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The International Criminal Court to the
rescue of the home and lives of the
Brazilian indigenous peoples

Analysing the possibility of investigating and prosecuting crimes of
extermination and forcible transfer of indigenous peoples in the Amazon
forest

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ABSTRACT

The mutual reliance between the right to live in dignity and peace and the right to a healthy environment is becoming unquestionable. However, the high rates of environmental destruction causing irreversible harms have converted environmental degradation in one of the major threats to international peace and security. Among the most threatened ecosystems are the forests, which are essential to mitigate climate change; besides, these natural treasures are home of millions of indigenous persons whose lives are closely linked with the natural environment surrounding them. However, the destruction of forests is disproportionately affecting indigenous groups; this is the case of the indigenous persons living within the Brazilian Amazon. Since the election of the new President of Brazil in October 2018, Brazilian indigenous persons have been suffering an unprecedented surge of violence, invasions, and destruction of their territories that is endangering their survival. This research focuses on analysing whether the attacks against indigenous peoples and the systematic destruction of their lands, starting from January 2019, can amount to a crime against humanity of extermination and of forcible transfer of Brazilian indigenous peoples as regulated in Article 7 of the Rome Statute. The research further assesses whether the alleged crimes can be investigated and prosecuted by the International Criminal Court. To this effect, it is evaluated if the reported violence against indigenous persons and the government policies issued since January 2019 comply with the elements of the alleged crimes. The research findings evidence that the principles of complementarity and gravity are fulfilled and that the International Criminal Court could be in the position of investigating and prosecuting the alleged crimes. The research findings also support the existence of crimes of extermination and forcible transfer of Brazilian indigenous persons. Finally, it is also assessed whether the Brazilian President could be criminally liable for inducing to the commission of these crimes.

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ABIP	Articulation of the Indigenous Peoples of Brazil
BNDES	Brazilian National Development Bank
CAR	Rural Environmental Registry
COFA	Amazon Fund Guidance Committee
CONAMA	National Environmental Council
CTFA	Amazon Fund Technical Committee
FUNAI	National Indian Foundation
IBAMA	Brazilian Institute for the Environment and Renewable Natural Resources
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICMBio	Instituto Chico Mendes de Conservação da Biodiversidade
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
Imazon	Instituto do Homem e Meio Ambiente da Amazônia
INPE	National Space Research Institute
IWGIA	The International Work Group for Indigenous Affairs
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
SFB	Brazilian Forestry Service

INTRODUCTION

Environmental degradation is becoming one of the main concerns, if not the most important, of the twenty-first century. The United Nations has already recognised it as one of the current threats to international security.¹ The deterioration of the environment is endangering the primary means we need for living and is undermining human dignity and the enjoyment of fundamental human rights such as the right to life, health, or shelter. The destruction of the environment is principally caused by human activities, primarily through the economic exploitation of natural resources, unreasonable exploitation harms the environment in an irreversible manner, provokes scarcity and gradually destroys the life support systems of the Earth. Therefore, the international community, States and civil society have the responsibility to implement as soon as possible all the necessary measures to guarantee the preservation of the environment for the present and future generations.

Deforestation is indeed one of the practices generally carried out in the name of economic development that has devastating effects on the environment. Forests are being destroyed mainly to transform them into agricultural plantations, areas for cattle raising, and for legal or illegal logging.² The consequences are numerous. Firstly, this results in the loss of fauna, flora, biodiversity, and entire ecosystems. Secondly, deforestation through burning is aggravating the problem of climate change, and at the same time, climate change is fostering the degradation of forests. Deforestation produces uncontrolled greenhouse gas emissions that contribute to the rise of the average temperature of the Earth.³ Besides, forests are an effective tool to mitigate global warming. Through photosynthesis, forests are capable of absorbing certain greenhouse gases such as CO₂, releasing oxygen to the atmosphere, and thus, acting as self-regulators of the temperature of the Earth. Therefore, it is essential to protect them. Finally, deforestation,

¹ Anand Panyarachun, 'A More Secure World: Our Shared Responsibility Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th Sess, Agenda Item 55' UN Doc A/59/565 12.

² Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar Publishing Limited 2018) 119..

³ Susan Solomon, Intergovernmental Panel on Climate Change and Intergovernmental Panel on Climate Change (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007) 138.

environmental degradation, and climate change are unfairly and disproportionately affecting the most vulnerable communities; namely, indigenous communities living within forests. The destruction and burning of forests provoke the loss of land, food, native vegetation, and other natural sources upon which persons belonging to indigenous groups depend. Depriving indigenous persons of their basic tools to live implies forcing them to die or to leave the land that they have dwelled for generations. Moreover, denying them the land they have always habited entails depriving them of their cultural heritage.

Furthermore, indigenous communities are indispensable for the conservation of the natural environments they inhabit. The ancestral knowledge they possess has converted them into the caretakers of the environment and has influenced them in the development of techniques aimed at preserving their environment and doing a sustainable use of their resources.⁴ Therefore, guaranteeing their survival is essential for the preservation of the environment.

One of the most threatened forests in the world is the Brazilian Amazon. It is composed of the biggest freshwater reserve and woodland of the planet and provides shelter to an incalculable number of fauna and flora species as well as to several indigenous human communities. Besides, the natural resources that inhabit this precious area are fundamental for the communities living within the forest and for the development of science, medicine, and the supply of the global community. It also plays an essential role in the equilibration of the Earth's climate, water resources, and biodiversity; hence, it has been considered as a region of global importance.⁵ However, the Brazilian Amazon is suffering from the highest rates of deforestation in the world. The destruction of the forest, mainly in favour of cattle raising, illegal logging, and agriculture, has affected some of the protected areas of the Amazon, including lands inhabited by indigenous communities. These practices favoured by public policies and subsidies, have transformed “the lungs of the planet” into the “farm of the planet”⁶ and have positioned Brazil as one of the

⁴ Lawrence Watters, ‘Indigenous Peoples and the Environment: Convergence from a Nordic Perspective’, *Human Rights and the Environment Volume II*, vol 2 (Dinah L Shelton, Edward Elgar Publishing Limited 2011) 37; Beatriz Garcia, *The Amazon from an International Law Perspective* (Cambridge University Press 2011) 1.

⁵ Garcia (n 4) 1.

⁶ Ed Couzens and others (eds), *Protecting Forest and Marine Biodiversity: The Role of Law* (Edward Elgar Publishing 2017) 129.

largest emitters of greenhouse gases. It has also endangered the life of the indigenous persons living within the Amazon, whose homes are being destroyed and lives threatened by entities and persons operating in collusion with the Brazilian Government.

The indigenous communities are the firsts to bear the damages caused by the destruction of the Brazilian Amazon. However, sooner or later, these damages will affect the entire international community.⁷ Therefore, it is fundamental to guarantee the environment all organisms depend on. Correlative to the duty to preserve the environment, there is the responsibility to protect indigenous persons' right to their land and their right to life. As Judge Weeramantry exposed, "The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself".⁸ Ultimately, if the environment is not adequately protected and cared, environmental degradation "may well endanger peace and security, and the very survival of humankind".⁹

Nevertheless, the current international framework for the protection of the environment seems to be not enough to prosecute and deter the gravest cases of environmental destruction. There are almost 500 multilateral treaties and agreements covering environmental issues; however, these political instruments suffer from a lack of ratification and mechanisms to ensure their enforcement and further monitoring of their fulfilment by the parties.¹⁰ Likewise, environmental law has experienced a noteworthy development in the last decades and has an important role in the preservation of the environment. However, it lacks the punitive tools to bring to an end mass destruction of the environment and ecosystems. Therefore, several authors have suggested complementing environmental law with international criminal law.¹¹

⁷ See United Nations Environment Programme (UNEP), Amazon Cooperation Treaty Organisation (ACTO) and Research Center of Universidad del Pacífico (CIUP), United Nations Environment Programme and Organização do Tratado de Cooperação Amazônica (eds), *Geo Amazonia: Environment Outlook in Amazonia* (United Nations Environment Programme, Regional Office for Latin America and Caribbean (UNEP); Amazon Cooperation Treaty Organisation (ACTO) 2009) 101.

⁸ International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry, 25 September 1997, 88

⁹ Eliana Teresa Cusato, 'Beyond Symbolism' (2017) 15 *Journal of International Criminal Justice* 491, 492.

¹⁰ Tom Carocchia, 'Rescuing the International Criminal Court: Crimes against Humanity and Environmental Destruction' (2018) 70 *Rutgers University Law Review* 1167, 1176–1178.

¹¹ Regina Rauxloh, 'The Role of International Criminal Law in Environmental Protection', *Natural Resource Investment and Africa's Development* (Botchway, Francis N, Edward Elgar 2011) 444.

The International Criminal Court (ICC) has no mandate to protect the natural environment *per se*. However, the 2016 Policy Paper on case selection and prioritisation issued by the Office of the Prosecutor of the ICC might enable the ICC to prioritise the investigation and prosecution of crimes of genocide, crimes against humanity and war crimes that are committed through destroying the environment or that result in the destruction of the environment. This could be the basis for the prioritisation and prosecution of the situation in the Brazilian Amazon.

Since January 2019, the deforestation rates of the Brazilian Amazon have suffered an enormous rise. The indigenous lands of the Brazilian indigenous communities living within the Amazon forest are being destroyed, and the indigenous groups are suffering from constant threats to their lives and their natural resources. Several indigenous persons have been murdered, and others have been expelled from their lands because of the destruction of the environmental areas they inhabit. This thesis is intended to analyse whether these practices could amount to a crime against humanity of extermination and forcible transfer of Brazilian indigenous persons. It is also intended to determine if the Policy Papers of the ICC together with previous case law could be an important factor for according the highest importance to this case, as the disappearance of the Brazilian indigenous communities due to the destruction of the Brazilian Amazon would have grave consequences for the world's environment. Therefore, it is essential to protect these communities and their lands.

The dissertation focuses on crimes against humanity of extermination and forcible transfer because these charges are the ones who fit the most the analysed case.

The focus is on crimes against humanity rather than on genocide due to strategic reasons. Accountability for genocide arises when it is proven that the imputed person committed the acts “with intent to destroy in whole or in part, a national, ethnical, racial or religious group”.¹² There is not enough evidence to consider that the Brazilian President fulfilled the necessary specific intent. On the contrary, crimes against humanity do not require a specific intent, being sufficient the voluntary commission of the proscribed acts with knowledge of the ongoing attack against part of the population. Moreover, the lack of

¹² Rome Statute of the International Criminal Court, 17 July 1998, Preamble.

specific intent to destroy a selected group broadens the protection provided by crimes against humanity compared to genocide, permitting us to consider environmental destruction when analysing the commission of the alleged crimes, and to do so, without challenging the anthropocentric character of the crime against humanity.

Furthermore, this thesis is focussed on the specific crimes of extermination and forcible transfer because there is not enough evidence to support the claim that the Brazilian President has intentionally induced the commission of the other facts qualified as crimes against humanity. Firstly, the focus has been on the crime of extermination, and not murder for instance, because the crime is allegedly committed through the imposition of conditions of life aimed at destroying indigenous reserves and the communities living there, rather than a systematic policy of assassinating individuals – although murders of community members are largely reported. Secondly, as regards the commission of any of the crimes of sexual violence listed in Article 7(1)(g), it has not been found evidence that the current Brazilian political leadership has induced the perpetration of such acts in any systematic way. Thirdly, there is no evidence that Brazilian indigenous persons have been victims of the crimes of enslavement, torture, imprisonment or enforced disappearance. Finally, it has not been found enough grounds to consider that the Brazilian President might be criminally liable for inducing agents to perpetrate the crimes of persecution and apartheid.

This thesis will, therefore, try to answer the following research questions: Does the Brazilian State policy affecting the Amazon forest and the communities living in those lands amount to the crime against humanity of extermination and forcible transfer of indigenous persons, likely to be investigated and prosecuted by the ICC? To give a response to this question in the first chapter it will be assessed the importance of the ICC Policy Papers on prioritising crimes under the jurisdiction of the ICC that involve the destruction of the environment. In the second chapter it will be explained the situation of the indigenous communities living within the Brazilian Amazon, the State policies related to the alleged acts of extermination and forcible transfer of indigenous persons, the attacks suffered by indigenous communities and the development of the deforestation rates since January 2019. In the third chapter it will be analysed the elements of the crimes against humanity of extermination and forcible transfer of population under the ICC Statute.

Finally, in the fourth chapter it will be conducted a case analysis, and will be commented the admissibility of the case of extermination and forcible transfer of indigenous population, if the elements of the crime are complied, and the individual criminal responsibility of the Brazilian President.

The assessment has been done using a qualitative methodology focused on the examination and interpretation of information taken from primary and secondary sources. Information regarding the situation of indigenous persons living in the Brazilian Amazon has largely relied on data published by the National Space Research Institute and the Instituto do Homem e Meio Ambiente da Amazônia. The most relevant secondary sources used have been reports by Survival International and Mongabay, as well as the interview-based research conducted by Amnesty International. All the data have therefore been obtained from reliable sources and have been verified. The interpretation of the crimes against humanity of extermination and forcible transfer has also been conducted using primary and secondary sources. The main primary sources have been the Rome Statute, the Elements of Crimes and the case law from the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC. As secondary sources have been used diverse books and academic articles, including the commentary to the “Rome Statute of the International Criminal Court” edited by Otto Triffterer and Kai Ambos.

1. THE ROME STATUTE PROVISIONS ON CRIMES AFFECTING THE ENVIRONMENT AND THE PROSECUTOR'S POLICY PAPERS

The ICC, whose creation is undoubtedly one of the most relevant achievements in international criminal law, is a permanent and independent court, “in relationship with the United Nations system”, which is aimed at prosecuting and punishing “the most serious crimes of concern to the international community” and protecting humankind.¹³ The Rome Statute of the International Criminal Court (Rome Statute) is the treaty that has established the ICC, and that regulates its jurisdiction and rules of procedure. This treaty was concluded in 1998; however, it did not enter into force until 2002, when it acquired the necessary number of ratifications by States.¹⁴

Under Article 5 of the Rome Statute, the ICC has jurisdiction over those offences considered to “deeply shock the conscience of humanity” and to threaten “peace, security and well-being of the world”,¹⁵ namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Accordingly, complaints regarding environmental crimes do not fall *per se* under the jurisdiction of the ICC; until now, convictions by the Court for acts involving environmental damages have been very rare. However, it is indubitable that environmental destruction may be endangering peace, security, the welfare of the planet and the survival of present and future generations.¹⁶

Article 17(1)(d) and Article 53(1)(c) of the Rome Statute establish as an admissibility threshold that the ICC shall prosecute only crimes that are grave enough. In this chapter will be commented the grounds that can justify the prioritisation of the prosecution of certain Rome Statute crimes committed by means of - or resulting in - the destruction of the environment, considering them crimes serious and grave enough to fall under the jurisdiction of the ICC. In this thesis, it is argued that the Prosecutor of the ICC could consider initiating an investigation over the case of the extermination and forcible transfer of Brazilian indigenous communities.

¹³ *ibid.*

¹⁴ *ibid* Article 126.

¹⁵ *ibid* Preamble.

¹⁶ *Ibid.*

To support this point, I will first comment Article 8(2)(b)(iv) as the only provision of the Rome Statute referring to the protection of the environment. Secondly, the focus will be on the development of the ICC Policy Papers, and finally, will be mentioned the case *Prosecutor v. Al Bashir* of the ICC, which highlights the importance and usefulness of the Policy Papers.

1.1 Article 8(2)(b)(iv) of the Rome Statute

Article 8(2)(b)(iv) is the only legal clause of the Rome Statute that has a reference regarding the protection of the environment. This Article prohibits:

“Intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.¹⁷

In this provision, the Rome Statute recognises the importance of preserving the natural environment and criminalises those acts that, during international armed conflict, produce mass and long-lasting damages to nature. However, the limited character of this norm restricts the possibilities of its application. Firstly, the “widespread, long-term and severe” harm to the environment as a consequence of the attack imposes a significant high threshold, difficult to fulfil. Secondly, to apply this provision, it is necessary to find a breach of the proportionality test regarding the “clearly excessive” effects of the harm produced, compared to the military advantage gained.¹⁸ If the proportionality principle were complied, the environmental damage would be justified, and the provision will not be applicable. Thirdly, this precept is only applicable in cases of international armed conflict. Therefore, environmental protection is granted neither in cases of non-international armed conflicts nor in situations of peace. These requirements significantly reduce the scope of the provision and the protection of the environment. Finally, and most obviously, this provision does not apply to crimes against humanity. As established in Article 22(2), “The definition of a crime shall be strictly construed and shall not be

¹⁷ Ibid Article 8(2)(b)(iv).

¹⁸ Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Third edition, CH Beck 2016) 374–379.

extended by analogy”.¹⁹ Thus, Article 8(2)(b)(iv) cannot be extended to crimes against humanity or genocide. Consequently, this provision is not relevant for the case analysed in this thesis. Still, it is a relevant precept to be taken into account for cases of international armed conflict.

1.2 The 2013 and 2016 Policy Papers of the Office of the Prosecutor

A strong encouragement to investigate and prosecute environmental crimes comes from the Policy Papers issued by the Office of the Prosecutor of the ICC. The Office of the Prosecutor has highlighted the importance of prosecuting crimes affecting the environment by stressing that environmental degradation is an important aspect to take into account when deciding whether a case is sufficiently grave to be prosecuted.

The 2013 Policy Paper on preliminary examinations issued by the Office of The Prosecutor explained how to conduct preliminary examinations to determine whether a case should be investigated or not, including, how to assess if the act is grave enough to be admissible under Article 17(1)(d) of the Rome Statute. The Policy Paper stressed that when evaluating the gravity of the act, had to be assessed “the scale, nature, manner of commission of the crimes and their impact”.²⁰ Furthermore, it highlighted that when assessing the impact of the crime, the “environmental damage inflicted on the affected communities”²¹ had to be considered. This statement is very relevant because the Prosecutor is emphasising that environmental damage operates as a factor qualifying an act as grave enough to be investigated. This assertion might be greatly useful to stress the seriousness of the crimes against Brazilian indigenous persons, and the necessity to prioritise the case.

The most important step taken by the Office of The Prosecutor to emphasise the relevance of the environment is the 2016 Policy Paper on case selection and prioritisation. The objective of the Policy paper is to inform and give guidance on how to select and prioritise

¹⁹ Rome Statute (n 12) Article 22(2).

²⁰ Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ International Criminal Court (2013) para 61.

²¹ *ibid* 65.

the cases that should be investigated and prosecuted”.²² The Policy Paper stresses that the selection and prioritisation of one case over others have to be done taking into account the “gravity of the crime, the degree of responsibility of the alleged perpetrators and the potential charges.”²³ Due to the great number of cases that are of concern of the international community, and that might endanger peace and security, the threshold of the gravity test is exceptionally high. Like in the 2013 Policy Paper, it is established that the gravity should be evaluated in accordance with the “scale, nature, manner of commission and impact of the crimes”.²⁴ In addition, the 2016 Policy Paper recognises that in the assessment of the manner of commission and the impact of the crime, environmental concerns should be included.

More concretely, regarding the manner of commission, the Prosecutor will test whether the Rome Statute crimes are perpetrated “by means of, or resulting in, the destruction of the environment”.²⁵ Moreover, when analysing the impact of the Rome Statute crimes, the Office of the Prosecutor:

*“will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”.*²⁶

Therefore, the 2016 Policy Paper focuses on those Rome Statute crimes committed *by means of* the destruction of the environment, and those crimes that *result* in the destruction of the environment. In the first case, ecological destruction is used to harm a certain population and thus to commit one of the Rome Statute crimes. The anthropocentric approach of this crime emphasises that are not environmental values what are protected but human values. Contrary, in the second case, the focus is on the damages caused to the environment, therefore are being protected human values and the integrity of nature.

²² Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ International Criminal Court (2016) para 1.

²³ *ibid* 34.

²⁴ *ibid* 37.

²⁵ *ibid* 40.

²⁶ *ibid* 41.

However, the environment itself cannot be considered a victim before the ICC,²⁷ and only human beings affected by the destruction of the environment will be considered as such.

Accordingly, the 2016 Policy Paper acknowledges that ecological destructions might constitute a path to commit Rome Statute crimes against the communities living within the affected environment and that this factor aggravates the crime, and makes its prosecution admissible. Hence, if the attacks upon these communities affecting the environment are perpetrated with the necessary intent and knowledge, the elements of the alleged crime are satisfied, and, all the other admissibility requirements are complied, the case can be pursued and possibly prioritised. In short, the provisions in the 2013 and 2016 Policy Papers could be essential to ensure that the crimes of extermination and forcible transfer of indigenous communities are given particular consideration and are prosecuted and investigated. By means of destroying the indigenous reserves of the Amazon forest and the Amazon forest itself, indigenous communities are being inflicted conditions of life that deprive them to access to the essential resources they need to survive and are being forced to leave their lands. Besides, uprooting indigenous communities from the Amazon forest results in mass destruction of this natural treasure that in turn, negatively impacts on indigenous groups.

The Policy Paper is a non-binding instrument aimed at guiding the Prosecutor's Office in the interpretation and application of the Rome Statute. It does not create any new crime under the jurisdiction of the Court, neither expands the applicability of the already existing crimes.²⁸ Therefore, environmental harm can only be taken into account when it implies a direct and identifiable human loss or damage.

²⁷ Cusato (n 9) 493–505.

²⁸ Adam Taylor, 'Is Environmental Destruction a Crime against Humanity? The ICC May Be about to Find Out.' *Washington Post* (16 September 2016) <<https://www.washingtonpost.com/news/worldviews/wp/2016/09/16/is-environmental-destruction-a-crime-against-humanity-the-icc-may-be-about-to-find-out/>> accessed 24 July 2020. The article is an interview with Alex Whiting, a professor at Harvard Law School. Whiting clarified that what they are doing is that "they are paying particular attention to crimes that are committed by use of environmental impact or have consequences of environmental impact". Even so, Whiting pointed out, referring to the ICC's Chief Prosecutor Fatou Bensouda, that "by expanding the focus, she is also creating the possibility for new opportunities for cases that may not be the obvious direct cases".

1.3 The case Prosecutor v. Omar Hassan Ahmad al Bashir

If the case of the indigenous communities living within the Brazilian Amazon were investigated and further prosecuted, this would not be the first case in which the decision to investigate was taken, among other things, because of the means in which the crime was committed.

In the case law of the ICC, there is one case in which the means of commission of the crime affecting the environment were decisive to evaluate its gravity and to assess its admissibility. The referred case is the case *Prosecutor v. Omar Hassan Ahmad al Bashir*.

The case *Prosecutor v. Al Bashir* is a pertinent case because it is the first time in which the ICC found it possible that an individual committed a Rome Statute crime by means of acts involving the degradation of the environment. Concretely, the Chamber found that the pollution of the water and the destruction of the means that the targeted group needed to survive, amounted to a deliberate infliction of “conditions of life calculated to bring about its physical destruction in whole or in part”, as a form of the crime of genocide. The ‘means of survival’ destroyed included food, shelter, crops, livestock and wells and water pumps. However, the contamination, poisoning and destruction of wells and water pumps were considered the most influential acts because as the Prosecutor emphasised, access to water is a fundamental aspect for life, and denying it means depriving these groups of their means for survival.²⁹ Therefore, in this case, the gravity of the crimes is worsened due to the essential role that natural resources like water have for the survival of the targeted victims. Furthermore, this particular case proves how environmental destruction can be used as a tool to commit one or more of the Rome Statute Crimes.

In essence, crimes of environment destruction do not fall *per se* under the jurisdiction of the ICC. However, the instruments commented in this chapter might help to foster the prioritisation of crimes in which environmental harm is involved, because the destruction of the environment worsens the gravity of the Rome Statute crimes. That would be the case of the extermination and forcible transfer of indigenous persons living in the Amazon

²⁹ International Criminal Court, *Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-3 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber, 4 March 2009, para 91 <<https://www.legal-tools.org/doc/e26cf4/>>

forest, whose lands and means of survival are being destroyed for their economic exploitation. This situation is leading to the disappearance of many Brazilian indigenous communities, who are suffering drops in their population. Besides, some communities have already been forced to leave the lands they inherited for generations. The systematic deforestation of the indigenous reserves of the Brazilian Amazon forest together with the state policies promoting threats and violent attacks against indigenous persons are putting at risk the survival of these communities, which are essential for the conservation of the forest. Therefore, it would be highly important to pay particular consideration to this situation and use the existing tools to prioritise the investigation and prosecution of this case.

2. THE SITUATION OF THE BRAZILIAN INDIGENOUS COMMUNITIES LIVING WITHIN THE AMAZON FOREST SINCE JANUARY 2019

In the previous chapter, it has been clarified that the ICC does not have direct jurisdiction over crimes purely affecting the environment. However, the Court could intervene in those cases in which environmental destruction results in the human atrocity. The destruction of the Brazilian Amazon is causing worrisome effects on the indigenous communities living within this area, and their physical and cultural survival is endangered. Consequently, the Brazilian policies against the protection of these natural reserves and their inhabitants are likely to end in irreparable humanitarian harm that will put at risk the well-being of the world. This chapter will present, firstly, the Brazilian legal framework regarding the rights of indigenous communities. Afterwards, it will be briefly commented on the situation of indigenous persons in Brazil. Then it will be described the State policies linked with the development of the destruction of the Brazilian Amazon. Finally, it will be expounded the harms that the indigenous communities have been suffering since January 2019 and the deforestation of the Amazon.

2.1 Brazilian Law concerning the rights of indigenous communities

Brazilian domestic legislation recognises the obligation to preserve and protect the Amazon forest and the indigenous territories located within the forest. It also recognises the importance to guarantee the rights of indigenous persons, their culture and lands. Article 225 of the Brazilian Constitution establishes the right to a healthy and ecologically balanced environment and provides that the Brazilian government and the community as a whole have an obligation to guard and preserve the environment.³⁰ Besides, paragraph 4 of Article 225 recognises the Brazilian Amazon as part of the national patrimony of Brazil, and Article 170 recognises environmental protection as a general principle of the economic activity. Several national laws, like Law 12.187 of 2009 on the National Policy on Climate Change or the Law 12651 of 2012 on the Forest Code, further develop constitutional provisions.

³⁰ Constituição da República Federativa do Brasil de 1988, Article 225 <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>

The rights of the indigenous persons are regulated in Chapter VIII of the Brazilian Constitution. Concerning their rights to land, Article 231 of the Constitution stipulates that:

*“Indians shall have their social organisation, customs, languages, creeds and traditions recognised, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property”.*³¹

Paragraph 2 of Article 231 emphasises that:

*“The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein”.*³²

Paragraph 5 of Article 231 explicitly prohibits the removal of indigenous persons from their lands, and Paragraph 6 prohibits the occupation of indigenous lands. Other laws protecting indigenous communities are the Indian Statute of 1973,³³ the Decree n° 1.775 of 8 January 1996,³⁴ which regulates the procedures to demarcate indigenous lands and the Normative Instruction n° 9/2020 of 16 April 2020, which protects demarcated indigenous lands from occupation.

In conclusion, the Brazilian Constitution and specific domestic laws recognise and protect the rights of indigenous peoples over their lands and their rights to maintain and practice their culture and customs.

2.2 Indigenous peoples in Brazil

Indigenous persons in Brazil represent around 0.43 per cent of the Brazilian population, being 896.900 people with 305 different ethnicities.³⁵ The legal provisions presented

³¹ *ibid* Article 231

³² *ibid* Article 231(2)

³³ Lei n° 6.001, de 19 de Dezembro de 1973, Dispõe sobre o Estatuto do Índio <http://www.planalto.gov.br/ccivil_03/Leis/L6001.htm>

³⁴ Decreto n° 1.775, de 8 de Janeiro de 1996. Dispõe sobre o procedimento administrativo de demarcação das terras indígenas e dá outras providências <http://www.planalto.gov.br/ccivil_03/decreto/D1775.htm>

³⁵ The International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 2020*. (34th edn, IWGIA 2020) 360; Survival International, ‘Brazilian Indians’ <<https://www.survivalinternational.org/tribes/brazilian>> accessed 25 July 2020.

above are highly crucial for the preservation of these communities, and the protection of their rights because their lives and culture are interlaced with and depend on the Amazon forest and the environment. The lands that indigenous persons have traditionally occupied is central to their culture, tradition and identity. Indigenous communities have a spiritual connexion with their territories, which influences their history, rituals and customs.³⁶ The way of life of each indigenous community is marked by their land and the resources, animals and plants they can find there. Indigenous communities consider preserving their territories and the diversity of resources they find there as fundamental because they could not maintain their traditions in a different place. For indigenous persons, the nature surrounding them is a source of wisdom and life, and it is sacred. From the land, they acquire nourishment and resources to live.³⁷ Therefore, they respect and carefully guard and protect their land, obtaining from it only the necessary elements they need to survive.

Indigenous persons have ancestral knowledge of their lands, which is transmitted among generations, about how the land should be treated and how natural resources at their disposal should be used without harming the earth.³⁸ Following an ecological and sustainable approach, they obtain food, energy and materials to build houses, bows and lances. Recycling materials and reusing their waste, indigenous communities coexist with nature in a well-balanced form.

The connexion and dependency between indigenous communities and their lands are so strong that destroying their territories would deprive them of their identity, culture, customs and means of survival. As a member of the Guaraní indigenous community, Marcos Veron, said, “This is my life, my soul. If you take me from this land, you take my life”.³⁹ Destroying their natural resources, which are the core element of their life, may entail imposing on them conditions of life calculated to bring about their destruction,⁴⁰ leading to their extermination. Besides, the invasion and occupation of their lands can result in the forcible transfer of entire indigenous communities, who might be annihilated

³⁶ Survival International, ‘Indígenas de Brasil’ <<https://www.survival.es/indigenas/brasil>> accessed 1 August 2020.

³⁷ Víctor M Toledo, ‘Indigenous Peoples and Biodiversity’, *Encyclopedia of Biodiversity* (Elsevier 2001) <<https://linkinghub.elsevier.com/retrieve/pii/B9780123847195002999>> accessed 1 August 2020.

³⁸ *ibid.*

³⁹ Survival International, ‘Indígenas de Brasil’ (n 36).

⁴⁰ Rome Statute (n 12) Article 7(2)(b).

if been separated from their territories. Referring to indigenous peoples, Lawrence Watters emphasised that:

*“Culture and the environment are intertwined and for many indigenous people they are indivisible. Any harm to one is almost certain to damage the other and injury to both is a substantial threat to identity and therefore, even survival”.*⁴¹

2.3 The circumstances of the case

Jair Bolsonaro was elected President of the Federative Republic of Brazil in October 2018, and his mandate began on 1 January 2019. Since then, the President has taken several measures leading to the systematic destruction of the Brazilian Amazon forest and the lands traditionally occupied by indigenous communities. Those measures induced to the commission of severe attacks to the indigenous persons living within the forest, which might result in their extermination and forcible transfer. Below it will be introduced the most relevant discriminatory statements made by the Brazilian President, the policies and legislative measures which have caused the destruction of indigenous lands and the extermination and forcible transfer of the indigenous communities, and their impacts.

2.3.1 Statements against indigenous peoples by the Brazilian President

The Brazilian President began making public comments against indigenous persons and the demarcation of their lands, and the necessity to ‘civilise’ indigenous communities already during his campaign to the presidency. In a speech in April 2017, Bolsonaro stated that if he was elected president “There will no longer be a single centimetre of indigenous land”.⁴² Furthermore, in November 2018 the newly elected President said in an interview that “As far as I’m concerned, there’s no more demarcation of indigenous land”.⁴³ The attitude of Bolsonaro during his presidential campaign triggered an increase of the violent

⁴¹ Dinah Shelton and Joseph L Sax (eds), *Human Rights and the Environment Volume II* (Edward Elgar Publishing Limited 2011) ch 1, p. 6.

⁴² *Bolsonaro Faz Discurso de Ódio No Clube Hebraica* (2017) <<https://www.youtube.com/watch?v=zSTdTjsio5g>> accessed 24 July 2020.

⁴³ Sam Cowie, ‘Jair Bolsonaro Praised the Genocide of Indigenous People. Now He’s Emboldening Attackers of Brazil’s Amazonian Communities.’ (*The Intercept*, 16 February 2019) <<https://theintercept.com/2019/02/16/brazil-bolsonaro-indigenous-land/>> accessed 24 July 2020.

menaces against indigenous persons and an increase of the deforestation of their lands. Nevertheless, the statements against the indigenous persons continued after initiating his term of office.

On 3 January 2019, Bolsonaro published on his Tweeter account a video of the Minister of the Institutional Security Cabinet, Augusto Heleno, saying that “the United Nations Declaration on the Rights of Indigenous Peoples was treasonous and that many existing indigenous lands were based on fraudulent documents”.⁴⁴ In April 2019, the Brazilian President referred to indigenous communities as a problem, saying that “We still have an indigenous problem”.⁴⁵ In July 2019, the President referred to indigenous persons as “prehistoric men”.⁴⁶ The President also said that “Indigenous people have changed and are increasingly human beings like us”.⁴⁷ Moreover, after the unprecedented and worldwide known fires that the Amazon forest suffered during July, August and September 2019, the President denied the burnings in his speech at the United Nations General Assembly saying that the Amazon forest “It is not being devastated or consumed by fire, as the media liars say.”⁴⁸ In the same discourse, the president mentioned that the fires were provoked by persons belonging to indigenous groups and by environmental organisations.⁴⁹

2.3.2 Development of the policies and legal measures directed at the destruction of indigenous communities and their lands

On the first day of his mandate, the Brazilian President issued the Provisional Measure n° 870/2019 reforming the National Indian Foundation (FUNAI), which is a governmental

⁴⁴ ‘Jair M. Bolsonaro en Twitter: “Com vivência no tema, General Heleno fala o que a grande parte da imprensa omite sobre índios. <https://t.co/6wLpCNAJtT>” / Twitter’ (*Twitter*) <<https://twitter.com/jairbolsonaro/status/1080965509317828608>> accessed 24 July 2020.

⁴⁵ Shanna Hanbury, ‘Indigenous Group Wins Unprecedented Right of Reply to Bolsonaro’s Racist Invective’ (*Mongabay Environmental News*, 7 April 2020) <<https://news.mongabay.com/2020/04/indigenous-group-wins-unprecedented-right-of-reply-to-bolsonaros-racist-invective/>> accessed 24 July 2020.

⁴⁶ ‘Bolsonaro Declares “the Amazon Is Ours” and Calls Deforestation Data “Lies”’ (*the Guardian*, 19 July 2019) <<http://www.theguardian.com/world/2019/jul/19/jair-bolsonaro-brazil-amazon-rainforest-deforestation>> accessed 31 July 2020.

⁴⁷ Shanna Hanbury (n 45).

⁴⁸ ‘Brazilian President Speaks out against “Media Lies” Surrounding Amazon Fires’ (*UN News*, 24 September 2019) <<https://news.un.org/en/story/2019/09/1047192>> accessed 24 July 2020.

⁴⁹ *ibid.*

body aimed at drafting frameworks for the protection of the rights of indigenous communities and for the identification, demarcation and conservation of their lands. In specific, the Provisional Measure intended to transfer the competences of FUNAI of identification, demarcation and conservation of indigenous lands to the Ministry of Agriculture, Livestock and Supply (Ministry of Agriculture), cutting off one of the most important functions of FUNAI. The Ministry of Agriculture, which is more interested in expanding the cultivable land of Brazil than protecting indigenous territories, became the authority in charge of identifying, delimiting and demarcating indigenous lands. In June 2019, the Congress turned down the Provisional Measure n° 870/2019. However, it was immediately approved the new Provisional Measure n° 886/2019, which not only reimposed the aforementioned reforms but also transferred the competence relevant to the rights of indigenous peoples to the Ministry of Justice. These provisions were integrated into Law n° 13.844/2019 of 18 of June, in Articles 21.XIV and 37.XXI respectively.⁵⁰ The constitutionality of both articles was challenged before the Federal Supreme Court because the new provisions could endanger the subsistence of indigenous communities and their rights to have their lands demarcated as established in Article 231 of the Brazilian Constitution. Therefore, Article 21.XIV and Article 37.XXI were removed from the Law n° 13.844/2019.

Similarly, a few days after the beginning of his mandate, the Brazilian President transferred the Brazilian Forestry Service (SFB), from the Ministry of Environment to the Ministry of Agriculture. Under the auspices of the Ministry of Environment, SFB promoted the sustainable use of forest, reaching an equilibrium between economic activities and protection of forests. Its principal activities were to issue forest concessions and collect relevant data of forests for framing policies aimed at their conservation and development. The information gathered by SFB was essential for the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA), which is in charge of overseeing the enforcement and compliance with the national environmental policies issued by the Ministry of Environment, as well as assessing the quality of the

⁵⁰ Lei n° 13.844, de 18 de junho de 2019, Estabelece a organização básica dos órgãos da Presidência da República e dos Ministérios <http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13844.htm>

environment. However, the shift towards the Ministry of Agriculture has weakened the monitoring mandate of the SFB.

On 14 January 2019, the Ministry of the Environment, led by Ricardo Salles, a supporter of using indigenous lands for economic purposes, issued the circular letter n° 5 suspending the partnership and collaboration agreements with organisations working on the protection of Amazon forest.⁵¹ The suspension lasted 90 days and left diverse organisations engaged with the protection of the environment without funds, making them incapable of continuing with their activities. The circular letter also established that the funds given during 2018 had to be inspected. Besides, the process for reaching funding agreements was prolonged because the circular letter stipulated that new agreements required an authorisation from the Ministry of Environment. The absence of these organisations facilitated the attacks against indigenous communities by *grileiros*,⁵² land grabbers, miners and other persons interested in exploiting indigenous territories.

In February 2019, the Minister of Agriculture, Tereza Cristina, proposed an agreement that would allow cultivating in indigenous lands implementing the model of agribusiness commodities.⁵³ However, the practice was contrary to Article 231 of the Brazilian Constitution, as Dinaman Tuxá, the coordinator of the Articulation of the Indigenous Peoples of Brazil (ABIP), highlighted, this way of farming “is not compatible with our reality and our way of life”.⁵⁴ Another measure aimed at facilitating the destruction of indigenous communities and their lands was reducing the competences and power of several environmental agencies. Two of the most important agencies affected were Instituto Chico Mendes de Conservação da Biodiversidade (ICMBio) and IBAMA. The

⁵¹ ‘Jeff Nascimento (em 🏠) en Twitter: “Ofício Circular n° 5 do @mmeioambiente, de 14.01.2019, determinando o levantamento e suspensão da execução por 90 dias dos convênios e parcerias com entidades do 3° setor por fundos administrados pelo MMA, Ibama, @ICMBio e JNRJ” <https://t.co/giFf0nGFry>” / Twitter’ (*Twitter*) <<https://twitter.com/jnascim/status/1085339137929105414>> accessed 24 July 2020.

