

NOTES

Dishonoring the Earth: Ecocide as Prosecutable Genocide Against Indigenous People

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INTRODUCTION

Global Indigenous¹ people exist as one with the environment, with no western binary between people and nature.² Destruction of Indigenous people is reciprocal with environmental destruction. Indigenous people, though only six percent of the global population, protect eighty percent of the world’s biodiversity and occupy exceedingly environmentally vulnerable regions.³ Because of these reasons, the International Criminal Court (the “ICC”) could be utilized to achieve justice by prosecuting ecocide as genocide, should impacted Indigenous peoples choose to utilize it.

The destruction of Indigenous communities via environmental and environmentally related harm is nowhere more apparent than in the Amazonian rainforests of Brazil. Under President Jair Bolsonaro, the Indigenous people of Brazil faced an unprecedented era of deliberate destruction, both directly and indirectly.⁴ The Bolsonaro Administration systematically dismantled environmental

1. Indigenous is hereinafter capitalized to affirm Indigenous people as autonomous subjects with agency, rather than indigenous, which refers to a characteristic of a person. See DANIEL HEATH JUSTICE, WHY INDIGENOUS LITERATURES MATTER 6, 8 (2018) (“The capital ‘I’ is important here, as it affirms a distinctive political status of peoplehood, rather than describing an exploitable commodity, like an ‘indigenous plant’ or a ‘native mammal.’”).

2. See Sarah Wright, Kate Lloyd, Sandie Suchet-Pearson, Laklak Burarrwanga, Matalena Tofa & Bawaka Country, *Telling Stories in, Through and with Country: Engaging with Indigenous and More-than-Human Methodologies at Bawaka, NE Australia*, 29 J. CULTURAL GEOGRAPHY 39, 39–60 (2012); Miguel Astor-Aguilera, *Latin America: Indigenous Cosmvision*, in ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY 158, 161–62 (Willis Jenkins et al. eds., 2017). See generally ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND TEACHINGS OF PLANTS (2013) (detailing the symbiotic and nonbinary intricacies between Indigenous people and nature).

3. Indigenous people are specifically at risk for their role in protecting the world’s richest resource regions and biodiversity. See Climate Academy by Grounded, *Why Protecting Indigenous Communities Can Also Help Save the Earth*, GUARDIAN (Oct. 12, 2020, 9:30 AM), <https://www.theguardian.com/climate-academy/2020/oct/12/indigenous-communities-protect-biodiversity-curb-climate-crisis> [<https://perma.cc/6GG5-E8V8>]; Marcia Langton & Zane Ma Rhea, *Traditional Indigenous Biodiversity-Related Knowledge*, 36 AUSTL. ACAD. & RSCH. LIBRS. 45, 46–47 (2013).

4. Flavio Siqueira, *Does Jair Bolsonaro Commit Crimes Against Humanity by Devastating the Amazon Rainforest?*, OPEN GLOB. RTS. (Feb. 17, 2021), <https://www.openglobalrights.org/does-bolsonaro-commit-crimes-against-humanity-by-devastating-the-amazon/> [<https://perma.cc/WTN3-B8Q6>].

and Indigenous peoples' protections, leading to alleged violations of Articles 6 (a), (b), and (c) of the Rome Statute.⁵ Bolsonaro called for attacks against Indigenous land protectors, decriminalized invasion of Indigenous land, and explicitly incited full-scale extermination of Indigenous peoples to access their land.⁶ In a complaint to the ICC, a coalition of Indigenous peoples alleged that, through these actions, Bolsonaro committed and incited genocide against them.⁷

The scenario in Brazil is but one of many. Indigenous people are under assault by colonial governments and corporations, which continue to environmentally displace, harm, and attack Indigenous people to maintain status within the nation-state world order that, arguably, created the need for global human rights efforts.⁸ Colonial governments leverage resources and land stolen from Indigenous people to maintain power and privilege in a world order dependent upon cohesive national identities, leading to the harm and exclusion of Indigenous people.

This Note explores a potential route for justice, should Indigenous communities choose to take it. There are a variety of routes to honor Indigeneity and return land sovereignty to Indigenous people, and the prosecution of ecocide as genocide in the ICC may be one such route.⁹ Despite being a potential route to justice,

5. See HUM. RTS. ADVOC. COLLECTIVE (CADHU) & ARNS COMM'N, 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 SYSTEMIC ATTACKS AGAINST INDIGENOUS PEOPLES BY PRESIDENT JAIR MESSIAS BOLSONARO IN BRAZIL 3–5, 27, 33 (2019), <https://apublica.org/wp-content/uploads/2019/11/e-muito-triste-levar-um-brasileiro-para-o-tribunal-penal-internacional-diz-co-autora-da-peticao.pdf> [<https://perma.cc/8JKM-QN6Q>]; Siqueira, *supra* note 4.

