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# Juridifying Bolsonaro's mass deforestation policies in Brazil through the International Criminal Court

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### **Abstract**

Under Brazil's ex-president Bolsonaro, deforestation of the Amazon increased dramatically. An Austrian NGO filed a complaint to the Prosecutor of the International Criminal Court (ICC) against Bolsonaro in October 2021, accusing him of crimes against humanity against the backdrop of his involvement in environmental destruction. This paper deals with the question of whether this initiative constitutes a promising means of juridification to mitigate conflicts revolving around mass deforestation in Brazil. It thematizes attempts to juridify environmental destruction in international criminal law and examines the Climate Fund Case at the Brazilian Supreme Court. Finally, emerging problems and arguments in favour of starting preliminary examinations at the ICC against Bolsonaro are illuminated. This paper provides arguments as to why the initiative might be a promising undertaking, even though it is unlikely that Bolsonaro will be arrested.

### **Zusammenfassung**

In der Amtszeit des brasilianischen Ex-Präsidenten Bolsonaro nahm die Abholzung des Amazonasgebiets drastisch zu. Eine österreichische NGO reichte im Oktober 2021 beim Ankläger des Internationalen Strafgerichtshofs (IStGH) eine Beschwerde gegen Bolsonaro ein, die seine Abholzungspolitik als Verbrechen gegen die Menschlichkeit einstuft. Der Beitrag behandelt die Frage, ob die Initiative ein vielversprechendes Mittel der Verrechtlichung darstellt, um Konflikte rund um die Massenabholzung des Amazonas zu entschärfen. Dafür werden Versuche beleuchtet, Umweltzerstörung im internationalen Strafrecht zu verrechtlichen. Zudem wird der Klimafonds-Fall vor dem Obersten Gerichtshof Brasiliens vorgestellt. Abschließend werden Probleme und Argumente für die Einleitung von Voruntersuchungen gegen Bolsonaro vor dem IStGH diskutiert. Der Beitrag liefert Argumente, weshalb die Initiative erfolgversprechend sein könnte, obgleich es unwahrscheinlich ist, dass Bolsonaro verhaftet wird.

## I Introduction

Jair Bolsonaro, then president of Brazil, held an infamous speech in front of his evangelical supporters in August 2021 (BBC 2021a): “I have three alternatives for my future: being arrested, killed or victory.” The last two options did not come true: Bolsonaro lost the Brazilian runoff election for the presidency to the leftist Luiz Inácio Lula da Silva on October 30, 2022 (Herrberg 2022a). Being arrested, however, is not inconceivable, as the Austrian Human Rights NGO AllRise wants to prove.

AllRise filed a complaint (2021) to the Office of the Prosecutor of the International Criminal Court (ICC) against Bolsonaro and other members of his government<sup>1</sup> in October 2021. The complaint accused them of crimes against humanity against the backdrop of their involvement in the massive deforestation of the Brazilian Amazon. The ICC prosecutor Karim Khan has yet to decide whether he will initiate preliminary examinations against Bolsonaro and his political allies. If this will be the case, the result might be a revolution in international criminal law: No individual has ever been convicted under international criminal law particularly for destroying the environment<sup>2</sup> (Gillett 2017:225).

In fact, the Amazon biome plays a crucial role in the survival of humankind by filtering the world’s harmful carbon dioxide output (Laurance 1999:96). While human-induced climate change is speeding up, average deforestation increased to 11,396 km<sup>2</sup> in four years during Bolsonaro’s term (2019 – 2022) – the largest relative increase in a Brazilian government term since satellite measurements began in 1988 (Marinko 2022). It appears that the rest of the world stood idly by, paralyzed and powerless against the background of this protracted global catastrophe.

Where political solutions seem to have too little impact, attempting to address the problem by legal means – i.e., juridifying the deforestation of the Brazilian Amazon through the ICC – emerges as an alternative. This paper will deal with the question of whether AllRise’s first goal, causing preliminary examinations against Jair Bolsonaro at the ICC, would constitute a promising means of juridification to mitigate local, regional and global conflicts revolving around mass deforestation in Brazil.