⁵² *Grileiros* is a portuguese term that alludes to persons who seiz land illegally for using or selling it. Amnesty International, ‘From Forest to Farmland. Cattle Illegally Grazed in Brazil’s Amazon Found in JBS’s Supply Chain’ (2020) AMR 19/2657/2020 12.

⁵³ Fern 25, ‘100 Days of Bolsonaro - Ending the EU’s Role in the Assault on the Amazon’ (*Fern*, April 2019) <<https://www.fern.org/news-resources/100-days-of-bolsonaro-ending-the-eus-role-in-the-assault-on-the-amazon-945/>> accessed 24 July 2020.

⁵⁴ Jenny Gonzales, ‘Brazil Wants to Legalize Agribusiness Leasing of Indigenous Lands’ (*Mongabay Environmental News*, 21 February 2019) <<https://news.mongabay.com/2019/02/brazil-wants-to-legalize-agribusiness-leasing-of-indigenous-lands/>> accessed 2 August 2020.

function of these institutions is to ensure the implementation and compliance with environmental law, prevent and combat illegal activities, protect the Amazon forest and the indigenous reserves from deforestation, and conserve the biodiversity and the indigenous territories. However, the reduction of their competences hampered their functions. Besides, these institutions suffer cuts in staff members, and a significant part of their staff was replaced by military officers. For instance, in IBAMA 21 of the 27 environment official guardians were fired, who are responsible for controlling and preventing illegal practices in the Amazon forest.⁵⁵

In April 2019, the Brazilian President issued the Presidential Decree nº 9.760/2019 of 11 April 2019.⁵⁶ The Decree hindered the imposition of environmental fines and included a wide range of forms to appeal and dodge those fines, hampering the prevention of illegal practices and detention and arrest of those committing them. It also limited the possibility to invest money from environmental fines in Non-Governmental Organisations (NGOs) working on environmental projects. As a result, in the period from the 1 January to 15 May of 2019, fines for illegal logging and other illegal practices against the fauna and flora of the Brazilian Amazon forest dropped by 34% comparing with the same period in 2018.⁵⁷

In May 2019, it was published the Decree nº 9.806/2019 regarding the composition and functioning of the National Environmental Council (CONAMA).⁵⁸ The new decree reduced the members of CONAMA from 96 to 23 and eliminated the participation of municipalities and civil society organisations. In the same month, the budget of the

⁵⁵ Thais Borges Sue Branford, 'Dismantling of Brazilian Environmental Protections Gains Pace' (*Mongabay Environmental News*, 8 May 2019) <<https://news.mongabay.com/2019/05/dismantling-of-brazilian-environmental-protections-gains-pace/>> accessed 24 July 2020.

⁵⁶ Decreto nº 9.760, de 11 de Abril de 2019 sobre as infrações e sanções administrativas ao meio ambiente e estabelece o processo administrativo federal para apuração destas infrações <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/Decreto/D9760.htm>

⁵⁷ Sue Branford and Thais Borges, 'Brazil Guts Environmental Agencies, Clears Way for Unchecked Deforestation' (*Mongabay Environmental News*, 10 June 2019) <<https://news.mongabay.com/2019/06/brazil-guts-environmental-agencies-clears-way-for-unchecked-deforestation/>> accessed 2 August 2020.

⁵⁸ Decreto nº 9.806, de Maio de 2019, para dispor sobre a composição e o funcionamento do Conselho Nacional do Meio Ambiente – Conama <http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decreto/D9806.htm>

Ministry of Environment was reduced by more than 20%.⁵⁹ The budget reduction affected IBAMA and the implementation of environmental programmes related to the prevention and control of forest torching, conservation of forests and monitor licensing practices.

The policies of the Brazilian President also affected the Amazon Fund, which is an institution that collects funds for implementing programmes focused on preventing, controlling and combating deforestation. The Brazilian National Development Bank (BNDES) manages the funds, and the organisation is governed by the Amazon Fund Guidance Committee (COFA) and by the Amazon Fund Technical Committee (CTFA), which are formed by representatives of the Brazilian government, the regional States governments, the civil society and experts. The Decree n° 9.759/2019 of 11 April 2019, affected the governance committees of the Fund, and in June, both committees were dissolved. This decision was criticised by Norway and Germany, the two major donors to the Fund, who suspended their donations until the independence of the Fund was re-established. However, many projects of the Fund have been cancelled due to the lack of investments. Moreover, because of the Decree n° 10.144/2019 of 28 November 2019, the BNDES is not allowed to gather funds anymore, which means a further reduction of the money of the Amazon Fund. These measures have gravely undermined the protection of the Amazon forest because they have restraint the margin of action of the Amazon Fund.

The National Space Research Institute (INPE), an indispensable public institution conducting scientific research on the situation of the Amazon forest, has also suffered the adverse effects of the new administration of Brazil. The data published by the INPE evidenced that deforestation rates had alarmingly increased since January 2019. Consequently, the current administration cut its funds and discharged part of the staff, including the president, Ricardo Galvão. President Bolsonaro has accused INPE of lying in the disclosed data.

In December 2019, the Provisional Measure n° 910/2019 was adopted, allowing invaders to regularise the possession of illegally occupied territories, including illegally deforested areas and indigenous lands. The Public Prosecutor criticised the measure questioning its

⁵⁹ Jake Spring and Stephen Eisenhammer, 'Exclusive: As Fires Race through Amazon, Brazil's Bolsonaro Weakens Environment Agency' *Reuters* (28 August 2019) <<https://www.reuters.com/article/us-brazil-environment-ibama-exclusive-idUSKCN1VI14I>> accessed 2 August 2020.

constitutionality and accusing that the measure would foster violations of environmental law and would incite violence against indigenous persons living in the forest. Although the Provisional Measure was expired due to the lack of a decision from the National Congress, a new Bill having almost the same content as the Measure 910/2019 was presented to the National Congress. The Bill 2.633/2020 has not been voted yet, but if the National Congress does not vote, the Bill will become enforceable.

In February 2020 the Bill 191/2020 was issued allowing the mining and exploitation of hydraulic resources in indigenous lands and establishing the rules to conduct such practices.⁶⁰ In April 2020, the president of FUNAI published the Normative Instruction nº 9/2020 of 16 April 2020.⁶¹ The instruction establishes the rules to certify that a rural property does not overlap any indigenous territory. However, the instruction only recognises as indigenous lands those areas that are demarcated and certified as indigenous reserves. Therefore, this protective mechanism does not apply to 237 territories that are still in the process of being delimited and demarcated, which are at risk of being occupied, purchased and adjudicated.⁶²

Due to the new Bill 17/2020, indigenous communities living in the State of Mato Grosso are in a particularly dangerous situation. The Bill permits to inscribe in the Rural Environmental Registry (CAR) properties that overlap with unregistered indigenous territories. The Bill affects 27 indigenous territories excluded from the CAR, and 29 territories traditionally occupied by indigenous communities but that have not been demarcated yet.⁶³ The exclusion of these lands from the protection of the Normative Instruction nº 9/2020 permits acquiring their property through occupation. Hence, these

⁶⁰ Projeto de Lei nº 191/2020, Regulamenta o § 1º do art. 176 e o § 3º do art. 231 da Constituição para estabelecer as condições específicas para a realização da pesquisa e da lavra de recursos minerais e hidrocarbonetos e para o aproveitamento de recursos hídricos para geração de energia elétrica em terras indígenas e institui a indenização pela restrição do usufruto de terras indígenas <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2236765>>

⁶¹ Instrução Normativa nº 9, de 16 de Abril de 2020, Disciplina o requerimento, análise e emissão da Declaração de Reconhecimento de Limites em relação a imóveis privados <<https://www.in.gov.br/web/dou/-/instrucao-normativa-n-9-de-16-de-abril-de-2020-253343033>>

⁶² Bruno Stankevicius Bassi, 'Medida que reduz proteção a terras indígenas foi articulada por Nabhan Garcia' (*De Olho nos Ruralistas*, 28 April 2020) <<https://deolhonosruralistas.com.br/2020/04/28/medida-que-reduz-protecao-a-terras-indigenas-foi-articulada-por-nabhan-garcia/>> accessed 2 August 2020.

⁶³ Fern, 'Direct Threat to Indigenous Territories of Mato Grosso and Brazil' (*Fern*, 22 June 2020) <<https://www.fern.org/news-resources/direct-threat-to-indigenous-territories-of-mato-grosso-and-brazil-2174/>> accessed 2 August 2020.

measures encouraged *grileiros* to attack indigenous communities living in non-registered territories in order to force them to flee and be able to acquire the property of the territory.

Finally, in March 2020 it was presented the Bill 1.142/2020, which provides urgent measures to support indigenous peoples during the Covid-19 pandemic.⁶⁴ However, the Brazilian President vetoed 16 of the provisions of the Bill, reducing the protection and rights of indigenous persons during the Covid-19 pandemic. The vetoes denied indigenous persons the enjoyment of rights like the right to access to potable water, the right to receive disinfectant and other materials for their hygiene and the right to have access to intensive care units specialised for indigenous peoples. The Bill and the vetoes were approved and transformed in Law nº 14.021/2020.⁶⁵

2.3.3 Violent threats and attacks against indigenous communities and illegal practices

Since January 2019, the occupations of indigenous lands, the death threats, attacks and assaults to indigenous communities and the assassination of indigenous persons have increased in comparison with previous years. This section will highlight the most tremendous situations for the purpose of this thesis.

In January 2019, the Public Prosecutor, through the Chamber of Indigenous People and Traditional Communities, sent a letter to the Ministry of Justice asking for the implementation of urgent measures to guarantee the protection of indigenous communities, after having received information of attacks against them.⁶⁶ The Prosecutor published information regarding the invasion of the lands of the Uru Eu Wau Wau community on 12 January 2019, death threats to the Karipuna indigenous community,

⁶⁴ Projeto de Lei nº 1.142 de 2020, Dispõe sobre medidas urgentíssimas de apoio aos povos indígenas em razão do novo coronavírus (Covid-19) <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2242218>>

⁶⁵ Lei nº 14.021, de 7 de Julho de 2020, Dispõe sobre medidas de proteção social para prevenção do contágio e da disseminação da Covid-19 nos territórios indígenas <http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14021.htm>

⁶⁶ Ministério Público Federal, 'MPF pede ao Ministério da Justiça medidas urgentes de proteção a comunidades indígenas sob ameaça de grileiros' (MPF, 19 January 2019) <<http://www.mpf.mp.br/pgr/noticias-pgr/mpf-pede-ao-ministerio-da-justica-medidas-urgentes-de-protecao-a-comunidades-indigenas-sob-ameaca-de-grileiros>> accessed 24 July 2020.

assaults to the indigenous community of Xavante de Marãiwatsédé and assaults to the indigenous communities living in the indigenous area of Guarani da Ponta do Arado.⁶⁷

The Karipuna indigenous community has reported constant death threats against their members. They also denounced that they are suffering constant invasions of their lands by *grileiros*, which prevented them from developing living activities like hunting or recollecting fruits.⁶⁸ On 14 April 2019, a Karipuna individual said to Amnesty International that:

*“We are few to do the surveillance and we don’t have police powers. It is very risky, and we are already threatened. If the government doesn’t act, we might lose our territory, it might be the end of the Karipuna. I don’t know if there are new paths, because we don’t patrol very often to avoid contact with intruders. They are armed with guns”.*⁶⁹

After an investigation, in July 2019, the Federal Police affirmed that there were indications of illegal land seizures in the territories of the Karipuna community.⁷⁰

The Uru Eu Wau Wau indigenous community has also suffered incessant occupations of their lands by intruders interested in getting the property of their territories. The occupations also hampered the survival of the community. A member of the Uru Eu Wau Wau community said to Amnesty International that, “Our survival comes from the forest. We will no longer have hunting. There will be no more trees”.⁷¹

In June 2019, 40 armed *grileiros* penetrated the indigenous territory of the Uru Eu Wau Wau community. They arrived two kilometres away from an indigenous village. A group of indigenous persons from the Uru Eu Wau Wau community asked *grileiros* to leave

⁶⁷ *ibid.* On 14 January 2019, one of the indigenous community of the area was held at gunpoint and threatened to be killed unless in seven days had abandoned the territory.

⁶⁸ Environmental Justice Foundation, ‘Illegal Loggers Threaten Indigenous Amazon Tribes as Law Enforcement...’ (*Environmental Justice Foundation*, 1 May 2020) <<https://ejfoundation.org/news-media/illegal-loggers-threaten-indigenous-amazon-tribes-as-law-enforcement-falters-under-covid-19>> accessed 26 July 2020.

⁶⁹ Amnesty International, ‘Fence off and Bring Cattle. Illegal Cattle Farming in Brazil’s Amazon’ (2019) AMR 19/1401/2019 22.

⁷⁰ *ibid.*

⁷¹ *ibid.* 21.

their territory; however, the invaders menaced that they would return and murder indigenous children.⁷²

On 4 July 2019, a group of *grileiros* torched a tanker truck sent by IBAMA to refuel a helicopter that was controlling the deforestation in the indigenous area of Rondônia.⁷³ In the same month, a group of around 15 armed miners violently occupied the Yvytotõ, one of the villages of the Waiãpi indigenous community. After the fierce invasion, the members of the community were forced to flee and were told not to return.⁷⁴ Moreover, after the intrusion, the group of miners killed the leader of the community, Emyra Waiãpi, who was found dead with stab marks.⁷⁵

Emyra Waiãpi is not the only person murdered since the Bolsonaro presidency began. Several of the victims were indigenous leaders, who had a significant impact on their community. Indigenous leaders are bearers of ancestral knowledge, so targeting them can provoke fear and the destabilisation of the community.

In November 2019, the Guajajara community suffered the loss of their leader Paulo Paulino Guajajara, who was shot to death by loggers invading their territory. In the ambush, Laércio Souza Silva Guajajara was shot as well, but he managed to survive.⁷⁶ In December 2019, a group of members of the Guajajara indigenous community were shot from a moving car, and Firmino Guajajara and Raimundo Guajajara were killed.⁷⁷

⁷² *ibid.*

⁷³ Amnesty International, 'Flashpoints in the Amazon' (2019) <<https://amazon-violence.amnesty.org/en>> accessed 2 August 2020.

⁷⁴ BBC News, 'Indigenous Man Killed as Brazil Miners Take Land' *BBC News* (28 July 2019) <<https://www.bbc.com/news/world-latin-america-49144917>> accessed 24 July 2020.

⁷⁵ Maria Ramirez Uribe and Chelsea J Carter CNN, 'Bolsonaro Doubts Tribal Leader's "Murder", Repeats Call to Mine the Amazon' (*CNN*, 31 July 2019) <<https://www.cnn.com/2019/07/30/americas/brazil-indigenous-leader-emyra-wajapi-killed-intl/index.html>> accessed 24 July 2020; Indian Law Resource Center, 'Llamado a Una Investigación Exhaustiva y Medidas Preventivas En Brasil' (2019) <<https://indianlaw.org/sites/default/files/documents/2019-07-31%20Waiapi%20Incident%20Statement%20SPA.pdf>>.

⁷⁶ Bruno Fonseca and Thiago Domenici, 'Sob governo Bolsonaro, conflitos no campo aumentam e assassinatos de indígenas batem recorde' (*Agência Pública*, 17 April 2020) <<https://apublica.org/2020/04/sob-governo-bolsonaro-conflitos-no-campo-aumentam-e-assassinatos-de-indigenas-batem-recorde/>> accessed 3 August 2020.

⁷⁷ The Guardian, 'Amazon Indigenous Leaders Killed in Brazil Drive-by Shooting' (*The Guardian*, 8 December 2019) <<http://www.theguardian.com/world/2019/dec/08/amazon-indigenous-leaders-killed-in-brazil-drive-by-shooting>> accessed 26 July 2020; Shanna Hanbury, 'Murders of Indigenous Leaders in Brazilian Amazon Hits Highest Level in Two Decades' (*Mongabay Environmental News*, 14 December 2019) <<https://news.mongabay.com/2019/12/murders-of-indigenous-leaders-in-brazil-amazon-hit-highest-level-in-two-decades/>> accessed 26 July 2020.

In the same month, a 15 years old child, Erisvan Guajajara, was found dead with stab marks.⁷⁸ In January 2020, three members of the indigenous community Miranha were killed after a confrontation with a group of *grileiros*.⁷⁹ In March 2020, Zezico Guajajara, was shot to death.⁸⁰ In April 2020, Ari Uru Eu Wau Wau, from the Uru Eu Wau Wau community, was also found dead with knife-wound marks on his neck.⁸¹ The leader of the Karipuna indigenous community, Andre Karipuna, also faces constant threats to his life.

On 5 May 2020, the Attorney General published a report analysing the increase in the violence against indigenous communities during 2019. The report affirmed that 2019 was the year with the second-highest rates of violence against indigenous peoples.⁸²

Finally, the Covid-19 is alarmingly affecting indigenous communities as well. They are not only worrying about the virus but also facing other threats. The pandemic has reduced the protection of indigenous territories, facilitating the attacks against indigenous communities and the occupation of their lands. The invasion and further destruction of indigenous lands by *grileiros*, miners and land-grabbers is having a double effect. Firstly, it is ending the necessary supplies that the indigenous communities need to survive. The destruction of their fauna and flora caused food and resources shortages.⁸³ The Karipuna and the Karitiana indigenous community are alarmingly affected by the lack of food.⁸⁴ Secondly, the lack of protective mechanisms has intensified the invasions and invaders can transmit the Covid-19 to indigenous communities, who are the most vulnerable health group in Brazil, particularly isolated communities whose immune system is exceptionally

⁷⁸ Shanna Hanbury (n 77).

⁷⁹ 'Five Murdered in 2020 Brazilian Amazon Land Conflicts, Adding to 2019 Surge' (*Mongabay Environmental News*, 14 January 2020) <<https://news.mongabay.com/2020/01/five-murdered-in-2020-brazilian-amazon-land-conflicts-adding-to-2019-surge/>> accessed 26 July 2020.

⁸⁰ Sam Cowie, 'In Brazil, COVID-19 Outbreak Paves Way for Invasion of Indigenous Lands' (*Mongabay Environmental News*, 10 April 2020) <<https://news.mongabay.com/2020/04/in-brazil-covid-19-outbreak-paves-way-for-invasion-of-indigenous-lands/>> accessed 28 July 2020.

⁸¹ Survival International, 'Mineros y Madereros Aprovechan La Pandemia de COVID-19 Para Invadir Las Tierras de Tribus No Contactadas' <<https://www.survival.es/noticias/12394>> accessed 1 August 2020.

⁸² Procuradoria-Geral da República, 'Conflitos associados à terra são principal causa de violência contra indígenas e comunidades tradicionais no Brasil, segundo MPF' (5 May 2020) <<http://www.mpf.mp.br/pgr/noticias-pgr/conflitos-associados-a-terra-sao-principal-causa-de-violencia-contra-indigenas-e-comunidades-tradicionais-no-brasil-segundo-mpf>> accessed 1 August 2020.

⁸³ Environmental Justice Foundation (n 68).

