

Ecocide: A new legal tool to defend the Amazon

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Abstract

From its establishment as a Portuguese colony in the 16th Century to the country's present political incarnation, Brazil has long been associated with the illegal dispossession of land, the rabid exploitation of natural resources, and the destruction of the Amazon rainforest. On the one hand this is surprising: Brazil has perhaps the most detailed set of forest protection laws in the world, and indigenous peoples have considerable rights under the 1988 Constitution. But there is a vast gulf between the recognition of rights and their enforcement. While Brazil's legal system recognizes environmental crimes, insidious forces ensure that laws that are inconvenient for exploitation are undermined or unenforced.

The excessive exploitation has been facilitated through the 'capture' and manipulation of certain government institutions by powerful corporate actors and large-scale landowners. Rather than protecting the natural environment, key policy makers (including Ruralistas at the highest levels of government) weaken environmental law enforcement, thereby encouraging the (so-called) 'Rainforest Mafias' who drive land invasions and deforestation. The resulting environmental harm is stark - land-grabbing is prolific, deforestation is rampant, and environmental defenders are attacked and murdered at a sickening rate. Now the Amazon itself is under threat. Competing

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claims for Brazil's rural land have defined and dominated the Brazilian political, legal, economic, and cultural landscape for centuries. This paper will examine the forces at play in Brazil and how their behaviour might be influenced by a new international law of ecocide.

Key words: Ecocide, Brazil, Bolsonaro, Lula, Amazon, ICL, ICC

Introduction

Since its foundation, Brazilian society has navigated a contradictory and often abusive relationship with the Amazon rainforest and its surrounding ecosystems. From the colonial period, through to the current New Republic, demands for economic development and the influence of political elites have driven exploitation of forests and mass violence against their indigenous inhabitants.

While environmental destruction peaked during the violent years of the military dictatorship of 1964-1985, a web of domestic protections introduced since the return to democracy in 1985 has failed to halt the unfolding environmental disaster. In the period between 1985 and 2019, Brazil as a whole lost 872,000 km² of native vegetation in the different biomes, the equivalent to 10.25% of its territory. In the Amazon region alone, deforestation figures released by the National Institute for Space Research (Inpe), showed a total of 470,472 km² deforested between 1988 and July 2021, the equivalent to 9.4% of the area delimited as Legal Amazon (which covers 58.9% of Brazil). While the rate of deforestation was successfully reduced by 83% under the Lula administration of 2003-10, since then it has increased year on year. Under President Jair Bolsonaro it rose significantly. Recent data indicate that the accumulated deforestation from 2019 to 2022 reached 35,193 km², an area that exceeds the individual size of two Brazilian states: Sergipe and Alagoas. It also represents an increase of almost 150% in relation to the previous four-year period (2015 to 2018), when 14,424 km² were devastated.

As this data indicates, while domestic political policies can be effective in reducing mass deforestation, the health of the Amazon is - in significant part - at the mercy of the government of the day. Because the Amazon can serve as a gigantic carbon sink, its demise is not only a problem for Brazil, but also for the wider world as we seek to mitigate dangerous global heating. This article

argues that novel solutions are required to prevent the continued destruction of the Brazilian Amazon and the indigenous and traditional communities who rely on it. A new international law of ecocide, or even a national version, would open-up important legal avenues for those who want to protect the forest and its communities and help deter those who drive the continued destruction of the 'earth's lungs'.

Current Legal Framework

Somewhat surprisingly, Brazil has some of the most comprehensive forest protection laws of anywhere in the world. For example, Indigenous people and their territories are robustly protected.³ The Constitution 'acknowledged the pre-existing rights of Indigenous people to their traditional lands, and further established that they had usufruct rights to the land, as well as "riches of the soil, the rivers, and the lakes existing therein"'.⁴ The rights and interests of Indigenous populations should be defended by public prosecution.⁵ Cultural rights⁶ and heritage⁷ are enshrined, and demarcation of Indigenous territory is required.⁸ However, Indigenous people do not have usufruct of the subsoil, and as such do not possess mineral resources on their lands; mineral rights belong to the Federal Government.⁹ Essentially, the land itself and anything of value underneath it remain vested in the state.¹⁰

Brazil also has a comprehensive legal framework for environmental protection. Chapter VI of the

³ Constitution of the Federative Republic of Brazil, 1988, Articles 174, 231.

⁴ Constitution, Article 231, para 8.

⁵ Constitution, Article 129.

⁶ Constitution, Article 215.

⁷ Constitution, Article 216.

⁸ See Constitution, Article 231; *Transitional Constitutional Provisions Act 1988*, Article 67. *Nb.* This issue has been addressed and limited by subsequent laws.

⁹ Constitution, Article 176.

¹⁰ Constitution, Articles 20, 22, 49, 109.