For this purpose, the paper is divided into four parts. Firstly, general definitions and crucial aspects of (international) juridification will be provided. Relating thereto, previous attempts to juridify environmental destruction in international criminal law and the question which path of juridification exactly AllRise has opted for will be thematized. Secondly, main arguments are taken up on why Bolsonaro’s deforestation policies might have been causing local, regional as well as international conflicts. The veracity of these arguments will be evaluated by examining the Climate Fund Case at the Brazilian Supreme Court and assessments by UN and regional human rights institutions of Bolsonaro’s environmental and human rights policies. Thirdly, challenges, emerging problems, and arguments in favour of starting preliminary examinations at the ICC against Bolsonaro will be illuminated. The final and fourth section provides arguments as to why AllRise’s initiative might still be a promising undertaking, even though it is unlikely that Bolsonaro will ultimately be arrested.

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<sup>1</sup> The AllRise file also accuses, among others, Ricardo Salles, former Minister of Environment. Due to space constraints this paper will mention Bolsonaro only as a representative of the accused politicians in the following paragraphs.

<sup>2</sup> This fact is still accurate, see “About the Court – The judges have issued 10 convictions and 4 acquittals” (<https://www.icc-cpi.int/about/how-the-court-works>). In none of these cases has a reference to environmental destruction been made.

## II Juridification

### 1 Core aspects

According to Schubert and Klein (2020:302), juridification describes “the fact that in modern states the scope of action in all areas of life is increasingly determined or restricted by laws, regulations, decrees [and] standardizations” (translation by the author), yielding the tendency that political decisions are frequently being shifted to the legal level. Whereas juridification can be a promising means to solve conflicts when political decisions are actively hampered by politicians in charge, it also leads to “a shift away from traditional representative institutions and collective shaping of political opinions”. This possibly entails “decreased transparency between political, administrative, and judicial bodies” (Magnussen and Nilssen 2013:244).

Transferring the concept to the international level, Abendschein-Angerstein (2015) defines international juridification as a process in which international cooperation is increasingly subject to rule-of-law principles, a myriad of treaties and institutional frameworks to support the fulfilment of the same. According to her, juridification involves more than a purely numerical increase in international rules, principles and regulations. A crucial aspect of international juridification is the emergence of a growing number of international courts – e.g., the ICC – or quasi-judicial dispute settlement bodies. In regard thereof, Abendschein-Angerstein emphasizes the importance of fair and impartial conflict resolution[s] with legally binding judgments, yet problematizing difficulties to establish effective monitoring procedures and enforcement systems to ensure compliance with judgements of international courts: “Since there is as neither a world government, nor a world police force, nor a world court yet, international rules cannot be enforced in the same way as in the nation state” (translation by the author) (ibid.).

Magnussen and Nilssen (2013:229) further specify juridification processes by dividing them into “more detailed legal regulation[s] of already regulated areas” on the one hand and “legal regulations of new areas” on the other hand. Accordingly, juridification might lead to the creation of a new set of norms, the amendment of existing rules and/or the elongation of existing legal norms by applying them in an innovative way to new areas.

Bearing these definitions of juridification in mind, it becomes evident that AllRise’s communication to ICC’s prosecutor cannot be considered a case of juridification as such. At the current stage, it is merely a political-activist approach which might have generated valuable knowledge and media attention by publicly condemning Bolsonaro’s deforestation policies. Nonetheless, the latter will be juridified only if the ICC’s prosecutor ultimately announces to start preliminary examinations against Bolsonaro. This would trigger ICC’s official mechanisms and procedures, which constitute the first step of juridification and might eventually lead to invoking the ICC’s judges to deal with the accusation (ICC-OTP Policy Paper 2013:17f.).

Until then, neither the ICC judges nor the prosecutor have any obligations to comment on complaints filed to the prosecutor by individuals or groups (ibid.:18). From an international criminal law perspective, All Rise’s undertaking can still end up in the legal cemetery of discarded and neglected accusations.

### 2 Juridification of environmental destruction in international (criminal) law

In July 2022, the General Assembly acknowledged the universal right to a clean, healthy, and sustainable environment in a historic, but non-binding resolution (A/RES/76/300) that urged governments, corporations, and other actors to magnify their efforts in this regard.