⁸⁴ *ibid.*

fragile to confront infectious diseases.⁸⁵ Besides, the infection of one member of a community might have worrisome effects because due to their traditions and lifestyle, the virus can spread very easily and quickly. Moreover, indigenous persons have difficulties in accessing health resources. As Andre Karipuna, the leader of the Karipuna tribe, points out, this could have devastating effects, leading to the disappearance of entire indigenous communities.⁸⁶

2.3.4 Deforestation rates since January 2019

Since January 2019, the deforestation rates have gradually increased. In January 2019, the deforestation of the Amazon rose by 54% in comparison with the same month in 2018.⁸⁷ In May 2019, the rates of illegal deforestation rose by 34% compared with 2018. INPE published that in May 2019, 739 km² of Amazon forest were swept, while in May 2018, 550 km² were destroyed.⁸⁸

In July, August and September, the Amazon forest suffered the largest and the most destructive fires in the last decades. The incapability to handle the fires was the consequence of the policies of reducing the protection of the Amazon forest, imposing cutbacks to environmental institutions and organisations, and facilitating the commission of illegal practices. The Instituto do Homem e Meio Ambiente da Amazônia (Imazon) reported that in July 2019, 1.287 km² of the forest was destroyed, also affecting indigenous territories. Compared with July 2018, in 2019 the deforestation rose by 66%.⁸⁹ In August 2019, 886 km² of Amazon forest were deforested, and 992 km² were degraded.⁹⁰ Despite the flames, indigenous reserves were intensively invaded during these months. In August 2019, illegal cattle ranching was reported in the Manoki

⁸⁵ UN/Department of Economic and Social Affairs Policy Brief #70, 'The Impact of COVID-19 on Indigenous Peoples' (2020) 1–2.

⁸⁶ Environmental Justice Foundation (n 68).

⁸⁷ Greenpeace Brasil, 'Desmatamento cresce no primeiro mês de 2019' (*Greenpeace Brasil*, 4 March 2019) <<https://www.greenpeace.org/brasil/blog/desmatamento-cresce-no-primeiro-mes-de-2019>> accessed 3 August 2020.

⁸⁸ Sue Branford and Thais Borges (n 57).

⁸⁹ Imazon, 'Imazon confirma tendência de crescimento no desmatamento da Amazônia nos últimos 12 meses' (*Imazon*, 16 August 2019) <<http://imazon.org.br/imprensa/imazon-confirma-tendencia-de-crescimento-no-desmatamento-da-amazonia-nos-ultimos-12-meses/>> accessed 3 August 2020.

⁹⁰ Imazon, 'Desmatamento na Amazônia aumenta 63% em agosto deste ano, segundo Imazon' (*Imazon*, 16 September 2019) <<http://imazon.org.br/imprensa/desmatamento-na-amazonia-aumenta-63-em-agosto-deste-ano-segundo-imazon/>> accessed 3 August 2020.

indigenous reserve, in the indigenous territories of the Karipuna and the Uru Eu Wau Wau, and the indigenous reserves of Rio Jacy-Paraná and Rio Ouro Preto.⁹¹

In October 2018, 187 km² of the Amazon forest were deforested, while in October 2019, the deforestation increased by 394%, amounting to 583 km² of which 7% were indigenous territories.⁹² INPE reported that in 2019, 10.129 km² of Amazon forest were deforested, an increase of 34% compared with 2018 when 7.536 km² of forest were deforested.⁹³

During 2020, the invasions of indigenous lands have increased. Imazon Institute reported that the most deforested indigenous areas are the indigenous reserves of Rio Negro, Raposa Serra do Sol, Uaçá I e II and Ituna Itatá, and the lands of the indigenous communities of Yanomami, Kayapó, and Xingu.⁹⁴

Furthermore, in 2020 the deforestation rates have frighteningly increased compared with 2019. In January 2020, the deforestation rates increased by 74% compared with January 2019, destroying 188 km² of forest.⁹⁵ In March 2020, the deforestation increased by 279%.⁹⁶ In April 2020, the deforestation increased by 171%, deforesting 529 km².⁹⁷ In

⁹¹ Amnesty International, 'Fence off and Bring Cattle. Illegal Cattle Farming in Brazil's Amazon' (n 69) 5.

⁹² Imazon, 'Desmatamento na Amazônia aumenta 212% em outubro deste ano, aponta Imazon' (*Imazon*, 3 December 2019) <<http://imazon.org.br/imprensa/desmatamento-na-amazonia-aumenta-212-em-outubro-deste-ano-aponta-imazon/>> accessed 3 August 2020.

⁹³ Instituto Nacional de Pesquisas Espaciais, 'PRODES — Coordenação-Geral de Observação Da Terra' (June 2020) <http://www.obt.inpe.br/OBT/assuntos/programas/amazonia/prodes?fbclid=IwAR319uB4ENGzS9gUC4SZtbBt60X_CT3B6neYcQU3oVfAVou3nNxDEErkKI> accessed 1 August 2020.

⁹⁴ Imazon, 'Terras Indígenas na Amazônia são as Áreas de Proteção que mais sofrem pressão por desmatamento, revela Imazon' (*Imazon*, 22 June 2020) <<http://imazon.org.br/imprensa/terras-indigenas-na-amazonia-sao-as-areas-de-protecao-que-mais-sofrem-pressao-por-desmatamento-revela-imazon/>> accessed 3 August 2020; Imazon, 'Tragédia anunciada: organizações alertam para explosão do desmatamento na Amazônia Legal' (*Imazon*, 17 June 2020) <<http://imazon.org.br/imprensa/tragedia-anunciada-organizacoes-alertam-para-explosao-do-desmatamento-na-amazonia-legal/>> accessed 3 August 2020.

⁹⁵ Imazon, 'Janeiro registra aumento de 74% no desmatamento da Amazônia, mostra Imazon' (*Imazon*, 14 February 2020) <<http://imazon.org.br/imprensa/janeiro-registra-aumento-de-74-no-desmatamento-da-amazonia-mostra-imazon/>> accessed 3 August 2020.

⁹⁶ Imazon, 'Desmatamento na Amazônia avança em março e registra recorde dos últimos dois anos, aponta Imazon' (*Imazon*, 15 April 2020) <<http://imazon.org.br/imprensa/desmatamento-amazonia-avanca-em-marco-e-registra-recorde-imazon/>> accessed 3 August 2020.

⁹⁷ Imazon, 'Abril registra recorde de desmatamento na Amazônia nos últimos dez anos, mostra sistema de monitoramento do Imazon' (*Imazon*, 18 May 2020) <<http://imazon.org.br/imprensa/abril-registra-recorde-de-desmatamento-na-amazonia-nos-ultimos-dez-anos-mostra-sistema-de-monitoramento-do-imazon/>> accessed 3 August 2020.

addition, in June 2020, 822 km² of Amazon forest were deforested; until June 2020, 2.544 km² of forest were destroyed.⁹⁸

⁹⁸ Imazon, 'Boletim do Desmatamento da Amazônia Legal (junho 2020) SAD' (*Imazon*, 17 July 2020) <<https://imazon.org.br/publicacoes/boletim-do-desmatamento-da-amazonia-legal-junho-2020-sad/>> accessed 1 August 2020.

3. CRIMES AGAINST HUMANITY: DEFINITION AND ELEMENTS

In this thesis, it is being defended that the facts presented in the previous chapter could be constitutive of a crime against humanity of extermination and forcible transfer of Brazilian indigenous persons living within the Amazon forest.

In this chapter, are therefore discussed the definition of the crimes against humanity of extermination and forcible transfer and the elements that are required to consider that such crimes have been committed.

3.1 Analysis of the general elements of the crime against humanity

Crimes against humanity, together with the crimes of genocide, war crimes and aggression, are among the most serious and abhorrent offences that can be committed. It is characterised by deliberately provoking intense and unnecessary suffering to the victims, either in times of conflict or in times of peace. As highlighted by Robertson:

*“It is an act of real brutality ordained by the government –or at least by an organisation exercising or asserting political power. It is not the mind of the torturer, but the fact that this individual is part of the apparatus of a state, which makes the crime so horrific and locates it in a different dimension from ordinary criminality”.*⁹⁹

Article 7(1) of the Rome Statute regulates crimes against humanity, establishing that:

“For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

(b) Extermination; [...]

(d) Deportation or forcible transfer of population; [...]”¹⁰⁰

⁹⁹ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New Press 2002) 361.

¹⁰⁰ Rome Statute (n 12) Article 7(1).

From the definition of crimes against humanity of Article 7 of the Rome Statute can be understood that the structure of a crime against humanity is a complex one, formed by two different parts that have to be fulfilled. On the one hand, the specific crime, that is, have to be committed one or more of the crimes listed in Article 7; and on the other hand, the three general elements, also called international or jurisdictional elements. The general elements are “widespread or systematic attack, directed against any civilian population, with knowledge of the attack”.¹⁰¹ The compliance with all the elements of Article 7 of the Rome Statute transforms a crime under national law into a crime against humanity of international concern prosecutable by the ICC.

3.1.1 Committed as part of an attack

The Elements of Crime highlights that it is not sufficient to commit one of the specific crimes listed in Article 7 of the Rome Statute to consider such an act a crime against humanity; it is fundamental that the crime is part of an attack. Article 7(2)(a) defines “attack” as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”,¹⁰² and the Elements of Crime notes that the attack does not need to be a military attack. Besides, the Rome Statute emphasises that the attack should be widespread or systematic. If these characteristics are fulfilled, committing one or more of the specific crimes of Article 7 might lead to the commission of a crime against humanity.

The notion of part of an attack alludes to a campaign or political action conducted to abuse or to go against civilian population, whether during an armed conflict or peacetime.¹⁰³ Furthermore, what has to be widespread or systematic is the attack itself and not necessarily the individual acts that form part of the attack. The ICTY in the case *Prosecutor v. Tadić*, stated that:

“A single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual

¹⁰¹ *ibid.*

¹⁰² *ibid* Article 7(2)(a).

¹⁰³ Triffterer and Ambos (n 18) 165–166.

*criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable”.*¹⁰⁴

Hence, individual crimes of extermination or forcible transfer may constitute crimes against humanity if there is enough nexus between these conducts and the broader policy. In order to determine if the single act is part of an attack, it is relevant to assess if the consequences over the victim would have been less perilous if the attack and policy in which it is rooted had not existed.¹⁰⁵ Therefore, in the absence of the broader attack, the isolated act would have been less dangerous.

Regarding the ‘multiple commission of acts’, can be understood as referring to the commission of more than one of the specific crimes of Article 7(1), but also refers to the commission of one of the specific crimes when produces multiple effects.¹⁰⁶ Therefore, it does not imply that have to be committed a high number of acts but requires that more than one act is committed, or is committed one act that is prolonged in time.¹⁰⁷ Once again, this definition is excluding from the jurisdiction of the Court isolated crimes.¹⁰⁸

Finally, to identify the existence of an attack, it is essential to identify its connection with a ‘State or organisational policy’. The existence of a State action or policy aimed at perpetrating crimes against humanity is fundamental to talk about a crime against humanity. As has been held by the ICTY, ICTR and the ICC, the State policy does not need to be adopted in a formal way, neither to be expressly promulgated to consider that such a policy exist. Hence, it is enough to prove the existence of a *de facto* policy or preconceived plan that can be deduced from the analysis of the course of acts.¹⁰⁹ The presence of a State action or policy can also be identified when public resources and

¹⁰⁴ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, para 649 <<https://www.legal-tools.org/doc/0a90ae/>>

¹⁰⁵ Triffterer and Ambos (n 18) 171–172.

¹⁰⁶ *ibid* 243.

¹⁰⁷ Kelly D Askin, ‘Crimes Within the Jurisdiction of the International Criminal Court’ (1999) 10 Criminal Law Forum 33, 40.

¹⁰⁸ Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press ; Distributed in the USA by Palgrave Macmillan 2009) 195.

¹⁰⁹ International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para 580 <<http://www.legal-tools.org/doc/b8d7bd/>>; *Tadić*, Opinion and Judgment, Trial Chamber (n 104) para 634; International Criminal Court, *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-717, Confirmation Decision, Pre-Trial Chamber, 30 September 2008, para 396 <<http://www.legal-tools.org/doc/67a9ec/>>

public force is used by public personnel acting in their official capacity to encourage the commission of the crime. As better described by Bassiouni, “Crimes against humanity by virtue of their nature and scale require the use of governmental institutions, structures, resources and personnel acting in reliance upon arbitrary power uncontrolled by law”.¹¹⁰

Moreover, the State action or policy can consist of the realisation of active conducts. However, it can also comprise an omission, where the State tolerates the commission of specific crimes and intentionally does not protect the victims.¹¹¹ Lastly, the policy can be a State policy or an organisational policy. The reference to ‘organisational policy’ implies that non-state actors can be behind the policy if they exercise *de facto* power and control over an area, even if they are not legitimately recognised.¹¹² In such cases, non-state actors would also be capable of developing the policies to commit crimes against humanity, hence should also be accountable.¹¹³ It is essential to conduct a case-by-case assessment to evaluate whether a non-state actor is capable of applying an organisational policy and fall under the jurisdiction of the ICC. To do so can be analysed whether the organisation has a hierarchical system, has a manner to apply the policy or has control over a territory.¹¹⁴

3.1.2 Widespread or systematic attack

The widespread or systematic nature of the attack is the fundamental elements to consider that the crime is not a common crime, but a crime against humanity. The attack can be either widespread or systematic, or both. As has already been explained in the previous section, what is required to be widespread or systematic is the attack itself and not the individual acts that conform the attack.

¹¹⁰ M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd rev. ed, Kluwer Law International 1999) 249.

¹¹¹ Triffterer and Ambos (n 18) 246.

¹¹² *Tadić*, Opinion and Judgement, Trial Chamber (n 104) para 654.

¹¹³ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, para 205 <<http://www.legal-tools.org/doc/e1ae55/>>

¹¹⁴ International Criminal Court, *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010, para 95 <<https://www.legal-tools.org/doc/338a6f/>>

One of the difficulties to analyse if the attack is widespread or systematic is that neither the Rome Statute nor the Elements of Crime have defined these terms.

Widespread refers to the quantitative aspect of the attack, concretely to the large-scale of the attack or number of victims. The threshold should not be established too high to limit the definition of crimes against humanity, neither too low to understand that an isolated crime against an individual victim might fall under the jurisdiction of the ICC. The International Law Commission interpreted the term large-scale, considering that:

*“Is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”.*¹¹⁵

The *ad hoc* Tribunals similarly defined the concept. Thus, in the case, *Prosecutor v. Tadić* the ICTY interpreted widespread as referring “to the number of victims” and “directed against a multiplicity of victims”.¹¹⁶ Furthermore, in the case *Prosecutor v. Blaškić*, the ICTY referred to widespread as “the scale of the acts perpetrated and to the number of victims”.¹¹⁷ The ICC has followed the interpretation of the International Law Commission as well as the interpretation by the *ad hoc* tribunals, adopting the definition of widespread as encompassing, “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.¹¹⁸ Besides, in the *Situation in the Republic of Kenya*, the Court pronounces itself regarding the assessment of the widespread element, saying, “The assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts”.¹¹⁹ Therefore, to be widespread, the attack does not have to cover a large geographical area.

¹¹⁵ United Nations and International Law Commission, *Yearbook of the International Law Commission 1996*. . Volume 2, Part 2. Volume 2, Part 2. (United Nations 1998) 47.

¹¹⁶ *Tadić*, Opinion and Judgement, Trial Chamber (n 104) para 648.

¹¹⁷ *Blaškić*, Judgement, Trial Chamber (n 113) para 206.

¹¹⁸ *Situation in the Republic of Kenya*, Decision on the Authorisation of Investigation, Pre-Trial Chamber (n 114) para 95; *Akayesu*, Judgement Trial Chamber (n 109) para 580.

¹¹⁹ *Situation in the Republic of Kenya*, Decision on the Authorisation of Investigation, Pre-Trial Chamber (n 114) para 95.

The International Law Commission referred to the term *systematic* as:

“Pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy”.¹²⁰

Again, this definition has been followed by the *ad hoc* tribunals as well as by the ICC. In the case, *Prosecutor v. Blaškić*, the ICTY held that systematic:

“Refers to the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are common expressions of such systematic occurrence”.¹²¹

The ICC in the *Situation in the Republic of Kenya* quoted the same definition.¹²² Therefore, the attacks to be systematic cannot be random or isolated.

It is complex to analyse whether an attack is systematic or widespread. However, in the case *Prosecutor v. Kunarac*, the ICTY clarified that the existence of one of these factors might be assessed considering the attacked civilian population.¹²³ The ICTY also noted that the Court has to “first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic”.¹²⁴

3.1.3 Directed against any civilian population

Regarding the concept of “population”, the ICTY in the case *Prosecutor v. Kunarac*, clarifies that not all the persons attacked need to be civilians. Nevertheless has to be

¹²⁰ United Nations and International Law Commission (n 115) 47.

¹²¹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para 101 <<https://www.legal-tools.org/doc/88d8e6/>>

¹²² *Situation in the Republic of Kenya*, Decision on the Authorisation of Investigation, Pre-Trial Chamber (n 114) para 96.

¹²³ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac and others*, No. IT-96-23-A, Judgment, Appeals Chamber, 12 June 2002, para 95 <<https://www.legal-tools.org/doc/029a09/>>

¹²⁴ *Ibid.*

proven that sufficient civilians were singled out and that the objective of the attack was to target, specifically, civilian population and not random individuals.¹²⁵

Concerning the notion of “directed against”, the Rome Statute and the Elements of Crime specify that the main targets of the act have to be civilians. This was also detailed by the ICTY that sentenced that:

*“The expression ‘directed against’ is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war”.*¹²⁶

Moreover, it is not needed that the acts are directed against civilians sharing the same characteristics or membership of a social group. What it is required is that the victims, that is, the targeted population, are civilians.

It is also relevant to comment on what is referred by “civilian population”. The Rome Statute does not define the concept of “civilian”. However, the ICTY, the ICTR and the ICC have applied by analogy the definition of civilian given in Article 50 Additional Protocol (I) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, of 8 of June 1997, and in common Article 3 of the Geneva Conventions. In the case *Prosecutor v. Tadić*, the ICTY stated that civilians include “all no-combatants within the meaning of Article 3 to the Geneva Conventions”.¹²⁷ The ICTY added that “the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in the midst of the

¹²⁵ *ibid* 90.

¹²⁶ *ibid* 91.

¹²⁷ *Tadić*, Opinion and Judgement, Trial Chamber (n 104) para 637.

attack does not change the character of the population”.¹²⁸ Furthermore, in the case *Prosecutor v. Akayesu*, the ICTR defined civilian population establishing that:

*“Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause”.*¹²⁹

Considering the concrete situation of the person when the crime is committed is essential to assess whether the person is a civilian or not. In similar terms was established by the ICTY sentencing that “the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian”.¹³⁰

Finally, the term “any civilian”, refers to any person regardless of its nationality, including stateless people.¹³¹

3.1.4 With knowledge of the attack

The Rome Statute establishes that the attack has to be committed with knowledge. The mental element of the crime against humanity is also tackled by the Elements of Crime, further explaining that:

“The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation. In the case of an emerging widespread or systematic attack against a civilian

¹²⁸ *ibid* 638.

¹²⁹ *Akayesu*, Judgement Trial Chamber (n 109) para 582.

¹³⁰ *Blaškić*, Judgement, Trial Chamber (n 113) para 214.