Constitution provides for protection/conservation of 'The Environment'.¹¹ Environmental policy¹² and the issue of permits and licensing¹³ predate the Constitution, as does civil liability.¹⁴ Criminal¹⁵ and administrative¹⁶ liability came later. The 1998 Environmental Crime Law establishes criminal and administrative punishment for individuals and companies for harming the environment, such as harvesting timber in government-owned forests and transporting, buying, or selling illegally-harvested timber.¹⁷ In theory, punishment may include prison sentences, fines and rights' restrictions for individuals and fines and business restrictions for companies, like suspension of their activities and prohibition on concluding agreements with the Government. In practice, these laws are not properly enforced, for different reasons: crimes are often unclear and generally dependent on administrative directives and actions. The laws are not comprehensive enough to curb much of the more serious types of environmental degradation. And penalties are arguably too low.

Under the Brazilian Forest Code, private landowners in the Amazon region must maintain 80 percent of the forest on their property as a nature reserve.¹⁸ Timber may be legally extracted subject to authorization by environmental agencies and commitments to maintain biodiversity, forest cover, and growth of native species.¹⁹

¹¹ Constitution, Article 225.

¹² International Comparative Legal Guides, *Environment & Climate Change Law 2019*, London: Global Legal Group Ltd, and Sao Paulo: Machado Meyer Advogados, 2019.

¹³ International Comparative Legal Guides, *Environment & Climate Change Law 2019*, London: Global Legal Group Ltd, and Sao Paulo: Machado Meyer Advogados, 2019; Federal Law No 6938 of 1981.

¹⁴ International Comparative Legal Guides, *Environment & Climate Change Law 2019*, London: Global Legal Group Ltd, and Sao Paulo: Machado Meyer Advogados, 2019.

¹⁵ International Comparative Legal Guides, *Environment & Climate Change Law 2019*, London: Global Legal Group Ltd, and Sao Paulo: Machado Meyer Advogados, 2019.

¹⁶ International Comparative Legal Guides, *Environment & Climate Change Law 2019*, London: Global Legal Group Ltd, and Sao Paulo: Machado Meyer Advogados, 2019.

¹⁷ Federal Law No 9605 of 1998.

¹⁸ Federal Law No 12,651 of 2012, Article 12.

¹⁹ Federal Law No 12,651 of 2012, Articles 17, 20–24.

This legal framework is supported by a set of domestic regimes tasked with the protection of Brazil's forests. Regarding the recognition of community forest rights, 'Brazil has the most complex system of forest tenure of all countries, with a total of eight [unique] tenure regimes. These regimes can be classified into three types: (a) community rights to forest resources within conservation unit areas; (b) community rights to forest resources within agrarian reform settlements; and [...] (c) the rights held by Indigenous or *Quilombola* communities.'²⁰ All of this is what President Lula once referred to as Brazil's 'Mosaic' of protections.²¹ These territorial regimes are largely (but not exclusively) tied to land in Brazil's Amazon.²²

Additionally, each area falls under the remit of a specific government agency: ICMBio (in the case of Extractive Reserves, Sustainable Development Reserves, and National Forests); INCRA (in the case of Forest Settlement Projects, Sustainable Development Projects, Agro-Extractive Settlement Projects, and *Quilombola* Territories); and FUNAI (in the case of Indigenous Lands).²³ Notably, unlicensed or unauthorized commercial activity is illegal in reserves and Indigenous territories.²⁴

From a normative perspective, Brazil's domestic legal regime recognizes both environmental crime and infraction.²⁵ Relevant criminal/civil law, regulations, and other provisions are enforced by IBAMA and ICMBio at the federal level, and by state and municipal environmental agencies at the local level.²⁶ As Human Rights Watch has noted: 'The Federal Police are in charge of

²⁰ Rights and Resources Initiative, Brazil, May 2012.

²¹ Sue Branford and Thais Borges, 'Brazil on the precipice: from environmental leader to despoiler (2010-2020)', Mongabay, 23 December 2019.

²² Human Rights Watch, Rainforest Mafias, Glossary ('Brazil's 'Amazon' refers to the area known as the 'Legal Amazon' under Law 1806/1953, that includes the states of Acre, Amapá, Amazonas, Mato Grosso, Pará, Rondônia, Roraima, Tocantins, and the western part of Maranhão.').

²³ Rights and Resources Initiative, Brazil, May 2012.

²⁴ Federal Law 9985 of 2000, Article 18; Constitution, Article 231; Federal Decree 6040 of 2007; see also HRW, Rainforest Mafias, pp 26–27.

²⁵ HRW, Rainforest Mafias, Glossary.