Nonetheless, Greene (2019:29) elaborates that the status quo of international law comprises only “a patchwork” of different environmental treaties that regulate particular areas, “but

there is not a comprehensive, codified international treaty that deals with environmental issues." Existing environmental treaties address special cases such as whaling or the protection of waterfowl, but "it is left to the individual countries to create domestic laws and methods of compliance with those treaties" (ibid.:29). The right to a healthy environment, for instance, was defined in the Stockholm Declaration of 1972 and later acknowledged in various international and regional instruments (Lopez 2007:255). The agreement's impact, however, remains controversial, since it neither recognized an individual right to file complaints nor did it create mechanisms to charge individuals who violate the Declaration's principles (ibid: 257).

Existing international criminal law regulations are similarly vague. In fact, the issue of widespread environmental destruction is still new territory for large parts of international criminal law (Greene 2019:1) and no individual has ever been convicted under international criminal law particularly for destroying the environment<sup>3</sup> (Gillett 2017:225).

The Rome Statute (1998:4) at least mentions environmental damage in the context of war crimes. According to Article 8(b)(iv), a perpetrator is to be held responsible for "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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." Since this must be in line with the finding that the action constituted a war crime, the threshold to start investigations is comparatively high. In fact, AllRise did not refer to this article for there is no ongoing war in Brazil, a necessary requirement to apply Article 8 (Esser 2014:357).

Another option for AllRise to juridify Bolsonaro's deforestation policies would have been to advocate for the creation of a new set of laws. Many proposals have been made throughout the last decades to juridify environmental destruction on the international level more effectively. Among them are attempts to create an "Ecocide Convention" accompanied by an "International Environmental Court" (Greene 2019:44), entitling the environment as a subject of international law with own rights (Böhm et al. 2021) or establishing the concept of "Crimes Against Future Generations" in international criminal law (Jodoïn and Saito 2012:115). The most persistent and recurring proposal, however, is to amend the Rome Statute by including "ecocide" as a fifth core crime against peace (Greene 2019:1). The inclusion of ecocide is a request that had already been brought forward in 1991<sup>4</sup> by the International Law Commission (A/CN.4/435), a body of experts invoked by the United Nations General Assembly to help developing and codifying international law. In the final draft of the Rome Statute, however, ecocide did not appear as a core crime.

A more recent attempt to amend the Rome Statute that gained worldwide attention is the announcement of a new ecocide definition drafted by an Independent Expert Panel convened by the Stop Ecocide Foundation in 2021 (Killean 2022). The ecocide definition proposed by the panel describes this type of crime as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." According to international law scholar Rachel Killean (2022), this would extend the "possibility of prosecutions for environmental damage beyond the context of war, theoretically enabling individuals to be prosecuted for harms such as (...) deforestation."

Most remarkably, UN Secretary-General António Guterres announced that it would be "highly desirable" to include ecocide as a crime at the ICC (Larena and Gosch 2021). In July 2022, the U.N. Special Rapporteur on human rights in the context of climate change published

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<sup>3</sup> This fact is still accurate, see footnote 2 above.

<sup>4</sup> Before the Rome Statute was officially drafted by 1998.



a report (A/77/226) recommending as well that the International Criminal Court "include an indictable offense of ecocide" (p. 21) and that the International Law Commission be mandated to add to the definition of ecocide "perpetrating violence against and "killing of environmental and indigenous human rights defenders" (p. 23).

There are, however, several obstacles to introducing ecocide as a fifth core crime to the Rome Statute, among them the required two-thirds majority of States Parties that must be in favour of the amendment according to Art. 121 (3), a lack of a collectively approved definition of ecocide (Greene 2019:31), and most importantly, concerns around issues of accountability, implementation and enforcement procedures (ibid. 35).

AllRise has chosen yet another path to potentially juridify Bolsonaro's deforestation policies. The communication to the prosecutor argues with article 7 of the Rome Statute, namely crimes against humanity. It is a strategic move, anticipating that the prosecutor might consider an already existing norm with the intention to expand its scope of application in an innovative manner to a new area: environmental destruction.