6. See HUM. RTS. ADVOC. COLLECTIVE (CADHU) & ARNS COMM'N, *supra* note 5, at 25, 33, 44.

7. *Id.*

8. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 269, 271 (Harcourt, Inc. 1951) (2004); Thalia Anthony, “*They Were Treating Me Like a Dog*”: *The Colonial Continuum of State Harms Against Indigenous Children in Detention in the Northern Territory, Australia*, 7 *STATE CRIME J.* 251, 251–77 (2018) (arguing that violence committed against Indigenous children in Australia is a symptom of settler-colonial structures that perpetuate state sovereignty at the expense of Indigenous sovereignty). See generally Elizabeth Comack, *Corporate Colonialism and the “Crimes of the Powerful” Committed Against the Indigenous Peoples of Canada*, 26 *CRITICAL CRIMINOLOGY* 455 (2018) (discussing how “corporate colonialism” has produced harms against Indigenous peoples in Canada and continues to produce harm to the present day); Kyle Whyte, *Settler Colonialism, Ecology, and Environmental Injustice*, 9 *ENV'T & SOC'Y* 125 (2018) (examining how settler colonialism causes ecological violence against Indigenous peoples by examining the effects of U.S. settlement on the Anishinaabe peoples); Korinna Horta, *Public-Private Partnership and Institutional Capture: The State, International Institutions, and Indigenous Peoples in Chad and Cameroon*, in *THE POLITICS OF RESOURCE EXTRACTION* (Suzana Sawyer & Edmund Terence Gomez eds., 2012) (discussing how development projects supported by the World Bank exacerbate power asymmetries between multinational corporations and the Indigenous Bakola and Bagyeli peoples in Chad and Cameroon). Nation-state world order refers to the current global power system, in which states are the primary actors and in which, for a state to consolidate power, it must have a hegemonic national identity.

9. See HUM. RTS. ADVOC. COLLECTIVE (CADHU) & ARNS COMM'N, *supra* note 5, at 64; Walter D. Mignolo, *Geopolitics of Sensing and Knowing: On (De)coloniality, Border Thinking, and Epistemic Disobedience*, 1 *CONFERO* 129, 131 (2013) (discussing an alternative model of decolonialism as an alternative to Western democracy and socialism to orient society's thinking and doing, which promotes communal ideas); Laura Cameron, Ian Mauro & Kevin Settee, “*A Return to and of the Land*”:

the ICC was created as a tool for justice in the nation-state world order and does not prioritize Indigenous viewpoints and perspectives.¹⁰ To reconcile the lack of Indigenous perspectives incorporated in the ICC and to honor Indigenous legal frameworks, this Note seeks to maintain roots in and respect of Indigenous cosmology and connectivity.¹¹

In Part I, this Note will examine the intricate juxtaposition between international and economic frameworks and an Indigenous ecological framework. This Note aims to identify the pervasiveness of colonial, international, and economic systems while recognizing the existence of Indigenous frameworks. It is never too late to imagine an international legal system with Indigenous cosmologies incorporated. In Part II, this Note will examine the operational definitions of ecocide and genocide before assessing potential prosecutability of ecocide in the ICC. Part III will assess examples from Brazil, Canada, and Nigeria that illustrate the prosecutability of ecocide as genocide. Part IV will examine whether this route is advisable based on estimated victim perspectives.

There is tension between recognizing Indigenous cosmologies as correct and arguing for accountability in a predominately colonial international legal system.¹² This Note recognizes and grapples with this tension. Genocide is

Indigenous Knowledge and Climate Change Initiatives Across the Canadian Prairies, 41 J. ETHNOBIOLOGY 368, 368 (2021) (discussing various responses of Indigenous communities to climate change, such as land-based education and grassroots activism, and identifying common themes of these responses, including Indigenous leadership, connecting with the land, and bridging Indigenous knowledge and Western science); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 54 (2009) (arguing that despite the Inter-American Court's general conformity with the UN Declaration on the Rights of Indigenous Peoples, its failure to conform regarding state expropriation of natural resources on Indigenous lands harms Indigenous peoples). See generally Walter D. Mignolo, *Epistemic Disobedience, Independent Thought and De-Colonial Freedom*, THEORY, CULTURE & SOC'Y, 2009, at 1, 1–23 (arguing for the decolonialization and dewesternization of geopolitics and knowledge to create a more just society).

10. See generally Howard S. Levie, *The History and Status of the International Criminal Court*, in 75 INTERNATIONAL LAW STUDIES: INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY (Michael M. Schmitt ed., 2000) (explaining that the history of the ICC is rooted in a nation-state world order that includes the Treaty of Versailles, and indicating that the ICC was created by treaty, which necessitates State consent); Awol Allo, Opinion, *The ICC's Problem Is Not Overt Racism, It Is Eurocentricism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/opinions/2018/7/28/the-iccs-problem-is-not-overt-racism-it-is-eurocentricism/> [<https://perma.cc/Q2GU-CSPN>] (indicating that the ICC is a Eurocentric, Western construct, which would necessarily exclude Indigenous perspectives, as there are few Indigenous peoples in Europe).

11. Indigenous cosmology refers to integrated Indigenous worldviews and universe views pre-colonization. Edwin C. Krupp, *Native American Cosmology and Other Worlds*, in 2 ENCYCLOPEDIA OF ASTROBIOLOGY 1659, 1660 (Muriel Gargaud et al. eds., 2d ed. 2015). These worldviews are still present and resilient today in many different Indigenous cultures.

12. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1, 8 (1999) (“The universalization of international law was principally a consequence of imperial expansion The systematic neglect of the centrality of colonialism for the whole project of international law is far from coincidental. Rather, it is a consequence of a powerful set of attitudes and juristic techniques that need to be identified, understood, and contested.”).

discussed, rather than crimes against humanity, to grapple with this tension, as genocide is “singled out for special condemnation and opprobrium.”¹³ This Note focuses on genocide, rather than crimes against humanity, to offer two forms of justice: retributive, in the form of prosecutions, and restorative, in the form of recognizing that perpetrators of genocide have a special intent to destroy groups as a whole. Prosecutions for crimes against humanity do not require special intent. These communities deserve to have their longstanding, systemic extermination recognized and prosecuted if it is preferred within their specific Indigenous communities.