²⁶ HRW, Rainforest Mafias, p 29.

criminal enforcement of environmental laws in federal areas, including Indigenous territories and federal conservation reserves.²⁷ The Amazon Task Force—a working group of federal prosecutors specialized in combatting environmental crimes in the Amazon—was established by the attorney-general in 2018 and then discontinued by the same authority.²⁸ Official law enforcement efforts are augmented by other informal actors such as the so-called Guardians of the Forest,²⁹ which (should) fall under Brazil's National Program for the Protection of Human Rights Defenders.³⁰ A number of enforcement bodies also exist at the state level.³¹ The root of the deforestation problem, therefore, is not that Brazil lacks legal protections for the Amazon rainforest. The problem is that the laws have proven to be deeply ineffective. Why?

Compromising threats

The first issue that has hampered efforts to prevent environmental destruction is common to many jurisdictions, namely, overwhelming and seemingly irresistible (perceived or real) economic incentives. Commercial agriculture, logging, and mining (spanning a wide range of commodities) are chief sectors of the national economy.³² The value and volume of Brazil's agriculture and mining exports account for some 40% of the country's commodity exports.³³

The Brazilian Amazon has long been a target of economic development.³⁴ Overzealous economic

²⁷ HRW, *Rainforest Mafias*, p 28.

²⁸ HRW, *Rainforest Mafias*, Glossary; *ibid*, p 28; Fabiano Maisonnave, 'Waiting for renewal, Amazon Task Force carried out 19 operations against environmental crimes in 2 years', *Folha de São Paulo*, May 3, 2021.

²⁹ Human Rights Watch, 'Brazil's Amazon—and Its Defenders—Are Under Attack From Illegal Loggers', 15 November 2019 (published in *Foreign Policy*).

³⁰ Amnesty International, *Brazil: Police Killings, Impunity, and Attacks on Defenders*, Submission for the UN Universal Periodic Review, 27th Session of the UPR Working Group, May 2017.

³¹ HRW, *Rainforest Mafias*, p 29.

³² Global Witness, *On Dangerous Ground: 2015's Deadly Environment: The Killing and Criminalization of Land and Environmental Defenders Worldwide*, June 2016.

³³ Deloitte Insights, *Brazil: Recovery in Sight*, 27 September 2021.

³⁴ Laura Bridgeman, 'Amazon Deforestation: Causes, Effects, Facts, and How to Stop It', *Sentient Media*, 4 November 2020.

activity has resulted in a significant amount of deforestation over the years. Accounting for most of the commercial activity in the Amazon are a number of players: multinational agribusiness and smaller-scale farmers;³⁵ large-scale cattle ranches (*latifundios*), some with their own private security firms;³⁶ and large-scale mining companies and small-scale surface miners (*garimpeiros*).³⁷ A variety of factors—including new commercial technologies, increased infrastructure, readily available financing, rising global commodity prices, etc—coalesced in the early part of the 21st Century to drive commercial expansion in the Amazon.³⁸ Many of these trends can be linked to both global economic factors as well as domestic political policies—enacted by successive administrations and enabled by associated lobbying groups.³⁹ Such conditions created incentives for commercial development and encouraged participation by a full spectrum of actors: large and small, legal and illegal.

Many of these individuals commit environmental offences: illegal ranching, farming, logging, mining—nearly all of it facilitated by illegal land-grabbing (*grilagem*). Worse still, a significant number engage in violent crime and human rights abuses—including murder, persecution, and various inhuman acts—against rural land users and defenders.⁴⁰ In other words, significant segments of these otherwise legitimate industries are riven by external forces of greed, brutality,

³⁵ 'Participação do agronegócio no PIB é a maior em 13 anos, estima CNA', G1 Globo, 5 December 2017; 'Pecuária e Abastecimento, Agropecuária puxa o PIB de 2017', Ministério da Agricultura, 4 December 2017; Luis Nassif, 'O poder político do agronegócio', GGN - O Jornal de Todos os Brasis, 4 October 2011.

³⁶ Meredith Hutchison, Sue Nichols, Marcelo Santos, Hazel Onsrud, Silvane Paixao, 'Demarcation and Registration of Indigenous Lands in Brazil', Department of Geodesy and Geomatics Engineering University of New Brunswick, Canada, May 2006.

³⁷ Meredith Hutchison, Sue Nichols, Marcelo Santos, Hazel Onsrud, Silvane Paixao, 'Demarcation and Registration of Indigenous Lands in Brazil', Department of Geodesy and Geomatics Engineering University of New Brunswick, Canada, May 2006.

³⁸ Center for International Forestry Research (CIFOR), 'Land-use trends and environmental governance policies in Brazil: Paths forward for sustainability', Working Paper 171, 2014.

³⁹ Amazon Watch, Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples, Part I, 11 September 2018.

⁴⁰ Global Witness, Deadly Environment: The Rise in Killings of Environmental and Land Defenders: 1 January 2002 to 31 December 2013, 2014.

and illegality.