¹³¹ *Tadić*, Opinion and Judgement, Trial Chamber (n 104) para 634; International Criminal Court, *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber, 7 March 2014, para 1103 <<https://www.legal-tools.org/doc/9813bb/>>

*population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack”.*¹³²

This implies that the perpetrator complies with the required mental element when he or she knows that the act is part of a widespread or systematic attack against a civilian population, or he or she intends the act to be part of the patterns of the attack. The Elements of Crimes highlights that the doer does not need to be aware of all the precise features of the State or organisational policy to be found accountable, is sufficient to have a general knowledge about the existence of the broader attack.¹³³ The ICTY and the ICTR followed the same doctrine. The ICTY added that the individual motives of the perpetrator to carry such conduct are irrelevant and that those motives do not have to be necessarily aligned with the purpose of the broader state action or plan.¹³⁴

The mental element serves to assess the connection between the conduct of the concrete person and his or her knowledge that the carried act was part of the collective attack. Some authors highlight that the concerned person does not need to be aware that the committed act amounts to a crime against humanity, being sufficient if the perpetrator knows that the conduct increases the risk of victims to suffer harm or facilitates the commission of other crimes.¹³⁵ The commission with knowledge of an act that is involved with the broader attack is an additional mental element requirement that cannot be confused with the *means rea* required for analysing the accountability of any of the crimes of Article 5 of the Rome Statute, regulated in Article 30 of the Rome Statute.

3.2 Analysis of the specific crimes: extermination and forcible transfer

The specific crimes refer to the enumerated acts in Article 7 of the Rome Statute, that when are committed “as part of a widespread or systematic attack directed against any civilian population”,¹³⁶ amount to a crime against humanity. These specific crimes are developed in Article 7(2) of the Rome Statute, as well as in the Elements of Crime. Due

¹³² International Criminal Court, *Elements of Crimes* (2011) 3.

¹³³ Triffterer and Ambos (n 18) 176.

¹³⁴ *Kunarac and others*, Judgment, Appeals Chamber (n 123) para 103; *Blaškić*, Judgement, Appeals Chamber (n 121) para 124.

¹³⁵ Triffterer and Ambos (n 18) 176.

¹³⁶ Rome Statute (n 12) Article 7(1).

to the purposes of this thesis, this part will be focused on explaining the crime of extermination and the crime of forcible transfer of population.

3.2.1 Crime of extermination

Extermination is defined in Article 7(2)(b) of the Rome Statute, specifying that “includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.¹³⁷

Moreover, the Elements of Crime develops the crime against humanity of extermination as follows:

“1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.

2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

*4. 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”.*¹³⁸

One of the elements that characterise the crime of extermination, and differentiates it from the crime of murder, is the notion of “mass killing”. It is unclear how many victims have to be affected to fulfil the criteria, although most judgements refer to a large number of persons. The ICTY in the case *Prosecutor v. Kristić* sentenced that:

“The very term ‘extermination’ strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation. [...] While extermination generally

¹³⁷ *ibid* Article 7(2)(b).

¹³⁸ International Criminal Court (n 132) 4.

*involves a large number of victims, it may be constituted even where the number of victims is limited”.*¹³⁹

The ICTR highlighted that one victim or a small number would not lead to accountability for extermination.¹⁴⁰ However, in the case *Prosecutor v. Krstić* the ICTY found that extermination can be committed when there are few numbers of victims, in the cases in which a small number of persons forms the population intended to destroy.¹⁴¹ The ICTR stressed that “the term ‘mass’, which may be understood to mean ‘large scale’, does not command a numerical imperative but may be determined on a case-by-case basis using a common sense approach”.¹⁴²

Extermination is ‘calculated to bring about the destruction of part of a population’. Population refers to an identifiable group of persons, understood in a broad sense; thus, it does not refer to the specific grounds legislated in the crime of genocide, but to individuals that for instance live in the same neighbourhood.¹⁴³

Regarding the way to ‘bring about the destruction of part of a population’, the Elements of Crimes specifies that death can be caused “by different methods of killing, either directly or indirectly”, as well as through the “deprivation of access to food and medicine”.¹⁴⁴ Other conditions of life that might bring about the destruction of part of a population are imprisoning and depriving persons of the necessities to survive, spreading a lethal virus or denying access to health care.¹⁴⁵ The ICTR considered that accountability for extermination also arises for planning the extermination if there is sufficient link between the planning and the killing.¹⁴⁶

¹³⁹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Krstić*, No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, para 501 <<https://www.icty.org/en/case/krstic>>

¹⁴⁰ International Criminal Tribunal for Rwanda, *Prosecutor v. Ntagerura*, No. ICTR-99-46-T, Judgment and Sentence, Trial Chamber III, 25 February 2004, para 701 <<https://unictr.irmct.org/en/cases/ictr-99-46>>; ICTR *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment, Trial Chamber III, 17 June 2004, para 309 <<https://unictr.irmct.org/en/cases/ictr-01-64>>

¹⁴¹ *Krstić*, Judgment, Trial Chamber (n 139) para 501.

¹⁴² International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-T, Judgment, Trial Chamber II, 21 May 1999, para 145 <<https://unictr.irmct.org/en/cases/ictr-95-1>>

¹⁴³ International Criminal Tribunal for Rwanda, *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, Trial Chamber II, 22 January 2004, para 694 <<https://unictr.irmct.org/en/cases/ictr-99-54a>>

¹⁴⁴ International Criminal Court (n 132) 4.

¹⁴⁵ *Kayishema and Ruzindana*, Judgmentm Trial Chamber II (n 142) para 146.

¹⁴⁶ *ibid*

The ICTR found that the crime of extermination could be committed by intention but also by omission when the person failed in preventing the commission of the crime:

*“The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event”.*¹⁴⁷

The ICTR gave guidance to assess whether a person committed extermination through omission. Concretely, the Trial Chamber proposed the following questions for its analysis:

*“(i) Did the Accused have authority and did he choose to not exercise it? (ii) Did the Accused have a moral authority over the principals such as to prevent them from committing the crime and did he choose not to exercise it? (iii) Was the Accused under a legal duty to act which he failed to fulfil?”.*¹⁴⁸

Finally, the ICTR also found that the crime of extermination could be committed through imprudence and gross negligence.¹⁴⁹

3.2.2 Crime of deportation or forcible transfer of population

Article 7(2)(d) defines the crime of deportation or forcible transfer of population as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.¹⁵⁰

¹⁴⁷ *ibid* 144

¹⁴⁸ International Criminal Tribunal for Rwanda, *Prosecutor v. Rutaganira*, No. ICTR-95-1C-T, Judgement and Sentence, Trial Chamber III, 14 March 2005, para 68 <<https://unictr.irmct.org/en/cases/ictr-95-1c>>

¹⁴⁹ *Kayishema and Ruzindana*, Judgementm Trial Chamber II (n 142) para 144, 146.

¹⁵⁰ Rome Statute (n 12) Article 7(2)(d).

Regarding the elements of the crime of forcible transfer, the Elements of Crimes states that:

- “1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.*
- 2. Such person or persons were lawfully present in the area from which they were so deported or transferred*
- 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.*
- 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”.*¹⁵¹

As the ICTY affirmed, these crimes aim to safeguard “the right and aspiration of individuals to live in their communities and homes without outside interference”.¹⁵² It is interesting to stress that the Rome Statute and the Elements of Crimes refer to forced displacement to encompass both concepts, deportation and forcible transfer; nevertheless, there is a distinction between these two crimes. The International Law Commission referred to deportation in cases of expulsion from the State or national territory, and forcible transfer of population occurs when there is an expulsion of people from one area to another area within the country.¹⁵³ Therefore, it is the element of being obliged to cross a border the differentiating factor between both crimes. Nevertheless, whether the victims were expelled from the national territory or within the national territory does not delimit the criminal responsibility of the perpetrator. As such was established by the ICTY, stating that “The forced character of displacement and the forced uprooting of the

¹⁵¹ International Criminal Court (n 132) 4–5.

¹⁵² International Criminal Tribunal of the Former Yugoslavia, *Prosecutor v. Krnojelac*, No. IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003, para 218 <<https://www.icty.org/en/case/krnojelac>>

¹⁵³ United Nations and International Law Commission (n 115) 49.

inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent”.¹⁵⁴

Brazilian indigenous persons living within the Amazon forest are being threatened to leave their indigenous lands, but are not being forced to abandon Brazil; therefore the analysis is going to be focused in the crime of forcible transfer of population. To do so, are going to be commented the four main features of this crime: its forcible and non-voluntary character, the lawful presence of the victims, the knowledge of the lawful presence and the expulsion without permitted grounds.

The crime of forcible transfer requires the unlawful movement of one or more persons within the national territory and frontiers employing force. The use of force is not limited to physical force, the Elements of Crimes clarified that forcible transfer:

*“May include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.*¹⁵⁵

Another forcibly means would be death threats and persecution.¹⁵⁶

Moreover, to talk about forcible transfer, the victims have to be lawfully present in the territory from which are expelled, and the perpetrator should be aware or can be expected to know that the victims are lawfully present. In case of doubt, the lawful or unlawful presence should be determined judicially by independent and objective courts.

The removal of people from lands where they are lawfully present is restricted under international law, which allows such expulsion only in limited and justified cases. Accordingly, the Guiding Principles of Internal Displacement of the United Nations prohibits arbitrary displacement and compels States and international actors to respect

¹⁵⁴ *Krnojelac*, Judgement, Appeals Chamber (n 152) para 218.

¹⁵⁵ International Criminal Court (n 132) n 12.

¹⁵⁶ Triffterer and Ambos (n 18) 266.

their obligations under international law in order to prevent displacement.¹⁵⁷ Principle 6 of the Guiding Principles recognises the right of people to be protected against arbitrary displacement aimed at the implementation of unjustified development projects.¹⁵⁸ Forcible transfer of population implies that the expulsion is carried out without permitted grounds and is not voluntarily; hence, it is unlawful. Although the Statute of the ICTY did not specifically include forcible transfer as a crime, the ICTY sentenced that forcible transfer constituted a crime against humanity under Article 5 of the Statute.

Furthermore, the ICTY spoke out about the crime of forcible transfer in the case *Prosecutor v. Simić*, holding that the fundamental elements of the crime of forcible transfer are the illegal and involuntary nature of the displacement and the lack of choice.¹⁵⁹ The ICTY highlighted that the context of the displacement had to be taken into account when deciding if the transfer was voluntary or forcible.¹⁶⁰ The ICTY also added that:

*“Whether a person would have wished to leave the area absent circumstances of discrimination or persecution may also be considered as indicative of a person’s wish. A lack of genuine choice may be inferred from, inter alia, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes calculated to terrify the population and make them flee the area with no hope of return”.*¹⁶¹

¹⁵⁷ United Nations Commission on Human Rights, ‘Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39’ (1998) E/CN.4/1998/53/Add.2 6.

¹⁵⁸ *ibid* 6–7.

¹⁵⁹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Simić*, No. IT-95-9-T, Judgement, Trial Chamber, 17 October 2003, para 125 <<https://www.icty.org/en/case/simic>>

¹⁶⁰ *ibid* 126.

¹⁶¹ *ibid*.

Finally, it is fundamental that the perpetrator had knowledge and intention to produce the forcible transfer of the victims. The ICC stressed that it is necessary to prove that the conduct of the perpetrator brought about the forcible transfer of the victims.¹⁶²

¹⁶² International Criminal Court, *Prosecutor v. Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para 245 <<https://www.legal-tools.org/doc/96c3c2/>>

4. CASE ANALYSIS: CRIMES AGAINST HUMANITY OF EXTERMINATION AND FORCIBLE TRANSFER OF BRAZILIAN INDIGENOUS PEOPLES.

4.1 The exercise of jurisdiction by the International Criminal Court

This section analyses the different procedures by which the ICC can initiate the investigation and prosecution of the crimes of extermination and forcible transfer of Brazilian indigenous persons. It is worth mentioning that in 2002, through the Legislative Decree n° 4.388, Brazil became part of the Rome Statute,¹⁶³ therefore, under Article 12(1) of the Rome Statute, Brazil has accepted the jurisdiction of the ICC over the crimes categorised in Article 5 of the Rome Statute.

Article 13 of the Rome Statute establishes how the ICC can exercise its jurisdiction. Article 13 regulates the referral by a State Party following Article 14, the referral by the Security Council based on Chapter VII of the United Nations Charter and the initiation *proprio motu* by the Prosecutor following Article 15.¹⁶⁴

Regarding the referral by a State Party, generally, states are not willing to report questionable practices of other States, due to the conflicts this can produce. Hence, it is unlikely that a State Party of the Rome Statute will refer to the ICC the situation in Brazil. However, the referral by a State Party also permits the State in which one or more of the crimes of Article 5 of the Rome Statute have been committed to self-refer the case to the ICC. The International Community has welcomed this option because theoretically, the referring State shows cooperation as well as a commitment to justice and human rights. Nevertheless, cases like the self-referral by the State of Uganda in 2003 or the self-referral by the government of the Democratic Republic of Congo in 2004 showed that self-referrals could lead to politicised processes, in which the ICC is limited to investigate and prosecute only those parties against the Government of the referring State.¹⁶⁵ In any case, the lack of investigative steps by the Brazilian judiciary to prosecute the alleged crimes and the fact that the crimes are imputed to the President of Brazil evidence that it is

¹⁶³ Decreto n° 4.388, de 25 de setembro de 2002, Promulga o Estatuto de Roma do Tribunal Penal Internacional <http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm>

¹⁶⁴ Rome Statute (n 12) Article 13.

¹⁶⁵ Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions' (2014) 18 The International Journal of Human Rights 444, 451–454.

unlikely that the Brazilian government will self-refer the situation that indigenous persons are suffering.

Concerning the referral by the Security Council, it is the most direct way to trigger the jurisdiction of the Court, as well as one of the most effective because it may compel the United Nations Member States to collaborate with the investigation and prosecution. However, it might also lead to politicised and one-sided processes, in which only the parties selected by the Security Council are investigated and prosecuted.¹⁶⁶ Similarly, only the situations that are of interest of the members of the Security Council will be referred. The UN Special Rapporteur on the rights of indigenous peoples has denounced the human rights situation of indigenous peoples in Brazil. However, the Security Council has not shown the intention to refer the situation to the ICC, and it is not probable that this will happen soon.

Finally, the Prosecutor can, *proprio motu*, decide to initiate an investigation. This mechanism guarantees the independence and impartiality of the procedure because the lack of referral by political actors might prevent the politicisation of the process. This was proven in the 2010 investigations into Kenya *proprio motu* started by the Prosecutor.¹⁶⁷ Nevertheless, to initiate investigations *proprio motu* the Prosecutor has to comply with the requisites established in Article 15 of the Rome Statute. Concretely, the Prosecutor shall conduct a preliminary investigation to seek reliable information about the crime,¹⁶⁸ afterwards if the Prosecutor considers that there are sufficient grounds to continue the investigation, it will request from the Pre-Trial Chamber an authorization for investigation.¹⁶⁹

However, the initiations *proprio motu* might face more problems of collaboration than the referrals by the Security Council. Besides, initiations by the Prosecutor might be obstructed by the Security Council through its power to defer a case under Article 16 of the Rome Statute. Still, even if initiations *proprio motu* can face more drawbacks, they constitute a source of impartiality and fairness in the selection of the violations that have

¹⁶⁶ *ibid* 454–456.

¹⁶⁷ *ibid* 456–458.

¹⁶⁸ Rome Statute (n 12) Article 15(2).

¹⁶⁹ *ibid* Article 15(3) and (4).

to be prosecuted. Moreover, it is unlikely that a procedure might be begun through the other channels; hence, initiation by the Prosecutor seems to be the best mechanism for the ICC to exercise its jurisdiction over the extermination and forcible transfer of indigenous persons in Brazil.

4.2 Admissibility of the Brazilian Amazon Case

Article 17(1) of the Rome Statute provides that:

“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; [...]

(d) The case is not of sufficient gravity to justify further action by the Court.”¹⁷⁰

Article 17 indicates the two requirements that have to be overseen to decide whether a case is admissible or inadmissible: the principle of complementarity and the gravity test.

The notion of *complementary* is developed in sections (a), (b) and (c) of Article 17(1) and implies that national jurisdiction is prioritised over the jurisdiction of the ICC. Thus, it should be assessed whether in the domestic sphere, the case is being investigated or prosecuted or has been investigated or prosecuted.

The first aspect to be analysed is the activity or inactivity of the domestic judicial system pursuant to Article 17(1)(a) of the Rome Statute. Therefore, the inexistence of an investigative procedure or prosecution would be enough to fulfil the complementarity test. In this sense, it was established by the ICC regarding the *Situation in the Democratic Republic of the Congo*, where the Pre-Trial Chamber said that:

“The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such

¹⁷⁰ *ibid* Article 17(1).

*case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17 (1) (a) to (c), 2 and 3 of the Statute.*¹⁷¹

Once has been proven that the national courts have not conducted any investigation or prosecution, it is no needed to continue assessing the factors of unwillingness and inability.¹⁷²

The procedure to conduct the complementarity test is further clarified by the ICC Appeals Chamber in the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*:

“Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. 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.”¹⁷³

¹⁷¹ International Criminal Court, *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, para 29 <<https://www.legal-tools.org/doc/73acb4/>>

¹⁷² International Criminal Court, *Prosecutor v. Bahar Idriss Abu Garada*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, para 29 <<https://www.legal-tools.org/doc/cb3614/>>

¹⁷³ International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-1497, 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, Appeals Chamber, 25 September 2009, para 79 <<https://www.legal-tools.org/doc/ba82b5/>>

The second factor to be taken into account is the ‘same case’ notion. To consider a case admissible, the ICC has to conduct a judicial assessment of whether the domestic judicial system is performing an investigation, prosecution or judgment over the same case that the ICC is evaluating.¹⁷⁴ If the case is considered the same, the ICC will not have jurisdiction due to the complementarity principle. However, if the case is not the same, then the ICC might be able to exercise its powers.

The ICC has developed through its case law the notion of ‘same case’. The Pre-Trial Chamber provided that, “for such a case to be inadmissible under Article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court”.¹⁷⁵

Having delimited the notions of inactivity and ‘same case’, it is going to assess whether the alleged crimes against humanity of extermination and forcible transfer which are imputed to the President of Brazil Jair Bolsonaro as a result of its State policies, as it is argued in this thesis, are admissible and fulfil the complementary test.

The Brazilian system of justice has been inactive in the investigation and prosecution of crimes against humanity of extermination and forcible transfer of indigenous persons living within the Amazon forest. As was explained in Chapter 2, the Brazilian Public Prosecutor has made several attempts to draw the Ministry of Justice’s attention to the threats that indigenous communities are suffering since January 2019. The Public Prosecutor also urged the Ministry of Justice to adopt measures to protect indigenous communities and their lands. Besides, the Federal Police has conducted diverse investigations regarding land-grabbing practices over reserved territories and has also researched some of the violent threats against indigenous communities, including the deaths of indigenous leaders like Emyra Waiãpi, who was found dead in July 2019.¹⁷⁶ On 5 May 2020 for the first time, the Office of the Attorney General issued a report regarding

¹⁷⁴ Triffterer and Ambos (n 18) 799.