I. FRAMEWORKS: INTERNATIONAL LEGAL, ECONOMIC, INDIGENOUS

The theories promoted in this Note operate in relation to three primary global frameworks: international legal, economic, and Indigenous. These frameworks outline important facets of global and local structures that impact this Note. First, because this Note argues for prosecution in the ICC, it necessarily engages with complex systems of international law that have developed from rich and storied histories. The history that shapes international law is predominately non-Indigenous.¹⁴ Despite the deep inadequacies of the international legal system, international legal tools, including the ICC, can be used to benefit Indigenous people in the short-term. Second, the economic framework establishes why ecocide against Indigenous-protected environments may be more prevalent because of the global economic system. Presumably, actors do not want to use ecocide as a tool of genocide on a whim; actors commit these crimes for prejudice and profit. Lastly, and inherently most importantly, this Note discusses an Indigenous framework. The communities in this Note are Indigenous, and as such, this Note requests that globally Indigenous perspectives be honored, respected, and used in place of colonial mindsets and frameworks.

A. INTERNATIONAL LEGAL

This Section will first discuss the colonial roots of the current international criminal legal system, which lead to a relative inability of the system to protect Indigenous peoples. Then, it will shift to discuss the limited, but available, tools currently accessible to Indigenous people.

The international criminal legal system exists primarily in the ICC and tribunals established to address specific conflicts. The ICC, formed by the Rome Statute, has operated as a prosecutorial body for certain crimes since 2002, with jurisdiction over crimes committed by nationals of or in the territory of state

13. Prosecutor v. Krstić, Case No. IT-98-33-A, Decision in the Appeals Chamber, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

14. See, e.g., *Developments in the Law—Indian Law, The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1755 (2016) [hereinafter *The Double Life of International Law*].

parties to the Statute.¹⁵ The ICC conducts fair and independent trials and has issued thirty-eight arrest warrants.¹⁶

Like the broader international legal system, the international criminal system exists because of the nation-state.¹⁷ The nation-state, rooted in territoriality and the unencumbered ability to exclude humans at the edge of any given territory, necessitates codified international human rights to protect humans from harms that occur because of a state's violent exclusion of individuals from its territory and from violations within a state's territory.¹⁸ The heart of a border-based system allows for, and in fact mandates, the enforcement of the nation-state's border, inevitably leading to violence.¹⁹ The nation-state is a product of and vehicle for colonization that terrorizes global Indigenous people.²⁰ The boundaries created by nation-states are "yet another method to eliminate or eradicate or absorb that which is Native."²¹

The international legal system is structured upon a corrosive ethos, but the ICC offers a few prominent benefits. First, though commentators debate the success of the ICC, it is undoubtedly the most promising international criminal court in existence.²² Second, when it successfully and fairly tries an international criminal, the ICC offers a type of justice to victims and disincentivizes criminal behavior.²³ It has been argued that the ICC builds a track record of justice, catalyzes domestic

15. See Rome Statute of the International Criminal Court arts. 4–21, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

16. *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/L95N-K59L>] (last visited May 16, 2023).

17. See ARENDT, *supra* note 8, at 268–69; see also Comack, *supra* note 8, at 460–69 (examining past and ongoing state involvement in crimes against Indigenous peoples). See generally Anthony, *supra* note 8 (illustrating the state crimes inflicted on Indigenous children and arguing that these crimes are directly linked to imposed state sovereignty on Indigenous peoples). The international legal system references all instruments of international law, including treaties, binding accords, nonbinding agreements, and other soft law instruments. See *International Justice*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/international-justice/#:~:text=International%20justice%20mechanisms,-The%20International%20Criminal&text=Established%20in%202002%2C%20the%20ICC,or%20unwilling%20to%20act%20genuinely> [<https://perma.cc/Y9R5-NCR4>] (last visited May 16, 2023). The international criminal legal system references international criminal law rather than other types of international human rights law. *Id.* International criminal law refers to the few instruments and courts that are established and operate to prosecute international crimes. *Id.*

18. See ARENDT, *supra* note 8, at 272, 276, 279, 281, 291; E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1523–31, 1524 n.48 (2019).

19. See Achiume, *supra* note 18, at 1524–25, 1529; 2 ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE*, 35–53 (1987); Kjetil Tronvoll, *Borders of Violence - Boundaries of Identity: Demarcating the Eritrean Nation-State*, 22 ETHNIC & RACIAL STUD. 1037, 1041–44 (1999).

20. See Achiume, *supra* note 18, at 1533–47; GIDDENS, *supra* note 19.

21. MISHUANA GOEMAN, *MARK MY WORDS: NATIVE WOMEN MAPPING OUR NATIONS* 30 (2013) (arguing that "imposing colonial geographical be understood as yet another method to eliminate or eradicate or absorb that which is Native").

22. The ICC is the only permanent international criminal court in existence.

23. See Jane Stromseth, *Is the ICC Making a Difference?*, JUST SEC. (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> [<http://perma.cc/3ZBE-AY6B>] [hereinafter Stromseth, *Is the ICC Making a Difference?*]; Jane E. Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE L. 87, 89, 92 (2009).

accountability processes, and empowers civil society to advocate for justice.²⁴ Additionally, the international legal system recognizes Indigenous peoples as deserving special concern.²⁵

In 2016, under former prosecutor Fatou Bensouda, the ICC announced it would focus on considering environmental crimes and cooperating with national governments to aid in prosecutions of illegal exploitation of natural resources, land grabbing, or the destruction of the environment.²⁶ However, the former prosecutor did not open any examinations or investigations into environmental crimes. Offering hope for this lack of action, the former prosecutor mentioned in her farewell comments that information would soon be forthcoming on a pending environmental crimes complaint.²⁷ The current prosecutor, Karim Khan, has yet to provide guidance on his perspective of environmental crimes, indicating that the future of environmental crimes prosecution in the ICC is indeterminate.