In contrast to the major commercial power behind expansion into the Amazon, federal agencies suffer from sustained underfunding. In practice, federal agencies have been contending with personnel shortages and lean budgets, which required them to abandon more remote outposts and cut the frequency of visits to the interior.⁴¹ In 2009, IBAMA employed some 1600 inspectors throughout Brazil, by 2019, it employed 780. Since 2013, FUNAI's budget has been gradually decreased by the federal government.⁴² In 2017 FUNAI's budget had reached its lowest level in the previous 10 years.⁴³ In 2017, INCRA saw its budget slashed by 30%⁴⁴ and FUNAI's cut by almost half.⁴⁵ In the same year, 'the National Program for the Protection of Human Rights Defenders remain[ed] underfunded, often limiting the protection it provides to telephone calls from officers based far away in Brazil's capital, Brasilia'.⁴⁶

To make matters worse, FUNAI and INCRA have been hampered by congressional investigations initiated by members of a powerful parliamentary caucus—the *Ruralistas*.⁴⁷ The parliamentary group *Frente Parlamentar da Agropecuária* (Parliamentary Front for Agriculture and Livestock) (FPA) or simply the *Ruralistas*, is an alliance of lawmakers (deputies and senators) from different political parties representing agri-businesses which prioritize commercial land development and

⁴¹ HRW, *Rainforest Mafias*, pp 29–30.

⁴² Alessandra Cardoso, 'Orçamento 2018: Funai respira, mas não se recupera', Institute of Socioeconomic Studies (INESC), 1 October 2018.

⁴³ Bárbara Libório, 'Com orçamento em queda, Funai gasta R\$ 12 por índio em 2017', *Amigos da Terra - Amazonia Brasileira*, 31 October 2017.

⁴⁴ Plataforma DHESCA Brasil, *Relatório sobre o impacto da política econômica de austeridade nos direitos humanos*, November 2017, p 23; 'Brazil 2017: environmental and indigenous rollbacks, rising violence', *Mongabay*, 27 December 2017.

⁴⁵ 'Brazil's indigenous people outraged as agency targeted in conservative-led cuts', *The Guardian*, 10 July 2017; 'Amazon protectors: Brazil's indigenous people struggle to stave off loggers', *Reuters*, 6 June 2017.

⁴⁶ Global Witness, *At What Cost?: Irresponsible business and the murder of land and environmental defenders in 2017, 2018*, p 23.

⁴⁷ Global Witness, *At What Cost?: Irresponsible business and the murder of land and environmental defenders in 2017, 2018*, p 23.

ownership over conservation and environmental regulation/protection.⁴⁸ Many members are large landowners and receive significant campaign finance from private sector interests linked to their activities.⁴⁹

To the *Ruralistas*, 'social and environmental land protections represent a barrier to unfettered access'.⁵⁰ The *Ruralistas* aim to remove barriers to development and consistently flex their 'political muscle toward achieving these ends' at both federal and state level.⁵¹ In October 2018, thanks largely to the *Ruralistas*, the bloc consolidated its already significant hold on Brazil's political system by firmly backing Jair Bolsonaro for President. In unprecedented fashion, since early 2019, the *Ruralista* bloc was able to operate two major levers of power: a near-majority of congress and a president whose extreme policies even make some in agribusiness uncomfortable. The populist Mr Bolsonaro was openly hostile toward rural land users and defenders and encourages landowners to use lethal force against those who reject their rapacious claims. Tellingly, he gazed back wistfully at Brazil's brutal military dictatorship.⁵²

Following Mr Bolsonaro's election, seven *Ruralistas* were given top positions, including: then-president of the FPA, Tereza Cristina, as Minister of Agriculture;⁵³ former FPA legal director

⁴⁸ See, e.g., Alceu Luis Castilho, 'A Serpente Fora do Ovo: A Frente do Agronegocio e o Supremacismo Ruralista', 12 *Okara: Geografia em Debate* (2018), pp 699–707.

⁴⁹ 'Global markets help sustain political power of agribusiness lobby in Brazil's congress', Earthsight, 25 September 2018.

⁵⁰ Amazon Watch, *Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples*, Part I, 11 September 2018.

⁵¹ Amazon Watch, *Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples*, Part I, 11 September 2018.

⁵² Sue Branford and Thais Borges, 'Brazil on the precipice: from environmental leader to despoiler (2010–2020)', Mongabay, 23 December 2019.

⁵³ Amazon Watch, *Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples*, Part II, 25 April 2019.