¹⁷⁵ International Criminal Court, *Prosecutor v. Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-307, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 August 2011, para 40 <<https://www.legal-tools.org/doc/ac5d46/>>

¹⁷⁶ ‘Brazil’s Bolsonaro Says No Evidence Indigenous Leader Murdered’ (*euronews*, 29 July 2019) <<https://www.euronews.com/2019/07/29/brazils-bolsonaro-says-no-evidence-indigenous-leader-murdered>> accessed 24 July 2020.

the threats and violence against indigenous communities. The report indicated an increase in the violence against indigenous persons due to land disputes, recognising that 2019 had been the year with the second-highest rate of violence of the decade.¹⁷⁷ Still, no criminal investigation was initiated. On 30 March 2020, a civil procedure was concluded brought by the Public Prosecutor,¹⁷⁸ in which the Federal Judge of Manaus, Raffaella Cássia de Sousa, recognised the discriminatory character of several discourses of the Brazilian President against indigenous communities, considering them unconstitutional and capable of inciting to violence.¹⁷⁹ Consequently, the Federal Judge ordered that a plan had to be elaborated to combat hatred against indigenous communities.¹⁸⁰ However, none of these actions was focused in the investigation or prosecution of the criminal responsibility of the Brazilian President for extermination and forcible transfer of indigenous peoples. Furthermore, the crime against humanity is not typified as such in the Brazilian penal code.¹⁸¹

In addition, to prosecute the Brazilian president for criminal charges, it is necessary to follow the special procedure legislated in the Brazilian Constitution. Article 86 of the Brazilian Constitution requires that two-thirds of the Chamber of Deputies accept the criminal charges against the President.¹⁸² If the necessary votes are obtained, the case will be brought before the Supreme Federal Court, which based on Article 102.I.b) of the Brazilian Constitution, is the competent tribunal to try the President.¹⁸³ In April 2020, the Supreme Federal Court approved the first and sole investigation against the Brazilian President Jair Bolsonaro, regarding the indictment made by the Minister of Justice, who accused Bolsonaro of “interfering with police investigations for political gain”.¹⁸⁴

¹⁷⁷ Procuradoria-Geral da República (n 82).

¹⁷⁸ Article 232 of the Brazilian Constitution stipulates that the Public Prosecutor intervenes in all the procedures involving indigneous peoples. “Os índios, suas comunidades e organizações são partes legítimas para ingressar em juízo em defesa de seus direitos e interesses, intervindo o Ministério Público em todos os atos do processo.” Constituição do Brasil (n 30) Article 232

¹⁷⁹ Case n° 1004416-31.2020.4.01.3200, 3° Vara Federal Cível da SJAM, 30/0372020, 5.

¹⁸⁰ *ibid* 8.

¹⁸¹ Decreto-Lei n° 2.848, de 7 de Dezembro de 1940, Código Penal <http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm>

¹⁸² Constituição do Brasil (n 30) Article 86.

¹⁸³ *ibid* Article 102.I.b).

¹⁸⁴ Joshua Cossin, ‘Brazil Supreme Court Approves Investigation into President Bolsonaro’ <<https://www.jurist.org/news/2020/04/brazil-supreme-court-approves-investigation-into-president-bolsonaro/>> accessed 3 August 2020.

In conclusion, the Brazilian judicial system has not conducted an investigation or prosecution regarding the criminal responsibility of the Brazilian President for the crimes against humanity of extermination and forcible transfer. Besides, the only investigation begun against Bolsonaro is not related to the crimes dealt with in this thesis. Therefore, it can be said that the requirements of inaction and ‘same conduct’ are fulfilled, and the complementarity test is likely to be passed.

By virtue of Article 18 of the Rome Statute, once the Prosecutor decides to initiate an investigation has to notify it to the State that would have jurisdiction to investigate and prosecute the case. In the term of one month since the notification, the State can inform the Prosecutor that has initiated or conducted an investigation into the case. If the Brazilian State would inform the Prosecutor that has initiated an investigation, there are grounds to believe that the Brazilian State would be unwilling or unable genuinely to conduct such an investigation. In the case *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the ICC found that some factors that may indicate whether the State is genuinely willing and able to investigate were the measures used to investigate, the resources invested and the investigative powers of the persons conducting the investigation.¹⁸⁵ Other factors established by the ICC are the “quantity and quality of the alleged investigative steps”.¹⁸⁶

So far, there has not been any investigation into the criminal responsibility of the Brazilian President for inducing the commission of crimes of extermination and forcible transfer of population, even if these crimes have been widely denounced by civil society, national institutions and international organisations. Taking into account the long and complicated procedure established by the Brazilian Constitution to prosecute the President and considering that the judiciary has not conducted any quality steps to elucidate the current situation, there are grounds to believe that if the Brazilian State would begin an investigation, the investigation will not qualify as ‘genuine’.

¹⁸⁵ International Criminal Court, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013, para 210 <<https://www.legaltools.org/doc/af6104/>>

¹⁸⁶ International Criminal Court, *Prosecutor v. Simone Gbagbo*, No. ICC-02/11-01/12-47-Red, Decision on Côte D’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014, para 30 <<https://www.icc-cpi.int/pages/record.aspx?uri=1882718>>

The second ground of admissibility is the *gravity* test, which is referred to both in Article 17(1)(d) and Article 53(1) of the Rome Statute. All crimes under the jurisdiction of the ICC are “the most serious crimes” that “threaten peace, security and the well-being of the world”.¹⁸⁷ The gravity test works as a filter to decide which cases are serious and grave enough to be prosecuted and to comply with the functions of retributive justice, deterrence and prevention of new crimes. The Pre-Trial Chamber established in the *Situation in the Democratic Republic of Congo* that “the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court”.¹⁸⁸

To determine when a case is grave enough, the Pre-Trial Chamber in the decision just mentioned referred to three factors: the systematic or large-scale character of the case, the gravity of the act and the social alarm that the conduct provoked at the international level.¹⁸⁹ In the same case, the Pre-Trial Chamber also referred to the position and role of the investigated and prosecuted person as another factor to be taken into account. Namely, the Chamber stated that investigations would be initiated only against the most senior leaders positioned in the highest level of the hierarchy.¹⁹⁰

However, the case law of the ICC has not always been consistent in applying these standards. In the same case of the *Situation in the Democratic Republic of Congo* the Appeals Chamber rejected the thesis adopted by the Pre-Trial Chamber considering it incorrect. Regarding the ‘systematic or large-scale’ requirement, the Appeals Chamber considered that such an interpretation was “inconsistent with the definitions of the crimes over which the Court has jurisdiction”.¹⁹¹ Regarding the social alarm factor, the Appeals Chamber found it inappropriate.¹⁹² And regarding the most senior leader approach, the

¹⁸⁷ Rome Statute (n 12) Preamble.

¹⁸⁸ *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I (n 171) para 41.

¹⁸⁹ *ibid* 47.

¹⁹⁰ *ibid* 54.

¹⁹¹ International Criminal Court, *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-169, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 13 July 2006, para 69 <<https://www.icc-cpi.int/pages/record.aspx?uri=183559>>

¹⁹² *ibid* 72.

Appeals Chamber sentenced that it was a “flawed interpretation of Article 17(1)(d) of the Statute” that “could severely hamper the preventive, or deterrent, role of the Court”.¹⁹³

The Pre-Trial Chamber in the *Situation in the Republic of Kenya* issued guidance on how to assess the gravity threshold:

*“In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave. [...] These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families”.*¹⁹⁴

These guidelines have been followed by the Pre-Trial Chamber in the Situation in Côte D’Ivoire,¹⁹⁵ and by the Prosecutor in its 2013 Policy Paper on preliminary examinations and its 2016 Policy Paper on case selection and prioritisation.¹⁹⁶ Therefore, the assessment of the gravity test in the Brazilian Amazon case will be done in light of the guidance provided by the Pre-Trial Chamber in the *Situation in the Republic of Kenya*.

Firstly, regarding the scale of the alleged crimes, the Office of the Prosecutor established that it:

“May be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in

¹⁹³ *ibid* 73 and 75.

¹⁹⁴ *Situation in the Republic of Kenya*, Decision on the Authorisation of Investigation, Pre-Trial Chamber (n 114) para 62

¹⁹⁵ International Criminal Court, *Situation in Côte D’Ivoire*, No. ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, Pre-Trial Chamber III, 15 November 2011, para 204 <<https://www.legal-tools.org/doc/e0c0eb/>>

¹⁹⁶ Office of the Prosecutor (n 20) para 61; Office of the Prosecutor (n 22) para 37.

*particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period). ”*¹⁹⁷

Entire indigenous communities are suffering from the violence and lack of protection allegedly promoted by the Brazilian President, being forced to leave their lands due to their occupation by *grileiros* and to suffer food scarcity provoked by the destruction of their lands. Some of the most affected indigenous communities are the Uru Eu Wau Wau, the Karipuna, the Xavante de Marãiwatsédé, the Waiãpi, the Yvytotõ, the Manoki, the Guajajara, the Yanomami, the Kayapó, the Xingu and the Waimiri Atroari. The intensity of the crimes could be higher; nevertheless, the situation has been occurring during more than a year and a half, and there is no sign of change. It may be argued that the incitement to crimes of extermination and forcible transfer began in January 2019, when the Brazilian President started his mandate, and the situation has been worsened along with his mandate, affecting the indigenous communities living within the indigenous reserves of the Brazilian Amazon, which covers around a 13% of the territory of Brazil.¹⁹⁸

Secondly, the nature of the crimes:

*“Refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction ”.*¹⁹⁹

The targeting of indigenous leaders has become a tool for the destabilization of indigenous communities, and some indigenous leaders have been violently killed, like the leader of the Waiãpi community, Emyra, who was killed in July 2019, and the leader of the Guajajara community, Paulo Paulino Guajajara, in November 2019. However, the death threats affect all the members of the communities. The occupation and destruction

¹⁹⁷ Office of the Prosecutor (n 20) para 62; Office of the Prosecutor (n 22) para 38.

¹⁹⁸ Survival International, ‘Brazilian Indians’ <<https://www.survivalinternational.org/tribes/brazilian>> accessed 23 July 2020.

¹⁹⁹ Office of the Prosecutor (n 20) para 63; Office of the Prosecutor (n 22) para 39.

of indigenous reserves is imposing indigenous communities conditions of life that could lead to their destruction as it is depriving them of food and necessary resources for their survival and development of their culture. Marta Guarani, from the Guarani indigenous community, said “We Indians are like plants. How can we live without our soil, without our land?”²⁰⁰

Thirdly, concerning the manner of commission, the 2016 Policy paper highlights that:

*“The manner of commission of the crimes may be assessed in light of [...] crimes committed by means of, or resulting in, the destruction of the environment or of protected objects”.*²⁰¹

The crimes of extermination and forcible transfer of indigenous persons living within the Amazon are being committed by means of the destruction of the forest, and also result in the destruction of the Amazon forest. As already expounded, the destruction of the indigenous reserves is creating “conditions of life, *inter alia* the deprivation of access to food and medicine”²⁰² that will lead to the destruction of the indigenous communities, that is, to their extermination. Between August 2018 and July 2019, 423.3 km² of indigenous lands were deforested.²⁰³ In 2019, 10.129 km² of the Brazilian Amazon Forest was deforested.²⁰⁴ Besides, the extermination and forcible transfer of indigenous communities entail depriving the Amazon forest of their most valuable caretakers.²⁰⁵ Hence, the extermination and forcible transfer of indigenous communities will facilitate the destruction of their reserved lands and the Amazon forest as a whole. As Richard Pearshouse, Head of Crisis and Environment Advisor at Amnesty International said:

²⁰⁰ Survival International, ‘Brazilian Indians’ (n 198).

²⁰¹ Office of the Prosecutor (n 22) para 40.

²⁰² Rome Statute (n 12) Article 7(2)(b).

²⁰³ Carolina Dantas, ‘Terras indígenas têm alta de 74% no desmatamento; área mais afetada protege povo isolado’ (*GI*, 28 November 2019) <<https://g1.globo.com/natureza/noticia/2019/11/28/terras-indigenas-tem-alta-de-74percent-no-desmatamento-area-mais-afetada-protege-povo-isolado.ghtml>> accessed 30 July 2020.

²⁰⁴ ‘PRODES — Coordenação-Geral de Observação Da Terra’ <<http://www.obt.inpe.br/OBT/assuntos/programas/amazonia/prodes?fbclid=IwAR018-pXgtWtZY5rgRb1M9mqcwduQ5QU025KQyQb3MZtMYngdSvWAaiRoL0>> accessed 30 July 2020.

²⁰⁵ Allen Blackman and Peter Veit, ‘Titled Amazon Indigenous Communities Cut Forest Carbon Emissions’ (2018) 153 *Ecological Economics* 56, 58.

“Protecting the human rights of Indigenous peoples is key to preventing further deforestation in the Amazon. The international community should be watching carefully and supporting those Indigenous communities on the front lines of the fight to protect the world’s most precious forests.”²⁰⁶

Finally, the impact of the crimes against humanity of extermination and forcible transfer of indigenous persons:

“may be assessed in light of, [...]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”.²⁰⁷

The Amazon forest and its natural resources are fundamental for the life, culture and identity of indigenous communities. A member of the Uru Eu Wau Wau indigenous community reported to Amnesty International on 30 April 2020 that the destruction of their reserves “it is like becoming homeless. For us [the forest] means everything necessary for our survival. Without the forest we are nothing, we have nowhere to go”.²⁰⁸

The conducted analysis highlights that the scale, nature, manner of commission and impact of the alleged crimes of extermination and forcible transfer against Brazilian indigenous peoples living within the Amazon forest might reach the necessary threshold to consider the case sufficiently serious and grave to be investigated and prosecuted by the ICC. However, it cannot be ignored that the gravity assessment is not completely objective.²⁰⁹ There are no concrete and immovable norms on how to examine the gravity of a case; hence, it is up to the ICC to decide whether the alleged violations fulfil the

²⁰⁶ Amnesty International, ‘Risk of Bloodshed in Brazil’s Amazon Unless Government Protects Indigenous Peoples from Illegal Land Seizures and Logging’ (7 May 2019) <<https://www.amnesty.org/en/latest/news/2019/05/brazil-risk-of-bloodshed-in-the-amazon-unless-government-protects-indigenous-peoples-from-illegal-land-seizures-and-logging/>> accessed 26 July 2020.

²⁰⁷ Office of the Prosecutor (n 22) para 41.

²⁰⁸ Amnesty International, ‘From Forest to Farmland. Cattle Illegally Grazed in Brazil’s Amazon Found in JBS’s Supply Chain’ (n 52) 28.

²⁰⁹ Triffterer and Ambos (n 18) 816.

degree of seriousness expected when the Rome Statute was drafted. Nevertheless, taking into account the conducted evaluation, the ICC could consider the present case grave enough.

4.3 The chapeau requirements in the Brazilian Amazon case

In the following part will be assessed whether the alleged crimes against humanity of extermination and forcible transfer of Brazilian indigenous peoples comply with the chapeau requirements. To do so, will be first assessed the general elements of the crime against humanity, and then, the elements of the two specific crimes invoked in the thesis, the extermination and forcible transfer of Brazilian indigenous persons. The assessment will be conducted following the analysis developed in Chapter 3.

4.3.1 General elements of the crime against humanity in the Brazilian Amazon case

a) On whether the extermination and forcible transfer of Brazilian indigenous peoples is part of an attack

The crimes of extermination and forcible transfer of Brazilian indigenous peoples are the result of a course of conducts perpetrated as part of the State policies implemented by the Brazilian President for the destruction of the indigenous reserves and the communities living within.

This widespread and systematic attack is inextricably associated with the multiple commission of single acts of extermination and forcible transfer of indigenous persons. Since the Brazilian President Jair Bolsonaro began its administration, land grabbers, miners and other groups interested in the occupation and destruction of indigenous reserves have violently threatened, attacked and killed persons belonging to indigenous groups, and have occupied and deforested their lands. Recalling some of the most relevant events presented in Chapter 2, in January 2019 *grileiros*, armed with guns and machetes, threat to kill the members of the indigenous communities of Uru Eu Wau Wau, Karipuna, Xavante de Marãiwatsédé and the Guarani.²¹⁰ A member of the Uru Eu Wau Wau community told Amnesty International that,

²¹⁰ Ministério Público Federal (n 46).

*“They confronted about 40 intruders, who were armed with sickles and machetes, cutting a path into their territory about two kilometres away from one Indigenous village and just beside the road they use to enter and leave their territory. When told to leave, the intruders allegedly replied that more intruders would be coming and threatened to kill the Indigenous children”.*²¹¹

The Indian Law Resource Centre reported in July 2019 the violent invasion and forcible transfer of the Waiãpi indigenous group living in the Yvytotõ village, and the murder of its leader.²¹² Besides several indigenous persons have been fiercely killed. An Uru Eu Wau Wau man told Amnesty International his concerns regarding the survival of his community if the situation continues worsening, “Our survival comes from the forest. We will no longer have hunting. There will be no more trees”.²¹³ Federal environment agents have also denounced an increase in intrusions and occupations of indigenous reserves.²¹⁴ The violent attacks are still going on, and as time goes by, indigenous communities continue losing more and more parts of their lands. The current situation exposes indigenous communities to two possible destinies; their disappearance due to the conditions of life imposed to them that forces them to suffer from lack of food and resources; or to suffer their forcible transfer, leaving the land they have dwelled for generations, and that is fundamental for the development of their culture, ethnicity and lifestyle.

These practices amount to the attack stipulated in Article 7 of the Rome Statute due to their link with the State Policies. As established by the ICTY, ICTR and the ICC, the existence of a formal policy is not required, is sufficient to prove that there is a preconceived plan aimed at the extermination and forcible transfer of Brazilian indigenous persons. In the Brazilian Amazon case cannot be said that there is a formal plan. However, the State Policy to dismantle indigenous territories through the extermination and forcible transfer of indigenous communities can be deduced from the

²¹¹ Amnesty International, ‘Fence off and Bring Cattle. Illegal Cattle Farming in Brazil’s Amazon’ (n 69) 20–21.

²¹² Indian Law Resource Center (n 75).

²¹³ Amnesty International, ‘Fence off and Bring Cattle. Illegal Cattle Farming in Brazil’s Amazon’ (n 69) 21.

²¹⁴ *ibid.*

actions promoted by the Brazilian Government, from the omissions and inaction of the Government to protect indigenous communities and from the comments issued by the Brazilian President against indigenous peoples.

As commented in Chapter 2, the Brazilian President Jair Bolsonaro has publicly made discriminatory comments against the indigenous persons, their lands and their culture. In 2017, during his presidential campaign, he already warned that if he was elected, “There will no longer be a single centimetre of indigenous land”.²¹⁵ In April 2019, the Brazilian President publicly said that “We still have an indigenous problem”.²¹⁶ After a civil procedure brought by the Public Prosecutor, the Federal Civil Court of the Judiciary System from the State of Amazonas sentenced that certain comments issued by the Brazilian President can incite to the discrimination and stigmatisation of indigenous communities, following a policy of assimilation of indigenous peoples contrary to the Brazilian Constitution.²¹⁷ The Court referred to the comments in which the Brazilian President referred to persons belonging to indigenous groups as “prehistoric men”, and said that “indigenous people have changed and are increasingly human beings like us”.²¹⁸

Furthermore, the Brazilian government has introduced several legislative measures directed at reducing the protection of indigenous peoples and easing the occupation and destruction of indigenous lands. These policies have been developed in Chapter 2.2.2. Some of the most relevant are the Provisional Measure n° 886/2019, transferring the competences of demarcation of indigenous lands from FUNAI to the Ministry of Agriculture; the transfer of the SFB from the Ministry of Environment to the Ministry of Agriculture, the suspension of partnerships with organisations aimed at protecting the Amazon forest.²¹⁹ Measures taken aimed at emptying of powers and competences various environmental agencies focused on the implementation of environmental law and monitoring the existence of illegal practices.²²⁰ One can also mention the Presidential

²¹⁵ *Bolsonaro Faz Discurso de Ódio No Clube Hebraica* (n 42).

²¹⁶ Shanna Hanbury (n 45).

²¹⁷ Case n° 1004416-31.2020.4.01.3200, 3° Vara Federal Cível da SJAM, 30/0372020 (n 186) 5

²¹⁸ Shanna Hanbury (n 45).