B. ECONOMIC

The current economic system is directed by a desire for profit, leading to greater exploitation of Indigenous peoples. The world is currently in the “Second Great Age of Global Capitalism.”²⁸ Ecocide occurs primarily when extractive industries exploit the environment for profit.²⁹ As environmental protectors, Indigenous people often stand in the way of extractive businesses accessing resources that would allow for greater profits. This harm results from a global capital market liberalization economic model.³⁰ This economic model incentivizes transitional business activity, which increasingly harms Indigenous people, as much of this transitional business activity is in extractive natural resource development. Scholars argue colonial-era imperialism of the “politically and economically subordinated Third World peoples” shores up the prosperity and collective self-determination of First World nations.³¹ By engaging in egregious

24. See Stromseth, *Is the ICC Making a Difference?*, *supra* note 23.

25. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 106–55 (2d ed. 2004) (articulating a legal framework for Indigenous peoples as special subjects of concern, with individual and collective rights, including self-determination and equality, as a matter of international law); G.A. Res. 61/295 (Sep. 13, 2007).

26. *ICC: Court to Expand Focus to Environmental and Other Serious Crimes*, LIBR. CONGR. (Sept. 26, 2016), <https://www.loc.gov/item/global-legal-monitor/2016-09-26/icc-court-to-expand-focus-to-environmental-and-other-serious-crimes/> [<https://perma.cc/46C2-JYCE>].

27. Inst. of Int’l & Eur. Affs., *Fatou Bensouda – Why the ICC Matters and Why It Is Here to Stay*, YOUTUBE (Feb. 17, 2021), <https://www.youtube.com/watch?v=M5unipalcw4>.

28. Robert Gilpin, *The Second Great Age of Capitalism*, in *THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY* 15 (2018).

29. See Martin Crook & Damien Short, *Marx, Lemkin and the Genocide-Ecocide Nexus*, 18 INT’L J. HUM. RTS. 298, 298–300 (2014).

30. See *The Double Life of International Law*, *supra* note 14, at 1755–76; see also He Fan & Ye Qianlin, *World Economic Order: Present and Future*, in *PARALLEL PERSPECTIVES ON THE GLOBAL ECONOMIC ORDER: A U.S.–CHINA ESSAY COLLECTION* 9 (Daniel Remler & Ye Yu, eds. 2017), <https://www.csis.org/world-economic-order-present-and-future> [<https://perma.cc/DGH3-7KMZ>].

31. Achiume, *supra* note 18, at 1518.

harms against Indigenous peoples, colonizing powers ensure Western states' political, ecological, and economic hegemony.³²

By operating within this framework, this Note accepts reality while recognizing the current economic order is systematically harmful to Indigenous people and Indigenous-protected environments. Economic neoliberalism and capitalism, and the desire for profit over people often incorporated into these systems, is not conducive to Indigenous, or environmental, well-being. This Note seeks to explore one potential way to mitigate environmental-based harm to Indigenous people but recognizes that the liberation, health, safety, and environmental security of Indigenous people are much larger issues that would likely benefit from a restructuring of the global economic system.

C. INDIGENOUS

This Note operates within the standard international legal framework but seeks to not abandon from all imagination a system that recognizes and reveres Indigenous ecological knowledge. Indigenous cosmologies transcend the constraints of Western conceptualizations, including the international legal system and modern, capitalist economics.³³ Indigenous ecology exists outside of the authority and coercion of the international legal system, which was built on nation-states by disregarding the colonized communities that existed before, and will continue to exist, outside of the nation-state framework.³⁴ In Indigenous cosmologies, there is no binary between human and nonhuman kin.³⁵ The Creator

32. Asafa Jalata, *Indigenous Peoples in the Capitalist World System: Researching, Knowing, and Promoting Social Justice*, SOCIO. PUBL'NS & OTHER WORKS 1, 2–3 (2011); Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L L.J. 297, 298, 308–12 (2002).

33. See generally Leanne Betasamosake Simpson, *Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation*, 3 DECOLONIZATION, INDIGENEITY, EDUC., & SOC'Y 1 (2014) (discussing how a resurgence of Indigenous conceptualizations requires a break from state educational systems); A. U'ilani Tanigawa Lum, *Accessing Traditional Kāpuka: Protecting the Storehouse of Knowledge Through the Rule of Law*, 20 ASIAN-PAC. L. & POL'Y J. 69 (2019) (discussing conflicts between Indigenous and Western values and laws); Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103 (2021) (discussing the differences between Western and Indigenous religious systems and traditions); MICHAEL D. MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT (2020) (presenting stories of Indigenous activists fighting for recognition of Native American religions and traditions that do not fit into Western definitions or legal systems).

34. See generally sources cited *supra* note 33; Daniel Heath Justice, "Go Away, Water!": *Kinship Criticism and the Decolonization Imperative*, in REASONING TOGETHER: THE NATIVE CRITICS COLLECTIVE 147–68 (2008) (noting that "[t]ribal sovereignty existed before colonization and does . . . exist after colonization"); KIMMERER, *supra* note 2 (explaining the intricacies of Indigenous ecology and its existence since time immemorial); Odette Mazel, *The Evolution of Rights: Indigenous Peoples and International Law*, 13 AUSTL. INDIGENOUS L. REV. 140 (2009) (discussing how the modern international system came about by refusing rights to Indigenous populations and the tensions between European and Indigenous assumptions and principles).