Ricardo Salles, as Minister of the Environment;⁵⁴ and rural caucus member Valdir Colatto, as Chief of Brazil's Forest Service.⁵⁵ By 2019, the FPA had 225 of the 513 deputies in the house, and 32 of the 81 seats in the senate.⁵⁶ Moreover, '[d]irect articulation with the Executive, especially with Minister Cristina, also helped in winning key positions in the permanent committees, where the bills that go to the Chamber's plenary are discussed'.⁵⁷ According to one study, from his inauguration through to September 2020, Mr Bolsonaro oversaw at least 57 acts that have weakened environmental protections in Brazil in some way.⁵⁸

Within days and weeks of taking office, the administration moved to freeze certain budgets, including that of FUNAI.⁵⁹ It also froze the Amazon Fund and the Climate Fund, two major instruments designed for funding programs for reducing deforestation, GEE emissions and climate change. In 2019, Mr Bolsonaro attempted (but failed) to move FUNAI from the Ministry of Justice to the Ministry of Agriculture, where critics said the agribusiness lobby would exert more influence.⁶⁰ Mr Bolsonaro obstructed Brazil's system of environmental fines, one of the main

⁵⁴ Amazon Watch, *Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples*, Part II, 25 April 2019; Anna Jean Kaiser, 'Brazil environment chief accused of "war on NGOs" as partnership paused', *The Guardian*, 17 January 2019.

⁵⁵ Jenny Gonzales, 'New appointments, new policies don't bode well for Brazilian Amazon', *Mongabay*, 4 February 2019.

⁵⁶ Bruno Bassi, 'The new face of the Ruralist Caucus', *Heinrich Böll Stiftung*, Rio de Janeiro, 13 November 2019; Amazon Watch, *Complicity in Destruction: How Northern Consumers and Financiers Sustain the Assault on the Brazilian Amazon and its Peoples*, Part II, 25 April 2019.

⁵⁷ Bruno Bassi, 'The new face of the Ruralist Caucus', *Heinrich Böll Stiftung*, Rio de Janeiro, 13 November 2019.

⁵⁸ Katie Surma, 'Bolsonaro should be tried for crimes against humanity, Indigenous leaders say', *NBC News* (in partnership with *Inside Climate News*), 24 June 2021; Mariana Valea, Erika Berenguerd, Marcio Argollo de Menezesf, Ernesto Viveiros de Castro, Ludmila Pugliese de Siqueira, Rita de Cassia Portela, 'The COVID-19 pandemic as an opportunity to weaken environmental protection in Brazil', *Biological Conservation*, 2021.

⁵⁹ ARNS Commission, *Informative Note to the Prosecutor: International Criminal Court pursuant to Article 15 of the Rome Statute requesting a Preliminary Examination into Incitement to Genocide and Widespread Systematic Attacks Against Indigenous Peoples by President Jair Messias Bolsonaro in Brazil*, November 2019, para 33; All Rise, *Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and principal actors of his former or current administration*, October 2021, paras 387, 388 and n 445.

⁶⁰ US Department of State, *Human Rights Report, Brazil 2019*, Section 5 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Abuses of Human Rights.

instruments for punishing those who illegally deforest the Amazon. After attacking IBAMA for having created an 'industry of fines', the administration cut its budget and created procedures that would delay payment of fines by those found responsible for illegal deforestation—undermining the intended preventative effect of the fines and thereby offering the *Ruralistas* a freehand.⁶¹ 'I will not allow for IBAMA to go out fining people left and right, nor ICMBio. The party is over', he said shortly after his election.⁶² In February 2019, 21 of the 27 IBAMA superintendents were dismissed.⁶³ In May 2019, Mr Bolsonaro's first Environment Minister, Ricardo Salles, sacked Olivaldi Azevedo as director of IBAMA, the federal environmental inspection agency.⁶⁴ On 1 November 2019, Mr Bolsonaro suggested that IBAMA agents 'who block progress' should be sent to a military base - notorious during Brazil's military dictatorship as a place where security forces summarily executed political prisoners.⁶⁵ Environmental agents still issued thousands of fines, but very few hearings were held after August 2020.⁶⁶

A presidential decree issued on 29 May 2019 restructured the National Environment Council (CONAMA). The move significantly diminished CONAMA membership from 96 to 23, adversely affected the participation of most states, and substantially curtailed the presence of municipalities and civil-society groups. Notably, council members representing civil society were reduced to only four from a previous level of 22 seats.⁶⁷ And from 2020 onwards, the administration engaged in

⁶¹ Human Rights Watch, 'Rainforest Destruction in Brazil's Amazon Is a Public Security Emergency', 4 February 2020 (published in Fonte Segura); Human Rights Watch, 'Brazil's Own Data Shows Amazon Fines Unenforced', 22 May 2020; Human Rights Watch, 'Amazon Penalties Suspended Since October', 20 May 2020.

⁶² Jake Spring, 'Brazil's Bolsonaro obstructs environmental fines key to protecting Amazon', Reuters, 2 July 2021.

⁶³ ARNS Commission, Informative Note to the Prosecutor, para 34.

⁶⁴ Brian Garvey & Mauricio Torres, 'Brazil's Jair Bolsonaro is devastating indigenous lands, with the world distracted', *The Conversation*, 30 May 2020.