*"The body of evidence against Mr Bolsonaro (...) points to, at least, an intent to facilitate and support – to aid, abet and otherwise assist – the ongoing widespread attack on the Brazilian Legal Amazon and on its Environmental Dependents and Defenders contrary to Article 7 and Article 25(3)(c) of the Rome Statute. This attack, and the multiple crimes that have occurred under its aegis – which include but are not limited to murder (Article 7(1)(a)), persecution (Article 7(1)(h)), and other inhumane acts of a similar character (Article 7(1)(k)) – necessitate an urgent and thorough ICC investigation and prosecution."* All Rise Communication to the ICC, p. 8.

In fact, international lawyers such as Matthew Gillett (2017:226) argue that article 7 of the Rome Statute could be applied to cases of human induced environmental destruction combined with a widespread or systematic attack against a civilian population, "for example, if perpetrators (...) removed natural food sources in local flora or fauna, in turn causing serious bodily and/ or mental harm." How AllRise has justified that deforestation attributable to Bolsonaro's government constitutes a crime against humanity will be shortly illuminated later in the paper.

It is worth noting that on September 15, 2016, the Office of the Prosecutor for the ICC announced that it will widen its remit to include cases of environmental destruction (ICC-OTP 2016:5). The paper also acknowledged that the prosecutor will henceforth consider environmental destruction when assessing the gravity of crimes (ibid.:41).

Accordingly, AllRise's communication to the prosecutor might turn into a litmus test as to what extent the policy paper is merely a symbolic gesture, or a serious document that the subsequent prosecutor Karim Khan, whose term started in June 2021, will take into account when assessing complaints filed to his office. So far, Karim Khan has not commented on whether or not he will follow his predecessor's announced path.

### **III Bolsonaro's deforestation policies**

#### **1 Inducing local and regional conflicts**

The main argument of the communication to the ICC prosecutor is that Bolsonaro and his government had been committing crimes against humanity by allowing and promoting widespread deforestation of the Amazon Biome, "one of the most vital organs to human and environmental health" (AllRise 2021:3). It is argued that this attack on the Amazon rainforest has

inflicted persecution, murder and inhuman suffering on its inhabitants, dependents and defenders.<sup>5</sup>

According to the accusation, the group of the Amazon's dependents and defenders has been in constant conflict with members of Bolsonaro's former government who benefitted from land-grabbing as well as with large landowners whose interests in Congress are represented by the Ruralistas, a powerful rural lobby in Brazil (ibid.:24). Thus, it is brought forward that by systematically weakening and eliminating environment protection laws and government controls, Bolsonaro has been promoting the penetration of the rainforest by loggers, fire-raisers and cattle ranchers (ibid.:113). AllRise further claims that Bolsonaro's administration has been pursuing policies to systematically remove, neuter, and eviscerate laws, agencies and individuals that serve to protect the Amazon. This is exemplified by the fact that Bolsonaro has cut the budgets of the indigenous agency FUNAI and the environmental agency IBAMA, which occupy leading positions with lobbyists from the agricultural industry (ibid.:128).

AllRise assesses that through a "culture of corruption and impunity" (ibid.:10) organized criminal groups have been encouraged to target environmental dependents and defenders, framed and treated as obstacles to the development of their illegal deforestation activities. The communication to the ICC contains a myriad of concrete numbers to prove these accusations. Global Witness (2021), for instance, made public that 20 land and environmental defenders were murdered in Brazil in 2020. Furthermore, it is reported that the contamination of soils and rivers with pesticides, land grabbing and invasions of territories increasingly lead to land-conflicts that "jeopardise the survival of Indigenous peoples and traditional communities who depend on the Brazilian Legal Amazon's natural resources for their water" (AllRise 2021:11).

In order to elaborate to what extent the communication can be considered backed up, well-founded and promising in terms of prospects, it is worth taking a short look at the assessment of UN and regional human rights institutions of Bolsonaro's deforestation policies.

## 2 Assessment of other UN and regional human rights institutions

On February 12, 2021, the Inter-American Commission on Human Rights published a report (OEA/Ser.L/V/II) on the human rights situation in Brazil that strongly condemned Bolsonaro's deforestation policies. The commission referred to an increase in threats, murders and attacks on human rights defenders addressing environmental issues (ibid.:12) and harshly criticized "the revision of indigenous and environmental policies in favor of illegal occupation of ancestral lands, the encouragement of acts of violence against indigenous leaders and communities, and authorization of the environmental destruction of their territories" (ibid.:29). In addition, the report denounced "weaker environmental policies" combined with budget cuts for environmental agencies such as FUNAI (ibid.:31).