35. Carpenter, *supra* note 33, at 2113 (explaining that Indigenous cosmologies maintain an "inextricable connection among place, belief, and practice that characterizes many Indigenous Peoples' religions" and cannot be practiced in a church, temple, or mosque); Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 807–08 (2019) (explaining the holistic

gifted the world to Indigenous people and intimately wove together the land and all its creations.³⁶ Therefore, in an Indigenous framework, all creatures have personhood because there is no division between human and nonhuman kin. When perpetrators kill creations, when they destroy the land, genocide is committed. In a system that honors Indigeneity, ecocide would be viewed as genocide because it *is* genocide to Indigenous people. The international legal system has offered no indication that this theory would prevail, though certain state courts have recognized the personhood of creations as related to their Indigenous kin.³⁷ Indigenous people operating within the current system have succeeded in using these colonial instruments to defend their pre-colonial rights.³⁸ The system's unwillingness to institutionalize Indigenous knowledge does not preclude it from being utilized as a tool to enshrine decolonization and revitalization on smaller scales.³⁹ This Note takes place in the space of colonial permanence in the modern international legal system, but only for brevity. It is not too late to imagine Indigeneity being exalted in an international forum.

II. THE GENOCIDAL IMPACT OF ECOCIDE: A PROSECUTABLE CRIME?

To fully address whether ecocide can be prosecutable as genocide against Indigenous people, ecocide and genocide must first be legally and culturally defined. This Part first addresses the complexity of defining ecocide, because it does not have a binding definition in international law, then discusses the jurisprudence that defines genocide in international law. Ecocide is persuasively defined by experts. Genocide has long been the subject of international law and

worldview of Indigenous peoples). *See generally* Wright et al., *supra* note 2 (explaining the Indigenous belief in the sentience of the natural world); KIMMERER, *supra* note 2 (explaining the intricacies of Indigenous ecology and its existence since time immemorial, and recognizing that there is no human/animal binary in North American Indigenous cultures); Astor-Aguilera, *supra* note 2 (same); Amya J. Sepie, *More than Stories, More than Myths: Animal/Human/Nature(s) in Traditional Ecological Worldviews*, 6 HUMANS. 78 (2017) (same).

36. *See* Carpenter & Riley, *supra* note 35, at 807–09 (describing how tribal cultures are centered upon the natural world); *see also* Angela R. Riley & Kristen A. Carpenter, *Ownin' Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 865 (2016) (explaining that “[b]ecause tribal cultures are inextricably linked to lands and other natural features, virtually all components of cultural life—material and intangible—link back to place”); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1302 (2001) (stating that “[t]here is a dynamic and on-going relationship between Native peoples and the land” and that “the land carries a critical significance to indigenous peoples”); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 202 (2014) (noting that Indian nations “long predate[] European contact” and that Indigenous “peoplehood is tied up in and defined by the lands from which they originated”).

37. *Manoomin v. Minn. Dep’t of Nat. Res.*, Case No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. 2021); *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, s 6 (N.Z.); *Corte Suprema de Justicia [C.S.J.] [Supreme Court]*, Sala. Civil, abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018, Radicación No. 11001-22-03-000-2018-00319-01 t.3, p.1 (Colom.).

38. *See* Carpenter & Riley, *supra* note 36, at 206.

39. *Id.*; Silvia Rivera Cusicanqui, *Ch’ixinakax utxiwa: A Reflection on the Practices and Discourses of Decolonization*, 111 S. ATL. Q. 95, 96, 100 (2012) (arguing that the existence of decolonization discourse necessitates a decolonizing practice and that Indigenous people bring ancient perspectives to modern systems).

each part of the legal definition analyzed in this Note has been the subject of multiple international legal cases. Ecocide as a tool to commit genocide is deeply interwoven into colonial economic and political systems that promote extraction of resources and people.⁴⁰ When ecocide is committed against Indigenous people, genocide is committed against Indigenous people, if the requisite intent is determinable. Ecocide is used to destroy and dispossess Indigenous land and water protectors. Lastly, this Part analyzes the usage of ecocide as a tool to commit Article 6 genocide against Indigenous people.

A. WHAT IS ECOCIDE?

In the international legal system, ecocide is a new discipline. Discerning what ecocide is, how it exists, and where it fits into the international legal system is all relatively new. Arthur Galston coined the term ecocide in 1970,⁴¹ leading to the creation of literature and theory on the issue. Galston's definition covered "willful destruction of the environment."⁴² Eight years after Galston coined the term, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed adding ecocide to the Genocide Convention.⁴³ Most recently, ecocide has been proposed as an amendment to the Rome Statute with an official legal definition. Ecocide, in this iteration, is as follows: "For the purpose of this Statute, 'ecocide' means 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."⁴⁴ Throughout this Note, this definition is utilized to determine which environmental crimes are sufficiently severe, widespread, and long-term to constitute ecocide and thus, arguably, be prosecutable under the Rome Statute's definition of genocide. Ecocide is used as a method to commit Article 6 genocide, discussed below, against Indigenous people, who protect a disproportionate amount of extractable resources compared to other populations.⁴⁵

40. See Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 588–95 (2002); Alexander Dunlap, *The Politics of Ecocide, Genocide and Megaprojects: Interrogating Natural Resource Extraction, Identity and the Normalization of Erasure*, 23 J. GENOCIDE RSCH. 212, 215; Jalata, *supra* note 32, at 2–13; Ngugi, *supra* note 32; Crook & Short, *supra* note 29.

41. See Hannibal Travis, *Ecocide: A Brief History of an Explosive Concept*, COLUM. J. EUR. L. BLOG (Jan. 8, 2016), <https://cjel.law.columbia.edu/preliminary-reference/2016/ecocide-a-brief-history-of-an-explosive-concept/> [https://perma.cc/E4F6-PJB9] (reviewing CLIMATE CHANGE AND GENOCIDE: ENVIRONMENTAL VIOLENCE IN THE 21ST CENTURY (Jurgen Zimmerer ed., 2015)).