⁶⁵ Human Rights Watch, 'Brazil's Amazon—and Its Defenders—Are Under Attack From Illegal Loggers', 15 November 2019 (published in Foreign Policy).

⁶⁶ Human Rights Watch, 'Brazil Events of 2020', World Report 2021, 2021.

⁶⁷ ARNS Commission, Informative Note to the Prosecutor, para 37 (referring to Presidential Decree No 9806/2019).

multiple actions and omissions (including the restructuring of certain federal agencies) aimed at rendering implementation of Lula-era strategies unfeasible.⁶⁸

In May 2019, discretionary funding allocated to the Ministry of the Environment was significantly curtailed. Programs adversely affected included those related to climate-change policies, forest fire prevention and control, federal environmental licensing activities, and conservation support.⁶⁹

Environment Minister Salles said in late-April 2020 that he saw the Coronavirus pandemic as an opportunity to reduce environmental restrictions while attention was focused elsewhere.⁷⁰ In October 2020, Mr Salles filed a petition asking a judge to require the executive secretary of the Climate Observatory, Marcio Astrini, to explain statements critical of government policy that he made in a media interview,⁷¹ a measure seemingly intended to intimidate Mr Astrini.⁷²

In June 2021, Mr Salles resigned, weeks after he was targeted by federal police as part of an investigation into alleged illegal logging in the Amazon.⁷³ Deforestation had risen sharply under his watch.⁷⁴ Mr Salles was replaced by Joaquim Alvaro Pereira Leite. An Environment Ministry official previously in charge of monitoring the Amazon, Mr Leite is linked to Brazil's agribusiness lobby.⁷⁵ In May 2020, the government transferred oversight of national forest concessions from the Ministry of the Environment to the Ministry of Agriculture, paving the way for commercial

⁶⁸ See Distribuição urgente e por dependência à Excelentíssima Senhora Ministra Rosa Weber – ADO no 59, ADPF no 747 e ADPF no 755, paras 99–102.

⁶⁹ ARNS Commission, Informative Note to the Prosecutor, para 38.

⁷⁰ Ernesto Londoño, Manuela Andreoni and Letícia Casado, 'Amazon Deforestation Soars as Pandemic Hobbles Enforcement', New York Times, 6 June 2020; Katie Surma, 'Bolsonaro should be tried for crimes against humanity, Indigenous leaders say', NBC News (in partnership with Inside Climate News), 24 June 2021.

⁷¹ Human Rights Watch, 'Stop Harassing Environmental Defenders', 16 October 2020.

⁷² Human Rights Watch, 'Brazil Events of 2020', World Report 2021, 2021.

⁷³ Samantha Pearson, 'Brazilian Environment Minister Ricardo Salles Steps Down Amid Illegal Logging Probe', Wall Street Journal, 23 June 2021.

⁷⁴ Bryan Harris & Michael Pooler, 'Resignation of Brazil environment minister cheered by activists', Financial Times, 23 June 2021.

⁷⁵ Oliver Stuenkel, 'Bolsonaro's Turmoil Could Be the Amazon's Gain', Americas Quarterly, 1 July 2021.

development in protected areas.⁷⁶ In the same month, the government transferred responsibility for leading anti-deforestation efforts in the Amazon from environmental agencies to the armed forces, a move criticized due to the military's lack of expertise and training.⁷⁷

Taken together, these acts of intentional sabotage have had disastrous effects for Brazil's fragile ecosystems. Rates of deforestation topped 10,000 km² annually during the first two years of the Bolsonaro administration (an increase of more than 30%).⁷⁸ After January 2019, when President Bolsonaro took office, the situation worsened in terms of 'land invasion' and deforestation.⁷⁹ Recent data indicates that '[d]eforestation in the Brazilian Amazon is hovering near a 12-year high...'.⁸⁰ In 2022, deforestation numbers continued to grow.

Ecocide – a possible solution

With domestic challenges hampering Brazil's ability to safeguard its natural environment, additional tools need to be considered. The entrenched system of exploitation will not be resolved easily; meaningful and sustainable change will require political determination, economic transition, and societal change. Carrots and sticks may be required in equal measure. But a good place to start would be a new criminal law that sends a strong message in favour of protecting our natural environment from the most serious forms of destruction; a law that encourages defenders

⁷⁶ Ernesto Londoño, Manuela Andreoni, and Leticia Casado, 'Amazon Deforestation Soars as Pandemic Hobbles Enforcement', *New York Times*, 6 June 2020.

⁷⁷ Human Rights Watch, 'Brazil Events of 2020', *World Report 2021, 2021*; US Department of State, *Human Rights Report, Brazil 2020*, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons: Indigenous People; Ernesto Londoño, Manuela Andreoni, and Leticia Casado, 'Amazon Deforestation Soars as Pandemic Hobbles Enforcement', *New York Times*, 6 June 2020.