²¹⁹ ‘Jeff Nascimento (em 🏠) en Twitter: “Ofício Circular n° 5 do @mmeioambiente, de 14.01.2019, determinando o levantamento e suspensão da execução por 90 dias dos convênios e parcerias com entidades do 3° setor por fundos administrados pelo MMA, Ibama, @ICMBio e JNRJ 📄 <https://t.co/giFf0nGFry>” / Twitter’ (n 51).

²²⁰ Sue Branford (n 55).

Decree n° 9.760/2019 hindering the imposition of environmental fines for illegal practices; the Decree n° 9.806/2019 amending the composition and functioning of CONAMA; the modifications of the Amazon Fund, the reduction of funds and firing of workers of the INPE. Also important are the Bill 191/2020 regulating the mining and exploitation of hydraulic resources in indigenous lands; the Bill 2.633/2020 regarding the regularisation of occupied territories permitting the occupation and further acquisition of property of indigenous lands by land-grabbers; the Normative Instruction n° 9/2020 leaving without protection 237 indigenous territories and the Bill 17/2020 permitting the inscription in the CAR of properties that overlap with indigenous lands. Another worrisome evidence of the State policy aimed at the destruction of indigenous communities is the 16 vetoes that the Brazilian President put on the Bill 1.142/2020 providing urgent measure to support indigenous persons due to the new Covid-19. The vetoes prevented indigenous peoples from enjoying rights like the right to access to potable water. The Bill and the vetoes were approved and transformed in the Law n° 14.021/2020.

The violent acts committed by land grabbers, miners and other groups interested in the occupation of indigenous lands are directly linked with the described policies. “An adequate test to determine whether a certain act was part of the attack is to analyse whether this act would have been less dangerous for the victim if the attack and the underlying policy had not existed”.²²¹ Following this idea, it can be affirmed that the single violent threats and aggressions against indigenous peoples would have been less perilous if the listed legal reforms were not adopted. These policies have paved the way to the invasion and destruction of indigenous lands with impunity. Besides, they are arguably part of a broader policy to end with the existence of indigenous reserves and their communities, as was explicitly affirmed by the Brazilian President Jair Bolsonaro during his presidential campaign.²²² Hence, the extermination and forcible transfer of Brazilian indigenous persons living within the Amazon forest is part of an attack.

²²¹ Triffterer and Ambos (n 18) 171–172.

²²² *Bolsonaro Faz Discurso de Ódio No Clube Hebraica* (n 42); Cowie (n 43).

b) On whether the alleged attack is widespread or systematic

Following the definition of *widespread* issued by the ICC in the *Situation in the Republic of Kenya*, widespread refers to “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.²²³ The attacks against indigenous persons are of large scale because they are broad, include diverse situations, affect multiple victims and are massive. In 2019, the attacks and invasions of indigenous lands grew by 150% in comparison with 2018.²²⁴ The attacks and destruction of their homelands affect the almost 900.000 Brazilian indigenous peoples and their communities living within the Amazon forest. Many of them are suffering huge reductions of their demarcated lands. Others, like the Piripkuna, the Kawahiva or the Awá, have been forced to leave their lands and follow nomadic styles of life because the persecution and constant destruction of their lands have left them nowhere to settle down. Besides, the nomadic lifestyles prevent many of them from procreating, which is leading to the disappearance of entire communities.²²⁵ As presented in Chapter 2, the threats against indigenous communities and the invasions are not isolated and rare, but frequent. Moreover, in Chapter 2 has been described the increase of deforestation rates of each month of 2019. The deforestation rates continue growing, as 2020 is exceeding the deforestation rates of 2019.

Regarding the *systematic* nature of the attacks, the ICC and the *ad hoc* tribunals refer to an attack implemented under a plan or a policy, in an organised and repetitive manner, and that is not random neither isolated. Has already been assessed the existence of a State policy aimed at exterminating and forcible transferring indigenous persons living in the reserves of the Amazon forest. The legislative measures implemented by the Brazilian President are directed towards the facilitation of the invasion and destruction of the protected lands. Hence, the violent threats and attacks against indigenous persons carried out for the occupation, and further degradation of their lands without resistance is

²²³ *Situation in the Republic of Kenya*, Decision on the Authorisation of Investigation, Pre-Trial Chamber (n 114) para 95.

²²⁴ Alice de Souza, ‘¿Qué pasa con los pueblos indígenas de Brasil y los incendios en la Amazonía?’ (*Distintas Latitudes*, 29 August 2019) <<https://distintaslatitudes.net/explicadores/indigenas-brasil-y-los-incendios-amazonia>> accessed 25 July 2020.

²²⁵ Survival International, ‘Uncontacted Indians of Brazil’ <<https://www.survivalinternational.org/tribes/uncontacted-brazil>> accessed 25 July 2020.

committed ‘pursuant to a preconceived plan or policy’. Moreover, the violence and the occupations are not random but recurrent.

In Chapter 2 have been described different episodes of invasions, deforestation and violence against the Uru Eu Wau Wau, the Karipuna, the Xavante de Marãiwatsédé, the Waiãpi, the Guajajara, the Yanomami, the Kayapó and the Xingu indigenous communities. The indigenous reserves of Yvytotõ, Manoki Rio Jacy-Paraná and Rio Ouro Preto, Rio Negra, Raposa Serra do Sol, Uaçá, Ituna Itatá, Apyterewa and the Cachoeira have been on high risk due to the deforestation practices. In 2019 the attacks resulted in a loss of 119.92 km² for the Ituna Itatá reserve, the Apyterewa lost 85.25 km², and the Cachoeira Seca reserve lost 61.2 km².²²⁶

c) On whether the attack is directed against the civilian population

In the case, the *Prosecutor v. Kunarac*, the ICTY sentenced that not the entire population has to be affected by the attack, being sufficient to prove that “enough individuals were targeted in the course of the attack”.²²⁷ Hence, if few of the indigenous communities of the 896.900 indigenous peoples were not affected, this would not prevent the ICC from considering that a crime against humanity has been committed.

d) On whether the acts against Brazilian indigenous peoples were conducted with knowledge of the attack

The mental element requires that the criminally accountable person participated with knowledge in the attack. The Brazilian President, as the drafter of the described policies in Chapter 2, could have known the consequences of the State policies that he issued and the discriminatory and provocative comments that he made. The Elements of Crime determines that to be criminally responsible is not necessary to know all the details of the attack, and although the Brazilian President might not have known all the characteristics of the violent aggressions and occupations, and how and when they were going to happen, he could have known that his actions were facilitating and inducing them.

²²⁶ The International Work Group for Indigenous Affairs (IWGIA) (n 35) 363.

²²⁷ *Kunarac and others*, Judgment, Appeals Chamber (n 123) para 90.

Besides, these attacks have been widely reported by Non-governmental organisations (NGOs) like Imazon, Amnesty International and The International Work Group for Indigenous Affairs (IWGIA), as well as by National Institutions like the Public Prosecutor, the Attorney General and FUNAI. Despite this, the Brazilian President continued enforcing the policy of destruction of indigenous reserves, reducing the protection of these lands through the dismantlement of and interference in organisations devoted to their protection. Accordingly, IBAMA, FUNAI, ICMBio and the Amazon Fund have been severely affected due to the reductions in the number of workers and cuts in funds.²²⁸ Moreover, notwithstanding the alarming harms that indigenous persons were suffering from *grileiros*, the Brazilian president paved the way for their extermination and forcible transfer with legislative measures like the Presidential Decree n° 9.760/2019 which promoted the invasion and destruction of indigenous lands through complicating the imposition of environmental fines, or the Bill 2.633/2020 that left without protection several indigenous lands.

Therefore, taking into account that the attacks against indigenous communities and their lands were widely published and known, can be deduced that the Brazilian President should have been aware that his policies and speeches increased the risk of indigenous persons of being threatened and invaded, and that those policies and comments were facilitating the commission of these attacks.

4.3.2 Analysis of the crimes of extermination and forcible transfer of Brazilian indigenous peoples

a) The extermination of Brazilian indigenous peoples

To determine whether there has been a crime of extermination should be analysed if were imposed conditions of life aimed at bringing about the destruction of indigenous communities; if there has been large number of killings and mass destruction; if the conduct was part of a widespread or systematic attack and if was committed with knowledge. In the previous part has been argued why the crime of extermination can be

²²⁸ The International Work Group for Indigenous Affairs, 'The Indigenous World 2020. 34th Edition' (2020) 367.

considered part of a widespread and systematic attack, hence now the focus will be in the other factors.

The Elements of Crime specify that the conditions to bring about the destruction of a population may include the “deprivation of access to food and medicine”,²²⁹ whether by direct or indirect means. The invasion, pollution and destruction of indigenous reserves by land-grabbers, miners and loggers are provoking the destruction of Brazilian indigenous peoples. The pollution and devastation of their lands are hampering their survival by limiting their access to food, plants and natural elements that they use to combat diseases and hunger. It cannot be forgotten that their lifestyle, culture and ethnicity are closely linked with their land and natural environment. Moreover, land-grabbers, miners and loggers persecute and violently threaten indigenous persons to leave their lands in order to invade them and exploit them; as a result, certain indigenous groups cannot procreate anymore because they have nowhere to settle.²³⁰ All these practices are leading to the disappearance of indigenous communities.

A person reported to Amnesty International how the occupation of the indigenous reserves has affected their livelihoods:

*“We used to extract copaiba oil, we don’t anymore. My father-in-law used to harvest nuts, grow manioc. Now we can no longer walk in the forest”.*²³¹

A man from the Manoki indigenous reserve also said:

*“For us, it is important to see the forest standing, to preserve it, because we get our livelihood from nature. Here [referring to an area of the Manoki indigenous territory that was fenced and burnt for cattle raising] you will not find even one animal and our food [animals and fruits] will not reproduce or grow in this area”.*²³²

²²⁹ International Criminal Court (n 132) 4.

²³⁰ International (n 225).

²³¹ Amnesty International, ‘Fence off and Bring Cattle. Illegal Cattle Farming in Brazil’s Amazon’ (n 69) 16.

²³² *ibid* 17.

An indigenous person from the Uru Eu Wau Wau community told Amnesty International that “Our survival comes from the forest. We will no longer have hunting. There will be no more trees”.²³³ A man from the Rio Ouro Preto Reserve reported that “It is sad to see such deforestation. Besides being a great loss, it is also a setback for us because the Reserve is our livelihood. We depend on the Reserve to survive”.²³⁴ The same person admitted that they could not harvest natural livelihoods like nuts and *açai*, a typical fruit from the Amazon forest, in the areas invaded by farmers because they were at risk of being injured or killed.²³⁵ Furthermore, the survival of the Karipuna and the Karitiana indigenous community is already hindered due to the food shortage they are suffering, a member of the Karitiana community recognised that:

*“The most difficult thing is not being able to get enough food. For example, we don’t have any oil or sugar. We try to feed ourselves with what we cultivate and by hunting. Tribesmen go to hunt wild animals but there are days that they return with no game at all. As we only have a small river passing by the village the fish are few and small”.*²³⁶

All things considered, it can be affirmed that the invasions, destruction and threats against indigenous communities result in the imposition of conditions of life that is bringing about their destruction.

Regarding the number of killings, the Elements of Crime refer to one or more persons killed. However, the jurisprudence of the *ad hoc* tribunals has been mostly inclined to understand that generally, a significant number of killings would be necessary, although in certain circumstances a limited number of victims would also be enough. The confrontations against persons belonging to indigenous communities have been multiple. In January 2019, a big group of armed *grileiros*, began destroying the indigenous reserve of the Uru Eu Wau Wau community and threaten them to kill their children if they confronted them.²³⁷ These type of violent threats have been constant and have been

²³³ *ibid* 21.

²³⁴ Amnesty International, ‘From Forest to Farmland. Cattle Illegally Grazed in Brazil’s Amazon Found in JBS’s Supply Chain’ (n 52) 22.

²³⁵ *ibid*.

²³⁶ Environmental Justice Foundation (n 68).

²³⁷ Amnesty International, ‘From Forest to Farmland. Cattle Illegally Grazed in Brazil’s Amazon Found in JBS’s Supply Chain’ (n 52) 27.

reproduced in plenty of the indigenous reserves. However, on several occasions, *grileiros* did not stop at threats, causing the death of various indigenous persons. Accordingly, in July 2019 was killed Emyra Waiãpi, leader of the Waiãpi community. In November 2019 Paulo Paulino Guajajara and Laérico Souza Silva Guajajara were shot; fortunately, the second one survived. In December 2019, a group of members of the Guajajara indigenous community were shot from a car, injuring Neucy Vieira Guajajara and Nico Alfredo Guajajara and causing the death of Firmino Guajajara and Raimundo Guajajara.²³⁸ Some days after, a 15 years old child, Erisvan Guajajara was found dead with multiple knife injuries.²³⁹ The Inter-American Commission on Human Rights (IACHR) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) condemned these murders and reminded the Brazilian government of its obligation to protect indigenous peoples.²⁴⁰ Similarly, the United Nations High Commissioner for Human Rights Michelle Bachelet questioned the policies of the Brazilian Government regarding indigenous peoples and their lands and suggested its reconsideration.²⁴¹

The threats and killings continued in 2020. In January 2020, three people from the indigenous community of Miranha were killed due to land confrontations.²⁴² In March 2020, Zezico Guajajara, from the Guajajara indigenous community was killed, and some days after, Antônio Filho Guajajara got a bullet in the head.²⁴³ While, in April 2020, Ari Uru Eu Wau Wau was murdered as well.

People involved in the protection of indigenous communities and their lands have also been tackled. A Federal environmental worker from IBAMA explained how in May 2019, while repairing a road connected with the Uru Eu Wau Wau indigenous, he and his colleagues were surrounded and threatened by 32 *grileiros*:

“We were surrounded by intruders. Thirty-two men, mostly hooded, arrived by foot behind us, with bottles with gas. They gave me

²³⁸ The Guardian (n 77); Shanna Hanbury (n 77).

²³⁹ Shanna Hanbury (n 77).

²⁴⁰ Organisation of American States, ‘OHCHR, IACHR Condemn Murders of Indigenous Leaders in Maranhão, Brazil’ N° 320/2019 (9 December 2019) <http://www.oas.org/en/iachr/media_center/PReleases/2019/320.asp> accessed 26 July 2020.

²⁴¹ UN News, ‘Murder of Brazilian Indigenous Leader a “Worrying Symptom” of Land Invasion’ (*UN News*, 29 July 2019) <<https://news.un.org/en/story/2019/07/1043401>> accessed 26 July 2020.

²⁴² ‘Five Murdered in 2020 Brazilian Amazon Land Conflicts, Adding to 2019 Surge’ (n 79).

²⁴³ Sam Cowie (n 80).

*documents of the association buying land [inside the protected areas]. They wanted us to stop repairing the road. There was a lot of shouting, these threats, calling us thugs. It lasted one hour and fifteen minutes. It was tense. [Weeks later, after informing them the documents were not valid], they started sending us audio messages with threats. One message said: “We have respected you - until now”.*²⁴⁴

Furthermore, in September 2019, Maxciel Pereira dos Santos, was shot to death because of their role in the protection of indigenous reserves from illegal activities as a member of the FUNAI.²⁴⁵

The killings are numerous; hence, the ICC could determine that they amount to the ‘large number of killings’ promulgated by the *ad hoc* tribunals. There is clear evidence that Brazilian indigenous persons are suffering conditions of life that are leading to their destruction and disappearance.

Lastly, it has been already proven that the Brazilian President had the intention to destroy the Brazilian indigenous reserves and the communities living within those reserves. The adopted policies affecting the use of indigenous lands and reducing the protection of indigenous communities, as well as the discriminatory statements inciting to the disappearance of indigenous communities and their assimilation, made by the Brazilian President, are evidence of such intention. Besides, according to the jurisprudence of the ICTR, the Brazilian President can be considered accountable for committing the crime of extermination through omission. Recalling the case *Prosecutor v. Rutaganira*,²⁴⁶ the President Jair Bolsonaro has authority to stop the massive threats, invasions and destruction of indigenous reserves that are leaving indigenous communities without means to survive. Nevertheless, the President has decided to maintain the destruction policy instead of using his authority to end with their extermination. Moreover, the Brazilian President has moral authority over the low lever perpetrators. For instance, the

²⁴⁴ Amnesty International, ‘Fence off and Bring Cattle. Illegal Cattle Farming in Brazil’s Amazon’ (n 69) 21.

²⁴⁵ Europa Europa press, ‘Asesinan en la selva amazónica de Brasil a un trabajador de la Fundación Nacional del Indígena’ (9 September 2019) <<https://www.europapress.es/internacional/noticia-asesinan-selva-amazonica-brasil-trabajador-fundacion-nacional-indigena-20190909011704.html>> accessed 26 July 2020.

²⁴⁶ *Rutaganira*, Judgement and Sentence, Trial Chamber III (n 148) para 68.

congressman Jeferson Alves dedicated to Bolsonaro a picture in which he was breaking with a chainsaw a chain blocking the entrance to the indigenous reserve of the Waimiri Atroary, traditionally occupied by the Kinja indigenous community.²⁴⁷ However, the President decided not to use his moral authority either. Finally, the Brazilian President failed to comply with his legal duty to protect indigenous peoples and their lands established in Article 231 of the Brazilian Constitution.

b) The forcible transfer of Brazilian indigenous peoples

Following Chapter 3, to evaluate whether indigenous peoples are forcibly transferred, it is going to analyse if the indigenous persons have been forcibly and involuntarily transferred; if indigenous persons are lawfully present in the indigenous reserves; and if the Brazilian President knew or could have known about their lawful presence and had no grounds to expel them.

The forcible transfer of indigenous communities has been conducted employing violent threats of force, death threats, coercion and persecution, as well as through the destruction of their lands and livelihoods, obliging them to flee and involuntarily abandon the lands that they have traditionally occupied.

In January 2019, *grileiros* threatened the Uru Eu Wau Wau with murdering their children if they did not abandon the territory they had invaded.²⁴⁸ In July 2019, the members of the Waiãpi community living in the Yvytotõ village were forced to leave their village due to the violent invasion by a group of armed miners.²⁴⁹ The threats of land-grabbers and *grileiros* have also resulted in the forcible transfer of the persons living within the Rio Jacy-Paraná Reserve, whom left the area and do not dare to return do to the fear of being killed.²⁵⁰ Besides, Marisa, from the Reserve Rio Ouro Preto reported to Amnesty International the threats she received in April 2020 by a cattle farmer:

²⁴⁷ Shanna Hanbury (n 45).

²⁴⁸ Amnesty International, 'From Forest to Farmland. Cattle Illegally Grazed in Brazil's Amazon Found in JBS's Supply Chain' (n 52) 27.

²⁴⁹ Indian Law Resource Center (n 75).

²⁵⁰ Amnesty International, 'Fence off and Bring Cattle. Illegal Cattle Farming in Brazil's Amazon' (n 69) 13, 16.

