Busse**, who specializes in criminal and environmental cases.

[Observatorio do Clima](#) is the leading network of Brazilian civil society organizations dealing with the climate and environmental crises. It is dedicated to building a decarbonized, egalitarian, prosperous, and sustainable country. It does this by monitoring federal policy, producing technical and scientific knowledge, mobilizing stakeholders, and communicating the relevance and urgency of combating the climate crisis. The network was founded in 2002 in São Paulo with 26 organizations. It currently has 77 member organizations. Observatoria do Clima is represented by Brazilian lawyers, **Surely Araújo**, who is a former President of Ibama and a senior official at Observatoria do Clima, and **Paulo Busse**.

## **SUPPORTING PARTIES:**

**Comissão Pastoral da Terra ('CPT'):** Comissão Pastoral da Terra was created to serve the cause of rural workers and to support their organization. The men and women of the countryside are the ones who define the paths to follow, with their objectives and goals. CPT conducts grassroots work with peoples of the land and water, promoting coexistence, support, monitoring and advice.

**Instituto Zé Claudio e Maria:** The Zé Claudio e Maria Institute was born to help maintain the struggle for justice, the memory of the socioenvironmental martyrs, the support for environmental threatened defenders, the solidarity economy, and the access to environmental education. Its mission is to bring more information about the struggles in defense of ecosystems, to strengthen the defenders protection network, and to keep on reporting the violence that happens in Brazil and in the four corners of the planet, especially with regard to environmental conflicts.

**Global Witness:** Global Witness' goal is a more sustainable, just and equal planet. They work to hold companies and governments to account for their destruction of the environment, their disregard for the planet and their failure to protect human rights. In Brazil, Global Witness has worked to protect environmental defenders and promote their voices while cutting off money flowing into destructive industries.

**Greenpeace International:** Greenpeace is a network of independent organisations, which uses peaceful, creative confrontation to expose global environmental problems, and develop solutions for a green and peaceful future. Greenpeace International acts as the coordinating organisation for the network, facilitating the setting of the long-term global campaign programme at a strategic level.

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