⁷⁸ Laura Bridgeman, 'Amazon Deforestation: Causes, Effects, Facts, and How to Stop It', *Sentient Media*, 4 November 2020.

⁷⁹ Juanita Rico, 'Bolsonaro's empty climate promises for Brazil', *Open Democracy*, 23 October 2021.

⁸⁰ Anthony Boadle, 'Brazil to step up its climate goals at COP26, says negotiator', *Reuters*, 26 October 2021.

and destabilises would-be violators, not only through stiffer penalties, but also through the enhanced weight of moral condemnation. In other words, a law that targets acts of 'ecocide.'

There is a growing movement in favour of an international crime of ecocide (the so-called) 'fifth crime' to be slotted into the Rome Statute of the International Criminal Court. In parallel, there is also an increasing number of initiatives pushing to introduce ecocide laws as national criminal laws, including in Brazil.⁸¹ Ecocide laws have the potential to substantially change the dynamic in the Amazon and dampen environmental harm in Brazil.

As a potential international law, the Independent Expert Panel for the Legal Definition of Ecocide⁸² ('Expert Panel') suggested the following definition:

*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.*⁸³

If adopted by the States Parties as an amendment to the Rome Statute, ecocide would be the first international criminal law to protect the natural environment in and of itself, irrespective of human harm (the four current international crimes - war crimes, crimes against humanity, genocide, and aggression - require proof of very serious harm to humans or their property). It would allow prosecutors to target those who knowingly cause very serious damage to forests, soils, or rivers, so long as they do so unlawfully or wantonly (namely, with 'reckless disregard for damage which

⁸¹ Stop Ecocide Foundation, 'Breaking news and press releases & Press releases', available at <https://www.stopecocide.earth/press-releases>.

⁸² 'Independent Expert Panel for the Legal Definition of Ecocide', Ecocide Law, available at <https://ecocidelaw.com/independent-expert-drafting-panel/>. The Independent Expert Panel was convened by Stop Ecocide Foundation in 2021 and published a proposed international definition of ecocide following a public consultation in June 2021.

⁸³ Stop Ecocide International, 'Legal Definition of Ecocide', June 2021.

would be clearly excessive in relation to the social and economic benefits anticipated').⁸⁴

The gravity threshold to prove any international crime is (and should be) very high... the ICC tends to be concerned with violations that 'threaten the peace, security and well-being of the world.'⁸⁵ So even assuming a new crime of ecocide is added to the Rome Statute, there are likely to be only a handful of scenarios each year that 'qualify' for prosecution. But the rampant destruction of the Amazon rainforest might well be one of them. As deforestation progresses (through fire or chainsaw) it is getting dangerously close to what scientists call the "tipping point." This is when the Amazon rainforest loses its ability to recover from periods of drought caused by forest suppression, causing severe damage to the biome, and eventually the forest begins to die - it becomes a vast savanna.⁸⁶

While the Expert Panel definition leaves room for economic development that is lawful and carries social and economic benefits (if they outweigh the harm), much of the land-grabbing, deforestation, and pollution in Brazil is either outright unlawful, or clearly excessive when compared to the benefits. Some of the damage to the natural environment has been 'severe', meaning 'damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources'⁸⁷ And a significant amount of the harm has also been either 'widespread' or 'long-term', some of it threatening entire species with permanent destruction. Each case will, of course, turn on the evidence available. But it seems likely that an ICC prosecutor would be able to gather sufficient

⁸⁴ Stop Ecocide International, 'Legal Definition of Ecocide', June 2021.

⁸⁵ Rome Statute of the International Criminal Court, Preamble.

⁸⁶ Chris A. Boulton, Timothy M. Lenton & Niklas Boers, 'Pronounced loss of Amazon rainforest resilience since the early 2000s', *Nature Climate Change*, vol. 12, March 2022, 271–278.

⁸⁷ Stop Ecocide International, 'Legal Definition of Ecocide', June 2021. This definition factors-in attacks on indigenous or traditional communities.

evidence to satisfy the legal elements of a new law of ecocide (applying the Expert Panel's definition). If so, those persons most responsible for the unlawful or wanton environmental damage in the Amazon would be vulnerable to criminal prosecution at the international level (it is worth noting that any new law would not apply retroactively). Even without an active prosecution, the mere threat of an indictment for an international crime would likely focus minds and change behaviour of those in positions of power, whether rainforest mafia, businesspeople, or politicians.

A new ecocide law in Brazil (as a national crime) could also be effective, depending on how it is defined. As it stands, the current Environmental Crimes Law is not applicable to the more serious and far-reaching forms of environmental degradation and is overly dependent on administrative rules and regulations (most criminal laws refer to regulatory terms, principles, acts, and decisions).⁸⁸ If a new Brazilian ecocide law was adopted with higher penalties for perpetrators, and prosecutors were given sufficient powers to use it properly, it would likely add a powerful tool to the Brazilian prosecutors' arsenal.