*“He came to me and said I should no longer plant there because it was his land and if I continued planting there, there would be a problem for me. I was alone with my two children. We decided to continue. One week later, when I was not there, he went and destroyed all my garden plots”.*²⁵¹

The Covid-19 Pandemic has worsened the situation of indigenous communities producing a decrease in the protection of indigenous reserves, what has eased the encroachment of indigenous lands. For example, more than ten thousands of miners and *grileiros* looking for gold and fuel have invaded the Yanomami reserve, and are getting very close to the indigenous villages, threatening the community.²⁵² Furthermore, the Piripkuna indigenous community and the Kawahiva have been forcibly transferred from their lands due to the persecution and destruction of their territories, and now are forced to move from one place to another looking for food, water and other natural sources, as they have nowhere to settle down.²⁵³ The Awá community is facing a similar destiny; after the forced expulsion from their land, their reserve was completely destroyed; hence, to find livelihoods, the community had to relocate near the Guajajara villages.²⁵⁴

The forcible transfer has affected indigenous communities lawfully living in their reserves. Article 231 of the Brazilian Constitution recognises the right of indigenous peoples to hold the possession of the territories that they have traditionally occupied and the rights that emerge from this permanent occupation, establishing the correlative obligation of the State to ensure that their lands are demarcated, and their property rights are respected. Paragraph 1 of Article 231 defines traditionally occupied lands as the territories in which indigenous peoples have dwelled for generations, covering the vital areas that indigenous persons require to acquire the natural resources they need for their survival, wellbeing and reproduction, and for the development of their culture and traditions.²⁵⁵ Article 231 also recognises that the rights of indigenous peoples over their

²⁵¹ Amnesty International, ‘From Forest to Farmland. Cattle Illegally Grazed in Brazil’s Amazon Found in JBS’s Supply Chain’ (n 52) 22.

²⁵² Sam Cowie (n 80).

²⁵³ International (n 225).

²⁵⁴ ‘ONG denuncia “genocidio” de indígenas awá guajá en Brasil | DW | 18.05.2020’ (DW.COM, 18 May 2020) <<https://www.dw.com/es/ong-denuncia-genocidio-de-ind%C3%ADgenas-aw%C3%A1-guaj%C3%A1-en-brasil/a-53490309>> accessed 28 July 2020.

²⁵⁵ Constituição do Brasil (n 30) Article 231.1.

lands cannot be limited, and that the expulsion of indigenous persons from their territories is resoundingly prohibited.²⁵⁶

As established in the Brazilian Constitution, indigenous peoples have the right to remain and possess their territories independent of their demarcation by the Brazilian State. The demarcation of indigenous territories is a duty imposed by the Brazilian Constitution. The aim is to ensure that the land rights of indigenous peoples are guaranteed, respected and protected through their recognition as lands owned by indigenous communities and their registration at the Property Registry Office or at the Federal Office of Patrimony of the Union of the Ministry of Finance.²⁵⁷ However, the demarcation is not a pre-requisite to consider a territory as an indigenous reserve traditionally occupied by indigenous persons.

The demarcation process is regulated in the Decree n° 1.1775 of 8 January 1996.²⁵⁸ However, the processes are prolonged and are frequently hindered because the demarcation helps to increase the protection of indigenous reserves against invasions. Since the Brazilian President Bolsonaro initiated its mandate, no indigenous reserve has been demarcated. The lack of action by the state promotes the deforestation and destruction of indigenous reserves, forcing indigenous communities to look for new areas where they can find food, water and other natural means to live. However, as already highlighted, the culture, customs and lifestyle of indigenous communities is closely linked with their land; hence, the forcible transfer of indigenous community is an attack to their identity, which is protected by Article 231 of the Brazilian Constitution.

All things considered, it can be affirmed that indigenous communities are being transferred from their belonging lands through the use of force, threats and the destruction of the natural resources they require to live. The involuntary character of the transfer is deduced from the lack of choice to remain that indigenous groups have when threatened to death if they do not leave; from the protests against the violent invasion of their reserves; and their claims over their traditionally occupied lands.

Can also be asserted that indigenous persons are forcibly transferred from territories in which they are lawfully present. The lawful presence is evidenced in Article 231 of the

²⁵⁶ *ibid* Article 231.4 and 5.

²⁵⁷ Decreto n° 1.775/1996 (n 34) Article 9.

²⁵⁸ *ibid*.

Brazilian Constitution, the Indian Statute of 1973, and the Decree n° 1.1775. In the cases of forced transfer of indigenous living within indigenous reserves already demarcated, the lawfully stay is also recognised by the title deeds registered at Property Registry Office or at the Federal Office of Patrimony of the Union.

Finally, the rights of indigenous lands are recognised in the previously named laws, which are published in the Federal Official Gazette, therefore, can also be assumed that the Brazilian President knows these laws, consequently, has knowledge of the lawful presence of indigenous lands in their reserves. Furthermore, as has been already argued, the statements of the Brazilian President inciting the encroachment of indigenous lands and opposing their demarcation, together with the lack of demarcation processes since January 2019 and the State policies aimed at reducing the protection of indigenous lands prove that the Brazilian President might have knowingly induced to the forcible transfer of indigenous peoples. Mainly, since January 2019, 114 new certified farms have been installed in unratified indigenous lands that were not demarcated due to the suspension of the demarcation processes since Bolsonaro started his mandate, and 237 indigenous territories have been opened to its occupation and registration by land-grabbers, farmers, miners and other persons interested in the invasion of these lands.²⁵⁹ Therefore, it can be affirmed that the Brazilian President complies with elements of knowledge and intention to induce the forcible transfer of indigenous peoples.

4.4 Individual criminal responsibility

In the following part will be assessed whether the Brazilian President, Jair Bolsonaro, can be criminally responsible for the alleged crimes and whether these crimes were committed with the required *mens rea*.

Article 25 of the Rome Statute regulates the individual criminal responsibility of perpetrators, clarifying that only natural persons that commit or attempt to commit one of the crimes listed in Article 5 of the Rome Statute can be investigated and prosecuted by

²⁵⁹ Bruno Fonseca, 'Illegal Farms on Indigenous Lands Get Whitewashed under Bolsonaro Administration' (*Mongabay Environmental News*, 23 June 2020) <<https://news.mongabay.com/2020/06/illegal-farms-on-indigenous-lands-get-whitewashed-under-bolsonaro-administration/>> accessed 28 July 2020.

the ICC; hence, the ICC only has jurisdiction over natural persons and not over legal or judicial persons.²⁶⁰ Article 25(3) establishes different forms to be criminally responsible:

“In accordance with this 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 [...].”²⁶¹

The Brazilian President might not be considered a direct perpetrator, a co-perpetrator nor a perpetrator by means, because he did not conduct the single acts against indigenous persons directly and did not commit them through another subordinated person over whom he had organisational and hierarchical control.²⁶² Therefore, Article 25(3)(a) might not be applicable.

Regarding criminal responsibility for ordering, soliciting or inducing to the commission or attempted commission of the alleged crimes, the lack of a superior-subordinate relationship between the Brazilian President and the *grileiros*, land grabbers, miners and

²⁶⁰ Rome Statute (n 12) Article 25(1).

²⁶¹ *ibid* Article 25(3).

²⁶² *Katanga and Ngudjolo*, Confirmation Decision, Pre-Trial Chamber (n 109) paras 512-517.

other persons conducting the attacks, proves that the Brazilian President cannot be prosecuted for ordering the alleged crimes.²⁶³

However, it could be argued that the Brazilian President is criminally liable for inducing to the alleged crimes. The ICC ruled that a crime is committed through inducement when the person can influence others to commit or attempt to commit a crime; the exerted influence has a direct impact on the commission of the crime, and the liable person is aware that due to the exerted influence the crime will be committed or attempted.²⁶⁴ As head of State, the Brazilian President has the constitutional obligation to protect and respect indigenous peoples. The noncompliance of his constitutional duties influences those groups against the conservation of indigenous reserves and its communities as they feel entitled to disobey the constitutional provisions as well. Besides, the public statements discriminating and belittling indigenous communities and promoting the disappearance of indigenous reserves and indigenous communities, together with the policies facilitating these practices, might have induced *grileiros*, miners, loggers and land grabbers to commit the violent and destructive attacks against indigenous persons and their reserves. Especially, the dismantlement of organisations like IBAMA and ICMBio aimed at protecting indigenous reserves and its communities, and the Presidential Decree n° 9.760/2019 hampering the imposition of environmental fines and facilitating the commission of illegal practices are a clear example of this induction. Furthermore, the Brazilian president may have been aware that the extermination and forcible transfer of indigenous communities were going to be committed in the ordinary course of events as a consequence of his acts and omission to protect and respect indigenous peoples; therefore, Article 25(3)(b) might be applied.

Another form of criminal responsibility legislated in the Rome Statute is aiding, abetting or assisting to the commission of the crime. The ICTY jurisprudence establishes that the liable person should have aid and/or abet with knowledge and such aid and/or abet should have contributed directly and substantially to the commission or attempted commission

²⁶³ *Akayesu*, Judgement, Trial Chamber (n 109) para 483.

²⁶⁴ International Criminal Court, *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, para 153 <<http://www.legal-tools.org/doc/5686c6/>>

of the crime.²⁶⁵ The ICTY expressed that it is not required the physical presence of the criminally liable when the crime is committed.²⁶⁶ Besides, moral encouragement and support might also be considered forms of aiding and abetting.²⁶⁷ The ICC specifies that the aid and/or abet should be given with the intention to ease the commission of the crime, hence increasing the risk of its commission or attempt.²⁶⁸ Can be affirmed that the State policies reducing the monitoring powers of organisations aimed at the protection of the Amazon forest and its indigenous communities, the policies facilitating the commission with impunity of illegal activities in indigenous reserves, and the policies against the demarcation of new indigenous areas have facilitated the commission of the crimes of extermination and forcible transfer of indigenous persons. Besides, there has been an encouragement to disrespect the indigenous lands and the communities living within. Consequently, the actions of the Brazilian President might have endangered the survival of indigenous communities and their lands, increasing their risk of being targets of a crime of extermination and forcible transfer.

The other forms of contribution established in Article 25(3)(d) of the Rome Statute refers to the contribution “to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”.²⁶⁹ The alleged crimes are not committed by an identifiable group like was considered in the case *Prosecutor v. Gbagbo*,²⁷⁰ therefore, it cannot be said that the Brazilian President contributed to the commission of a crime by a group, knowing their criminal purpose.

In essence, the carried out assessment suggests that the Brazilian President, Jair Bolsonaro, might be criminally responsible for inducing to commit the crimes of extermination and forcible transfer of indigenous peoples, or for aiding and abetting the

²⁶⁵ *Tadić*, Opinion and Judgement, Trial Chamber (n 104) para 688.

²⁶⁶ *ibid* 691.

²⁶⁷ *ibid* 689.

²⁶⁸ International Criminal Court, *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges against Charles Blé Goudé, Pre-Trial Chamber, 11 December 2014, para 167 <<https://www.legal-tools.org/doc/0536d5/>>; *Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II (n 264) para 174.

²⁶⁹ Rome Statute (n 12) Article 25(3)(d).

²⁷⁰ International Criminal Court, *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, para 252 <<http://www.legal-tools.org/doc/5b41bc>>

commission of the named crimes. However, the State policy aimed at ending with the indigenous protected areas and the communities living within them, promoted and applied through the public policies and laws already enumerated and the Brazilian President statements, evidence that the acts of the President, were not a mere aid to commit the alleged crimes but an inducement of its commission. Specifically, the Brazilian President used its position as head of State to encourage the destruction of indigenous communities and their lands. Besides, his influence has had a direct impact in the commission of the alleged crimes, because in the absence of the policies issued since January 2019, and the discriminatory statements against indigenous persons, the crimes of extermination and forcible transfer might not have happened. Hence, we are inclined to think that, under Article 25(3)(b) of the Rome Statute, the Brazilian President, is criminally responsible for inducing the commission of the crimes of extermination and forcible transfer of indigenous peoples.

Finally, the alleged crimes of extermination and forcible transfer were committed with the required mental element regulated in Article 30 of the Rome Statute. Concretely, Article 30 requires the commission of any of the crimes of Article 5 of the Rome Statute with intent and knowledge.

In relation with the commission with intention, following Article 30(2) of the Rome Statute could be deduced that the Brazilian President induced the commission of crimes of extermination and forcible transfer of indigenous persons. The induction was conducted through voluntarily issuing State policies aimed at reducing the protection over indigenous lands, hence facilitating their destruction, and through making statements diminishing indigenous communities. Besides, knowing that Brazilian indigenous communities have always been at risk and have always suffered threats and aggressions by *grileiros*, the Brazilian President was allegedly aware that when implementing those policies, the extermination and forcible transfer of indigenous persons were going to “occur in the ordinary course of events”.²⁷¹ Hence, it was possible to anticipate that reducing the protection of indigenous peoples and their lands and facilitating the commission of illegal activities, could result in an increased risk for indigenous persons

²⁷¹ Rome Statute (n 12) Article 30(2).

to be exterminated and forcible transferred.²⁷² Furthermore, based on Article 30(3) of the Rome Statute, the alleged crimes were committed with knowledge because the Brazilian President was conscious and aware of his acts and their possible consequences. Therefore, it can be concluded that the Brazilian President induced the commission of the alleged crimes of extermination and forcible transfer with the intent and knowledge required in Article 30 of the Rome Statute.

²⁷² International Criminal Court, *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2482, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para 1012 <<http://www.legal-tools.org/doc/677866/>>

5. CONCLUSION

The Rome Statute crimes are characterised by an anthropocentric approach, protecting human lives and values and giving only little space to the protection of the natural environment. However, the interdependence between human dignity and the right to a safe and healthy environment is becoming progressively more evident. This relation has been emphasised by the Office of the Prosecutor in its 2013 Policy Paper on preliminary examination and its 2016 Policy Paper on case selection and prioritisation in which it stresses the need to pay particular attention to Rome Statute crimes committed through the destruction of the environment or resulting in the destruction of the environment. The case presented in this thesis is a clear example of the mutual reliance between human lives and nature, concretely, between Brazilian indigenous peoples and the Amazon forest.

The Brazilian Constitution recognises the rights of indigenous peoples over the territories of the Amazon forest that they have traditionally occupied. The connection that indigenous persons have with their lands is fundamental for the development of their culture, traditions, identity and survival. However, since the new elected President, Jair Bolsonaro, began its mandate in January 2019, the Government policies have been directed at ending with the demarcation of indigenous territories and decreasing the protection of indigenous communities and their lands. These policies provoked the intensification of threats and attacks against indigenous communities and an increase of the invasions and destruction of indigenous reserves. This situation has caused food scarcity and shortage of the natural resources that indigenous peoples need to survive, forcing several communities to flee.

Taking these facts into account, the purpose of this research has been to analyse whether the Policy of the Brazilian Government allegedly aimed at destroying indigenous lands and the communities living within could amount to a crime against humanity of extermination and forcible transfer of indigenous peoples. This dissertation has also been focused on assessing whether the ICC could investigate and prosecute these crimes and whether the Brazilian President could be held criminally responsible.

To assess whether Brazilian indigenous peoples are victims of extermination, it has been analysed if the illegal occupation, destruction and pollution of indigenous lands, the violent and deathly threats and the killings that the communities are suffering has resulted in the imposition of conditions of life over indigenous communities that are leading to their disappearance. Since this situation is producing shortages of food and natural resources upon which they depend, is hampering their procreation, and is resulting in the murdering of members of the communities, it can be concluded that Brazilian indigenous peoples are being exterminated. Regarding the forcible transfer of indigenous persons, the dissertation has proven that indigenous peoples are lawfully present in the territories they have traditionally occupied. Besides, there is evidence that indigenous peoples are suffering death threats if not leaving their lands, and are being forced to leave their lands involuntarily and unjustifiably. Therefore, it can be concluded that indigenous peoples are suffering the forcible transfer from their lands.

This research has also shown that the crimes of extermination and forcible transfer of Brazilian indigenous peoples are crimes of international concern prosecutable by the ICC. To make such a statement, it has been evaluated whether the case complied with the general elements of the crime against humanity. Firstly, it has been proven that the State policies and legislations facilitating the attacks against indigenous communities and the invasion and further destruction of their lands, together with the statements of the Brazilian President promoting the disappearance of indigenous communities and their lands, indicate that the crimes of extermination and forcible transfer of Brazilian indigenous peoples are part of an attack. Moreover, it has been evidenced that the attacks against Brazilian indigenous persons are widespread and systematic, because the aggressions and threats to indigenous peoples and the violent invasions are not taking place randomly but constantly, and they affect numerous indigenous communities. Therefore, it can be concluded that the Brazilian State Policy aims at destroying indigenous lands and the communities living within them and it amounts to the crimes against humanity of extermination and forcible transfer, as per Article 7 of the Rome Statute.

The second question to be answered was whether the ICC could investigate and prosecute the alleged crimes. It has as already been affirmed that the alleged crimes amount to

crimes over which the ICC has jurisdiction. However, the next step is to determine whether the ICC can exercise its jurisdiction over the presented case. This research has examined if the complementarity principle and the gravity test regulated in Article 17 of the Rome Statute are fulfilled. The inaction of the Brazilian judicial system to investigate and prosecute the facts allegedly amounting to extermination and forcible transfer of indigenous peoples and the unlikelihood that any genuine investigations will be initiated have been evidenced. On this basis, it may be argued that the complementarity principle is also potentially fulfilled.

The environmental implications of these crimes might be an argument of enough weight to justify the prioritisation of the investigation and prosecution of the Brazilian Amazon case. The ICC may have sufficient grounds to consider that the gravity threshold needed is reached. The performed analysis shows that the ICC could be in the position of investigating and prosecuting the alleged crimes of extermination and forcible transfer of Brazilian indigenous persons.

Finally, this dissertation also concentrated on evaluating the criminal responsibility of the Brazilian President Jair Bolsonaro. Regarding the mental element of Article 30 of the Rome Statute, it can be concluded that the Brazilian President has the required *mens rea* to be held responsible. Regarding the individual criminal responsibility, the conducted assessment has shown that due to the position of the Brazilian President as head of State and his capability to exert influence over the commission of the alleged crimes, the President could be criminally liable for inducing the extermination and forcible transfer of indigenous peoples. Concretely, the criminal responsibility of the Brazilian President arises from his discriminatory statements favouring the disenfranchisement of indigenous communities, the public policies inciting the occupation of indigenous lands, and for omitting his duty to protect indigenous communities from their extermination and forcible transfer.

The investigation and persecution by the ICC of the crimes committed against Brazilian indigenous persons might be essential to bring to an end the current situation that the indigenous communities and the Brazilian Amazon forest are suffering.

It is urgent to cease these crimes of being committed because they are producing irreparable harm to the indigenous communities, to the Amazon forest, and the international community as a whole. The disappearance of indigenous communities entails an immeasurable human loss, vanishing an incalculable knowledge of one of the most important forests of the world. Besides, the disappearance of indigenous communities implies depriving the Amazon forest of its more precious caretakers. Due to the importance of the Amazon forest for the world's equilibrium, stopping the extermination and forcible transfer of indigenous communities is fundamental to guarantee its preservation and a measure aimed at ensuring the survival of the world's present and future generations.²⁷³ The investigation and prosecution of the Brazilian Amazon case by the ICC could have a significant deterrence effect, preventing the commission of Rome Statute crimes involving the destruction of the environment. The right to a safe and healthy environment is the most crucial element for life; and, the preservation of nature is fundamental to guarantee “peace, security and the well-being of the world”.²⁷⁴

As Mireille Delmas-Marty said:

*“The awakening could be very sudden if we wait for the dream to turn into a nightmare of direct confrontation between states and between human beings forced to live together, in ever greater numbers, on an ever less habitable planet”.*²⁷⁵

²⁷³ Rome Statute (n 12) Preamble.

²⁷⁴ *ibid.*

²⁷⁵ Mireille Delmas-Marty, *Sortir Du Pot Au Noir: L'humanisme Juridique Comme Boussole* (Buchet-Chastel 2019) 56.

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