From 2 to 13 December 2019, The UN Human Rights Council sent a Special Rapporteur<sup>6</sup> to Brazil with the mandate to examine the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. The language of the subsequent report (A/HRC/45/12/Add.2) could hardly have been clearer. According to the

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<sup>5</sup> 30 million people live in the Amazon, encompassing around 350 different Indigenous and ethnic groups (AllRise 2021:6). Among them are traditional peoples such as *Quilombolas* (descendants of African slaves), *Ribeirinhos* (inhabitants that live close to the river) and *Seringeiros* (rubber tappers). Defenders of the Amazon as environmental activists, not exclusively but frequently indigenous peoples, are included in this group, since it is argued that they face governmental oppression likewise (ibid.).

<sup>6</sup> Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

Special Rapporteur (OHCHR 2022:2), "Brazil is on a steep path of regression from sustainability and human rights", adding that "images of the rampant burning of the Amazon rainforest have become a frightening visual of that descent and the eroding commitment of Brazil to (...) international values and principles."<sup>7</sup>

Whereas the last UN Human Rights Council's Universal Periodic Review of Brazil took place in 2017, two years before Bolsonaro took office as president, a briefing note by Ravina Shamdasani, the spokesperson for the UN High Commissioner for Human Rights, has been published on June 10, 2022 (OHCHR 2022c). In the press statement, Shamdasani condemned ongoing attacks faced by human rights defenders, environmentalists and indigenous peoples in Brazil. In this regard, she acknowledged Bolsonaro's inglorious role by emphasizing that "authorities must adopt adequate measures to guarantee their rights to land, territories, and traditional livelihoods, while protecting them from all forms of violence and discrimination both by State and non-State actors" (ibid.).

Although the above mentioned human rights institutions do not refer to the concept of crimes against humanity when condemning Bolsonaro's activities, it is evident that AllRise's findings about the human rights situation in Brazil are generally in line with their assessments of Bolsonaro's deforestation policies.

### 3 Contributing to global conflicts

Besides listing local and regional conflicts as repercussions of deforestation in Brazil, AllRise's communication to the ICC prosecutor takes a further, even bolder step: It is argued that the global consequences of Bolsonaro administration's emissions, owing to extensive deforestation, should be considered crimes against humanity (AllRise 2021:5). This argument is backed up by a scientific report (2021) that prominent climate researchers such as Rupert Stuart-Smith and Friederike Otto from Oxford University prepared for the communication. According to their estimations, over 180,000 heat-related deaths globally this century can be attributed to Bolsonaro's deforestation policies if these continue without hindrance (Stuart-Smith et al. 2021:6).<sup>8</sup>

In fact, peace and conflict researchers such as Homer-Dixon (1991:88) have long warned that human-induced climate change in general and deforestation in particular cause and exacerbate international conflicts, a tendency that will deteriorate in the future. According to him, decreased agricultural production, economic decline, population displacement, and disruption of legitimized institutions and social relations as measurable impacts of climate change (ibid.:91) will continuously – and increasingly – cause "scarcity disputes between countries", "clashes between ethnic groups" as well as "civil strife and insurgency", bringing about human suffering on a large scale (ibid.:78).

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<sup>7</sup> The Rapporteur further posited that the government is being accused of instigating human rights violations by hampering monitoring or enforcement (ibid.:8). It was denounced that Bolsonaro's deforestation policies constitute a "catastrophic risk to the human rights of billions of people around the world" and further stated that "the killing and criminalization of indigenous and environmental rights defenders and members of non-governmental organizations is alarming" (ibid.:13).

<sup>8</sup> Concerning the entailing conflict potential, Stuart-Smith et al. (2021:6) write: "The sustained, uncontrolled acceleration of [deforestation] significantly contributes to the likelihood and intensity of extreme weather events around the Earth which already (...) directly cause widespread loss of life through extreme heat and floods, increase the risk of future pandemics, and indirectly foment political instability, migration and war."