42. BARRY WEISBERG, *ECOCIDE IN INDOCHINA: THE ECOLOGY OF WAR* 4 (1970).

43. Nicodème Ruhashyankiko (Special Rapporteur on Prevention and Punishment of the Crime of Genocide), U.N. Hum. Rts. Comm., Subcomm. on Prevention of Discrimination & Prot. of Minorities, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CH.4/Sub.2/416, ¶¶ 462–78 (July 4, 1978).

44. The Promise Inst. for Hum. Rts., *The Crime of Ecocide*, UCLA SCH. L., <https://law.ucla.edu/academics/centers/promise-institute-human-rights/ecocide> [https://perma.cc/4WESVQVK] (last visited May 16, 2023). This definition is not legally binding but was crafted by a team of renowned experts, incorporating diverse perspectives. *Id.* It is the definition used by advocates attempting to incorporate ecocide into the canon of international criminal law. *Id.*

45. Indigenous people are specifically at risk for their role in protecting the world's richest-resource regions and biodiversity. Indigenous people make up under six percent of the global population but

Though there is little research on the definition of ecocide in Indigenous cosmologies, there is an inherent knowledge that destroying an environment is atrocious and equates to the destruction of the people.⁴⁶ The inextricable interconnection between Indigenous people and nonhuman kin is portrayed eloquently in Indigenous art and storytelling.⁴⁷ In the words of Joy Harjo,

*Remember the earth whose skin you are:
red earth, black earth, yellow earth, white earth
brown earth, we are earth.
Remember the plants, trees, animal life who all have their
tribes, their families, their histories, too. Talk to them,
listen to them. They are alive poems.
Remember the wind. Remember her voice. She knows the
origin of this universe. . . .
Remember that you are all people and that all people
are you.
Remember that you are this universe and that this
universe is you.*⁴⁸

If you destroy an environment so holistically as to disrupt the ability of its creatures to live in it, then ecocide has been committed, and thus genocide, as there is no human/nonhuman binary.⁴⁹

B. WHAT IS GENOCIDE?

Genocide is a complicated field, often interpreted differently by victims, scholars, and international law. It is a nuanced concept interwoven with deep

protect eighty percent of biodiversity. See Climate Academy by Grounded, *supra* note 3; Langton & Rhea, *supra* note 3.

46. See, e.g., Joy Harjo, *Remember*, in SHE HAD SOME HORSES 40, 40 (1983) [hereinafter Harjo, *Remember*]; Joy Harjo, *For Calling the Spirit Back from Wandering the Earth in Its Human Feet*, in CONFLICT RESOLUTION FOR HOLY BEINGS 4, 4 (2015) (“Acknowledge this earth who has cared for you since you were a dream planting itself precisely within your parents’ desire.”).

47. See, e.g., Harjo, *Remember*, *supra* note 46.

48. *Id.*

49. See Crook & Short, *supra* note 29, at 300 (discussing Marx’s conception of humankind as part of the “web of ecosystems”); *Indigenous Peoples and the Nature They Protect*, U.N. ENV’T PROGRAMME (June 8, 2020), <https://www.unep.org/news-and-stories/story/indigenous-peoples-and-nature-they-protect> [<https://perma.cc/6PUA-EGSE>]. For an oral history depiction of the lack of human/nonhuman binary in Indigenous cosmology, see JEWELL PRAYING WOLF JAMES, LUMMI CULTURE PROT. COMM., SALMON WOMAN AND HER CHILDREN (1992), [https://www.lummi-nsn.gov/userfiles/190_Story%20of%20Conservation%20of%20the%20Salmon\(1\).pdf](https://www.lummi-nsn.gov/userfiles/190_Story%20of%20Conservation%20of%20the%20Salmon(1).pdf) [<https://perma.cc/TJK9-CBEQ>] (“Off, in the distant waters, someone swam, apparently alone, listening to the song and story of Raven. It was Salmon Woman. She was still in the waters, observing. She was moved ever so deeply by the story of Raven and his people’s needs. She felt sorry, but at the same time had great respect for him.”) and JEWELL PRAYING WOLF JAMES, LUMMI CULTURE PROT. COMM., BEAR AND THE STEELHEAD (1992), [https://www.lummi-nsn.gov/userfiles/190_Story%20of%20Conservation%20of%20the%20Salmon\(1\).pdf](https://www.lummi-nsn.gov/userfiles/190_Story%20of%20Conservation%20of%20the%20Salmon(1).pdf) [<https://perma.cc/TJK9-CBEQ>] (“Brother Bear was restricted from hunting, fishing, or gathering as long as his wife was pregnant. It was Raven’s duty to hunt, fish, and assure that plants and roots were gathered for the house of his brother—Bear.”).

interpersonal pain for many. This Note will veer away from endeavoring to create a definition of genocide worthy of its nuanced reality. Rather, for this Note, genocide will be defined as it was in the Rome Statute and transcribed below, with the caveat of two comments on Indigeneity and genocide. In writing the below definition, colonial states, like Canada, intentionally excluded Indigenous communities from the conversation.⁵⁰ The definition reflects this exclusion by not accounting for any Indigenous perspective and largely leaving out the types of crimes, like ecocide, that predominately harm Indigenous people. Colonial genocide “is slower, more insidious, structural, systemic, and often spans multiple administrations and political leadership.”⁵¹ Colonial genocide often does not meet the strict parameters of genocide that is prosecutable in the ICC, in part because states, such as Canada, campaigning to grant impunity for colonization, fear repercussions.⁵² Prosecutable genocide is unique in that it “attacks the very existence of [a] community.”⁵³

Article 6 Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with *intent to destroy, in whole or in part*, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵⁴

This Note will focus more narrowly on intent and parts (b) and (c). Ecocide as a method of genocide leads to slow, decades-long deaths, which would make an argument under part (a) more difficult, because part (a) is generally concerned with immediate death. Parts (d) and (e) are less applicable when considering ecocide as the tool for genocide, so they have been omitted from the analysis. The jurisprudence on parts (b) and (c) has created definitions that are more conducive to arguing that ecocide constitutes prosecutable genocide.