In addition, the current Brazilian Environmental Crimes Law depends on evidence of the presence of a material result, and that is an essential problem: crimes can only be prosecuted after the occurrence of the harmful event. As proposed by the Expert Panel, the crime of ecocide is a crime of endangerment and resembles other Brazilian laws, such as the crime of reckless or wanton management of a financial institution (article 4 of Law 7.492/86), which defines crimes against

⁸⁸ See for example: Art. 29, "kill, chase, hunt, catch, use wild fauna specimens, native or in migratory routes, without the proper permission, license or authorization from the competent authority, or in disagreement with that obtained"; art. 38, "destroy or damage a forest considered of permanent preservation, even if in formation, or use it in violation of the protection rules"; art. Art. 40, "cause direct or indirect damage to Conservation Units and to the areas dealt with in Art. 27 of Decree No. 99.274, dated June 6, 1990, regardless of their location"; Art. 44, "extract from public domain forests or forests considered of permanent preservation, without prior authorization, stone, sand, lime or any type of minerals"; Art. 51, "sell chainsaws or use them in forests and other forms of vegetation, without a license or registration from the competent authority".

the national financial system. With endangerment crimes, guilt may be established when the actor knowingly takes the risk to cause the damage (whether or not it actually occurs). This is important for environmental crimes as the ultimate harmful result may occur many years later, by which time it is 'too late'. What is at stake is the stability of human civilization, not to mention thousands of species of animals and plants. In this apocalyptic context, in which the limitations of the administrative control and prevention are very evident, the most intrusive arm of the legal system, criminal law, is the one endowed with the dissuasive role that can address the dangers that lie ahead.

Another characteristic of a comprehensive definition of ecocide is its intrinsic, direct and necessary relationship with other fundamental rights threatened by environmental degradation: right to life with dignity, health, food, indigenous rights, etc. As proposed by the Expert Panel, a single norm would have the additional advantage to address, combine and reinforce many fundamental rights at once.

Criminal law has the power to help change attitudes and mindsets within society. 'Ecocide' is a clear and irresistible concept, immediately comprehensible by victims and general population - especially the Indigenous and other traditional populations in the Amazon. If adopted, the ecocide law could send a captivating message throughout the country: civil society members, academics, policy makers, corporate executives, public servants, jurists, judges, prosecutors, etc. It may certainly contribute to change the way people see their relationship with the environmental and the need to preserve the natural world.

Finally, if a country like Brazil introduces a law of ecocide in line with the definition proposed by the Expert Panel, it would certainly contribute to raise awareness of the many dangers posed by

the kind of policies the Bolsonaro administration promoted and implemented in Brazil, and on the crucial importance of protecting national biomes like the Amazon and the Cerrado, reducing greenhouse gases emissions and curbing climate change. It would also serve as an example and send a powerful message to other countries.

Whether falling under an international or national ecocide law, business partners, suppliers and financiers could be investigated and prosecuted for complicity in ecocide. Again, even without a full prosecution and conviction, the mere allegation of complicity in a crime in the same category as war crimes would likely cause significant reputational damage and possible financial harm. Corporations are already coming under pressure to remove harms from their supply chains.⁸⁹ Individual responsibility for international crimes falling on company executives could be a game changer.

Conclusion

Despite the myriad of challenges facing environmental protection in Brazil, there are new and emerging legal tools that can be used to bolster the defence of the Amazon rainforest and other important ecosystems. A new national or international crime of ecocide would add a much-needed gravity to the equation, countering the influence of corrupt political groupings and commercial interests. The individuals responsible for environmental destruction on a grand scale do not employ half-measures in pursuing their objectives. It is crucial that the Brazilian or international legal community match their determination and protect both people and planet. A new law of ecocide represents a very real possibility to counter the malign influence of powerful actors, bringing

⁸⁹ 'Companies are underestimating the risks of deforestation in their commodities supply chains', Mongabay, December 2016.

justice to the worst offenders and deterring others.

For the time being, a cycle of violence against indigenous and traditional communities and environmental destruction appears ascendent within Brazil. This may be temporarily alleviated now that Bolsonaro has been ousted following Lula's victory in the 2022 election. It is indeed promising that Mr Lula has placed the environment and climate change amongst the highest priorities of his administration. But the new president takes over an extremely polarised country with a partially hostile congress, a stagnant economy that urgently needs to be revived, and indigenous and traditional peoples who remain under constant pressure and attack from criminal elements intent on the destruction of the Amazon. Furthermore, President Lula will have to begin by restoring all that was dismantled during the Bolsonaro years (2019-2022), in particular the agencies responsible for implementing the environmental and indigenous peoples' protection policies in the Amazon. Whoever holds power in Brazil, it is vital that environmental defenders receive the institutional support they require to protect some of the most important biodiversity hotspots on the planet.