## 4 The “Climate Fund Case” at Brazil’s Supreme Court

In September 2020, the Supreme Court of Brazil held an unprecedented public hearing in which 66 experts were invited to speak, among them scientists, representatives of the federal and state governments, environmentalists, indigenous people and entrepreneurs (Setzer 2020). The public hearing emanated from the so-called “Climate Fund Case”, an Action for Non-compliance with Fundamental Precept filed by four oppositional political parties in the Supreme Court (ibid.). The plaintiffs argued that the immobilization of Brazil’s Climate Fund actively induced by Bolsonaro’s government<sup>9</sup> constituted an unconstitutional omission, since according to Brazil’s federal Constitution’s Article 225 (2010) “all have the right to an ecologically balanced environment and both the Government and the community shall have the duty to defend and preserve it for present and future generations.”

At the public hearing, UN Special Rapporteur on Environment and Human Rights, David Boyd, emphasized Brazil’s international obligations and deemed current deforestation policies unconstitutional (Setzer 2020).

The Court’s final decision, issued on July 4, 2022, mandated that the Brazilian government fully reactivate its National Climate Fund<sup>10</sup> (Kaminski 2022). The latter was acknowledged by the Supreme Court as the primary option available to reduce emissions in Brazil. According to the judges, not employing it constituted a breach by omission of the national constitution (ibid.). Luís Roberto Barroso, Justice of the Brazilian Supreme Court, and Patrícia Perrone Campos Mello, Clerk at the Brazilian Supreme Court, further stated that “from a supralegal perspective, the STF [Supreme Court] affirmed – for the first time – that environmental treaties fall under the category of international human rights treaties, since a healthy environment is a condition for the exercise of such rights” (Barroso and Campos Mello 2022).

Both this judgement and UN and regional human rights institutions’ severe critique of Bolsonaro’s deforestation policies might be important aspects to consider for the ICC prosecutor, but they certainly do not determine whether Karim Khan will accept the file. After all, the threshold to start preliminary examinations based on suspected crimes against humanity remains high. In the following section of the paper, it will be explained why.

## IV Feasibility

### 1 Challenges and problems

The following arguments, which might deter the ICC prosecutor from taking up the case, particularly apply to AllRise’s claim that Bolsonaro’s deforestation policies have been directly responsible for conflicts and deaths on a global scale.

Since the above mentioned number of 180,000 heat-related deaths supposedly attributable to Bolsonaro’s government are mere estimations by climate researchers and therefore scientifically disputable, it will be hard to indict Bolsonaro based on these numbers. Accordingly, Greene (2019:43) argues that in our capitalist system “we are all both perpetrator and victim” when it comes to accelerating climate change. Thus, legal boundaries need to be defined in a

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<sup>9</sup> The Climate Fund was created in 2009 under the National Climate Change Policy to financially support mitigation and adaptation projects. In 2019, the government agency in charge of the Climate Fund was dissolved by Bolsonaro’s Minister of the Environment, Ricardo Salles (Setzer 2020).

<sup>10</sup> The Supreme Court has yet to rule on another lawsuit filed by the same political parties accusing the Federal government of immobilizing the Amazon Fund. The latter is a tool to promote projects that prevent or combat deforestation (The Grantham Research Institute on Climate Change and the Environment 2020).

non-arbitrary manner: What exactly makes one action more environmentally devastating and graver than another? It might be difficult to justify why Bolsonaro is to be held accountable, while other state leaders allowing and supporting wide-spread environmental destruction are not. Furthermore, the ICC's capacities are limited. Its primary task is pursuing the most serious crimes of concern to the international community, which is why the persecutor might concentrate more on instances of extreme and acute violence than on cases of gradual environmental destruction with rather long-term consequences (Killean 2022). In an open letter to the ICC Prosecutor from May 20, 2022, AllRise openly conceded this difficulty: "We imagine that the ICC is experiencing extremely high workloads, notably with the war of aggression in Ukraine adding to your strain" (AllRise 2022).

Another argument is of an even simpler nature: The ICC's primary objective is reflected in the Court's build-up. Instead of environmental law, the judges are experts in criminal or humanitarian law. Greene (2019:39) emphasizes that the biographies of the ICC judges in 2019 showed that none of the judges had any experience in environmental law: "Presenting environmental cases before the ICC judges could be similar to presenting patent law cases to a family law judge - simply inappropriate."