50. See NAT’L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, A LEGAL ANALYSIS OF GENOCIDE: SUPPLEMENTARY REPORT 7 (2019), https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf [<https://perma.cc/4AZK-KUZC>].

51. *Id.* at 20.

52. *Id.* at 7.

53. Ben Saul, *Was the Conflict in East Timor ‘Genocide’ and Why Does It Matter?*, 2 MELB. J. INT’L L. 477, 483 (2001); see also Larry May, *How Is Humanity Harmed by Genocide?*, 10 INT’L LEGAL THEORY 1, 24 (2004).

54. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 38544 (emphasis added).

C. ECOCIDE AS PROSECUTABLE GENOCIDE IN THE INTERNATIONAL CRIMINAL COURT

Under the existing traditional legal framework, ecocide may still be prosecutable as genocide under Article 6 of the Rome Statute.⁵⁵ Discerning intent is difficult because heads of corporations and governments hide their intent through bureaucracy and politics.⁵⁶ This difficulty may be why ecocide is not consistently prosecutable but is prosecutable only in scenarios in which the perpetrator is more unabashed in their crimes. By using analysis rooted in knowledge-based and purpose-based intent, this Section evidences how individuals and governments can be held accountable for ecocide as a tool of genocide, despite any obscurity present surrounding perpetrators' intent. After discerning intent, the analysis shifts to fact application to the (b) and (c) sections.

1. Element 1: Intention of the Harming Parties

There is no quantifiable understanding of what amount or combination of action and language lends itself to a determination of genocidal intent. The Rome Statute, Article 6, mentions intent: "For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"⁵⁷ Article 30 also details the mental element necessary for criminal prosecution:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.⁵⁸

55. See *infra* Section II.A for a discussion of the interconnectivity between ecocide and genocide against Indigenous people.

56. See Stephanie van den Berg & Anthony Deutsch, *Explainer: How to Prove Genocide, the Most Serious War Crime?*, REUTERS (Apr. 14, 2022, 4:40 AM), <https://www.reuters.com/world/how-prove-genocide-gravest-war-crimes-2022-04-13/> [<https://perma.cc/8YSC-KXLH>] (noting that the specific intent required for Article 6 genocide is difficult to prove and requires significant evidence); Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF 23, 25 (2004) ("To the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to 'efficient' business practices, or supplying the means to commit the crime. Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers.").

57. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 38544.

58. *Id.* art. 30.

Genocide requires both the intent for the action and the intent to destroy a protected class, commonly known as *dolus specialis* or specific intent.⁵⁹

Articles 6 and 30 offer base definitions of genocide and the mental element necessary for genocidal intent, and international courts have expanded on this definition by considering intent as knowledge-based or purpose-based. In Part III, this Note will apply the understanding of knowledge-based and purpose-based intent to case studies to evidence how ecocide may be prosecutable as genocide. Perpetrators of ecocide, as a tool for genocide, can meet the intent element of prosecutable genocide if the intent is analyzed through the following definitional analysis.

Knowledge-based intent and purpose-based intent may both be applicable if the ICC were to prosecute ecocide as genocide. Because the ICC has never tried genocide, interpretations of what standard is necessary to prove intent are not precedential but merely informative.⁶⁰ Purpose-based intent interpretation mandates that an individual must have acted with the purpose of destroying a group. In contrast, knowledge-based intent interpretation accounts for perpetrator culpability if the person commits the act knowing that the act will or is likely to destroy a protected group.⁶¹ Knowledge-based intent interpretation is beneficial when arguing for accountability of individuals for their role in a policy or plan.⁶² The ICC has issued an arrest warrant for former Sudanese head of state Omar Al-Bashir charging him with genocide, and in this warrant the ICC indicates that a knowledge-based approach may be appropriate when the inquiry of intent to commit genocide is incorporated into a policy or plan, rather than just an

59. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Decision in the Trial Chamber, ¶ 498 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

60. See Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT'L L.J. ONLINE 71, 73 (2017), <https://harvardilj.org/wp-content/uploads/sites/15/Greenwood-Formatted.pdf> [<https://perma.cc/SUH5-L9VV>] (arguing the ICC can learn from the decisions of various tribunals).

61. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2269, 2284, 2289 (1999) (explaining that knowledge as to consequences of actions represents one possible reading of the word "intent" in light of traditional criminal law doctrine and the drafting history of the Convention; in particular, it coincides with the default intent standard imposed by the recently adopted Rome Statute of the ICC).