Gillet (2017:225) makes clear that the ICC lacks the security forces needed to enable the direct enforcement of arrest warrants. Even if Bolsonaro was convicted in the end, it is unlikely that he and his supporters will accept the judgment, especially if causation and criminal liability are not thoroughly defined beforehand (ibid.:35). The then Chief of the Institutional Security Cabinet General of Brazil, Augusto Heleno, for instance, claimed in the aforementioned public hearing in September 2020 at the Federal Supreme Court of Brazil that the lawsuit was a conspiracy (Setzer 2020). He further asserted that international non-governmental organisations fuelling this conspiracy were "manipulated by foreign powers", applying "false arguments, fabricated and manipulated figures and unfounded accusations to harm Brazil" (ibid.).

Finally, it is not undisputable that starting preliminary investigations against Bolsonaro will constitute a deterrent for other state leaders and CEOs of corporations responsible for environmental destruction. It might even depoliticize the issue, as politicians and company leaders could idly wait for an ICC judgment that might take years to be finally delivered. This might cause them to shirk responsibility instead of taking affirmative action to tackle environmental problems that accelerate human-induced climate change. This argument is in line with McCargo's claim that "criminalizing political leaders for their bad behavior or questionable decisions risks devaluing or undermining the political process" (2015:10). The ICC judgement could "backfire and rouse rather than settle passions" (ibid.:15f.) by bringing down the controversial figure Bolsonaro in a highly polarized country like post-election Brazil (Herrberg 2022b).

## **2 Arguments in favour**

Brazil's current president Lula promised a 180-degree turnaround from the environmental policies of his predecessor (Herrberg 2022a). Nonetheless, Bolsonaro's term will have long-lasting detrimental repercussions difficult to undo, for national environmental institutions and laws have been weakened, and right-wing criminal groups are reportedly controlling parts of indigenous territories (ibid.). Besides, Lula does not have a parliamentary majority (ibid.). It is thus highly unlikely that the conflicts revolving around deforestation will be resolved by political means only.

Accordingly, Supreme Court Justice Luís Roberto Barroso and Supreme Court Clerk Patrícia Perrone Campos Mello (2022) stressed that the court's aforementioned final decision on the Climate Fund Case recognized that "environmental protection and the fight against climate

change do not constitute political issues, but rather fall under the constitutional, supra-legal and legal duty of the federal government.”

The ICC has jurisdiction if a state is unwilling or unable to prosecute the acts seriously at the national level (Article 17 (1) (a) Rome Statute). Even though Brazil has become a global showcase of national climate litigation cases (Fontes and Leite 2022), these usually deal with government policies and neither address Bolsonaro’s individual accountability nor aim at imposing sanctions on him. All Rise’s request could therefore be considered justified<sup>11</sup>, since Brazil’s last Prosecutor General during Bolsonaro’s term, Augusto Aras, did not seek an investigation against Bolsonaro in this regard (Salomao 2022).<sup>12</sup>

Currently, the ICC has received multiple complaints against Bolsonaro<sup>13</sup> (ibid). They are all connected thematically by the oppression of the indigenous inhabitants as their subject matter. The assumption of criminal liability under the Rome Statute may be more valid when all of these complaints are taken into account together; an option, that the ICC prosecutor can make use of (ibid).

Against the backdrop of the ongoing climate crisis with its disastrous global repercussions, the ICC prosecutor might conclude that he must adopt the Rome Statute to the global status quo, permitting its application in an innovative way to contribute to a larger systemic change in international criminal law. A paradigm shift would be in line with the Rome Statute’s preamble, which indicates that it is designed to protect the current population of the world and “future generations”. In this sense, Gillet (2017:235) argues that “extending the protection against disproportionate environmental harm (...) would accord with the animating spirit behind the consensus reached in Rome in 1998.”

This argument can be applied to the human rights situation of the Amazon’s dependents and defenders as well. Reconciliation processes in the future could be illusory, if they are not backed up by ICC investigations and a potential verdict that establishes individual criminal responsibility and imposes sanctions, including jail sentences, on offenders (Gillet 2017:250). This process might take a long time, but it would still be better for the victims of Bolsonaro’s deforestation policies than general institutional inaction. Affected people might especially benefit from the broader symbolic impact of preliminary examinations and – if the accusation overcomes this hurdle – main investigations; an argument which will be further elaborated in the concluding section of the paper.

## V Conclusion

*“If victory is being defined as ‘Bolsonaro in jail,’ the chances are low (...). If we define victory as another puzzle stone to build awareness, to have the ICC deal with our case, to start a preliminary investigation, we can speak of success.”* AllRise initiator Johannes Wesemann (SZ Magazin 2021).

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<sup>11</sup> Environmental lawyer Joana Setzer, one of the specialists in this area, stated that “more and more litigation cases have been seeking to hold individuals accountable”, concluding that “under this trend” it might be possible to hold Jair Bolsonaro accountable as well (Fontes and Leite 2022).

<sup>12</sup> It is not yet known whether this will change with a new Prosecutor General under Lula.

<sup>13</sup> For example, in August 2021, the Association of Indigenous Peoples of Brazil (APIB) filed a criminal complaint before the ICC accusing the president of genocide against the indigenous population (Salomao 2022, the official document is not publicly available). Already in November 2019, the Human Rights Advocacy Collective had also referred the matter to the ICC, accusing Bolsonaro of committing crimes against humanity by persecuting indigenous populations (ibid.).

Wesemann argues that preliminary examinations against Bolsonaro would make a precedent case, serving as a deterrent for other political and business leaders to stop environmental degradation with global implications (*ibid.*). Of course, the opposite might be the case and the attempt could misfire. If the ICC prosecutor does not consider the complaint, initiators of future legal-activist actions might be discouraged, and perpetrators encouraged to continue with their devastating activities. Nonetheless, in view of the global climate crisis, it is worth taking this risk. Even if the glass of legal water was half empty and AllRise's file was doomed to fail, the attempt will have created international media attention, setting the topic of the Amazon's deforestation on the global agenda. Furthermore, a rejection of the file would disclose the shortcomings of the current international criminal law system and illustrate that new legal tools need to be developed, e.g., an amendment of the Rome Statute to include ecocide, in order to tackle the problem of mass deforestation.

If, however, Karim Khan accepts the file, the symbolic ramifications of this hitherto unique step should not be underestimated. Constituting a case of strategic litigation<sup>14</sup> and creating widespread media and public attention, the prosecutor's decision might entail effects such as "changes in ideas, perceptions, and collective social constructs relating to the litigation's subject matter" (Rodríguez-Garavito 2011:1680). Future attempts to advocate for indigenous rights in Brazil could refer to the prosecutor's decision, which is undoubtedly of great symbolic value.

Furthermore, defenders and dependents of the Amazon Biome could benefit from factfinding and reconciliation processes which preliminary examinations<sup>15</sup> and main investigations potentially entail. As soon as the latter are initiated, the NGO coalition for the ICC can provide further support for victims of Bolsonaro's deforestation policies through witnesses' and victims' protection and advocacy in the field (Schiff 2013:755f.). Jeopardized activists would have the right to psychological counselling and a Trust Fund for Victims, to make representations to the Pre-Trial Chambers, and to be protected by a Victims and Witnesses unit (*ibid.*:756).

As the juridification of Bolsonaro's deforestation policies through the ICC is only one approach, it can be complementary to other activist and political actions, such as international awareness campaigns and peacebuilding measures. Starting preliminary examinations against Bolsonaro will not solve the problem of the Amazon's widespread deforestation, but it might help mitigating conflicts revolving around it. Standing idly by while the world's green lung is being destroyed should not be an option for human rights NGOs like AllRise. After all, their attempt can be considered promising, as even in international criminal law "bold ideas can create new momentum, and great changes can be accomplished with enough vision and drive" (Greene 2019:48).

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<sup>14</sup> Strategic litigation, especially in Latin America, has frequently led to judicial activism, i.e., "judicial proceedings that (1) affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause; (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations (Rodríguez-Garavito 2011:1676).

<sup>15</sup> According to the Office of the ICC prosecutor (OPT ICC 2013:20), preliminary examinations include receiving testimony at the seat of the Court. The Office may "seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate" (*ibid.*). This could be considered a first step of entailing reconciliation processes.

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