62. See Claus Kreß, *The ICC's First Encounter with the Crime of Genocide: The Case Against Al Bashir*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 669, 695–701 (Carsten Stahn ed., 2015) (arguing that knowledge-based intent should not be limited to direct perpetrators as long as each perpetrator, regardless of hierarchy, acts as part of a "realistic collective campaign directed towards the destruction of a protected group"); William A. Schabas, *Part 2 Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.6 Genocide/Crime de Génocide*, in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 124, 128–34 (2d ed. 2016) ("However, the relevance of 'specific intent' declines dramatically when the starting point in the inquiry is a plan or policy. Then, the more significant question is whether the offender had knowledge of the plan or policy. Reliance upon the contextual element set out in the Elements of Crimes focuses the debate about the mental element of the perpetrator on knowledge rather than on intent. Such an approach, described in the literature as the 'knowledge-based approach', received a significant nod of approval from Pre-Trial Chamber I in the *Bashir* arrest warrant decision." (footnote omitted)).

individual's actions.⁶³ Commentary on the creation of the Rome Statute offers another indication that the ICC may favor knowledge-based intent interpretation over purpose-based intent.⁶⁴ Other ad hoc tribunals, though significantly favoring the purpose-based intent interpretation, have considered the knowledge-based intent interpretation.⁶⁵ In the Bashir warrant, the pretrial chamber assessed the genocidal intent of the government, rather than the genocidal intent of the President as an individual.⁶⁶ The knowledge-based intent analysis would be conducive to a finding of genocidal intent for perpetrators of ecocide if the perpetrator had the knowledge that their actions would amount to genocidal harm. The purpose-based intent analysis would be conducive to a finding of genocidal intent if the perpetrator used ecocide with the purpose of destroying the Indigenous people occupying the land. Both of these definitions can be conducive to finding that ecocide is a tool of genocide in different scenarios.

Additionally, ad hoc tribunals offer persuasive guidance on who may be held accountable for genocide that is committed via government structure, creating a route to prosecuting perpetrators with influential roles in executing ecocide with genocidal intent. Ad hoc tribunals offer guidance in convicting individuals who played leading roles within organizations that incited genocide.⁶⁷ If direct evidence of intent is unascertainable, circumstantial evidence may be utilized to prove intent.⁶⁸ Accomplices, aiders, and abettors may also be prosecuted if they had knowledge that their assistance would aid in genocide when they provided the assistance.⁶⁹ In seeking proof of discriminatory intent, the trial chambers can consider “the general context in which the acts of the accused fit,” statements and deeds, and whether the individual was acting “against the backdrop of . . . widespread and systematic violence being committed against only one specific group”⁷⁰ Genocidal intent can also be inferred from

63. See *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 3, 6–8 (Mar. 4, 2009) [hereinafter *Bashir ICC Warrant*]; Kreß, *supra* note 62, at 693–701.

64. See Kreß, *supra* note 62, at 693–701; International Criminal Court, Elements of Crimes, IS-ASP/1/3, at 113 (Sept. 10, 2002) [hereinafter *ICC Elements of Crimes*], https://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf [<https://perma.cc/TV2Z-FCC2>] (recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis); Schabas, *supra* note 62.

65. *Prosecutor v. Jelisić*, Case No. ICTY-IT-95-10-T, Decision in the Trial Chamber, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

66. *Bashir ICC Warrant*, *supra* note 63. Bashir was the head of the government at the time, so the intent of the government could be reasonably classified as his will. *Id.*

67. See generally *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A-T, Decision in the Trial Chamber (Int'l Crim. Trib. for Rwanda Dec. 3, 2003) (holding high-level representatives of a news organization accountable because of their role in the organization).

68. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A-T, Decision in the Trial Chamber, ¶¶ 99, 222, 253 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

69. *Id.* at ¶¶ 535–41 (explaining that, as far as genocide is concerned, the intent of the accomplice is to knowingly aid or abet one or more persons to commit the crime of genocide); see Kai Ambos, *What Does “Intent to Destroy” in Genocide Mean?*, 91 INT'L REV. RED CROSS 833, 851 (2009).

70. *Jelisić*, Case No. ICTY-IT-95-10-T, ¶ 73.

the gravity of harm caused, the targeting of all members of the group without distinction, the targeting of a group's leadership, the detrimental effect and long-term impact of the violence in terms of the future survival of the group, the methodical and systemic nature of the attacks, the implication of multiple levels of a chain of command in the attacks, potential motives of the perpetrators in terms of competition for resources or territory, the existence of a political doctrine consistent with genocidal intent, and attacks on cultural or religious property or symbols associated with the group.⁷¹

Genocidal intent can be “an intent to physically destroy the group through acts intended to harm its socio-cultural structure.”⁷² Importantly for this Note's scenarios, rooted in colonial legacies, “genocidal intent may be inferred, among other facts, from evidence of ‘other culpable acts systematically directed against the same group.’”⁷³ There is no indication that evidence from pre-2002 is inadmissible.⁷⁴ In proving genocidal intent for this Note's scenarios, the importance of colonialism's intentional destruction of Indigenous people plays a crucial role in evidencing that the perpetrator's intent currently exists. Intent is determined by the totality of the circumstances, considered together rather than separately, within the context of any “manifest pattern of similar conduct directed against that group or . . . conduct that could itself effect such destruction.”⁷⁵ Because the ICC has not definitively ruled on whether it prefers knowledge-based or purpose-based interpretation of intent, this Note will use both.

The intent analyzed in this Section applies to intent to destroy a national, ethnic, or racial group—Indigenous people—as determined by the perpetrator's view of Indigenous people. Indigenous people are viewed by perpetrators as national, ethnic, or racial groups. These categories are important for the colonially structured international legal system. Outside of the international legal system, Indigenous identities do not always fit into Western-imagined boxes to be checked. Indigenous people are sovereign national groups in some countries, including the United States and Canada, and are thus unequivocally “national groups.”⁷⁶ Indigenous people in Amazonian Brazil and Ogoniland, Nigeria, are more likely to be categorized as an ethnic group, because the colonial imagination

71. Beth Van Schaack, *Why What's Happening to the Rohingya Is Genocide*, JUST SEC. (Oct. 1, 2018), <https://www.justsecurity.org/60912/happening-rohingya-genocide/> [<https://perma.cc/L9MW-GSM7>] (alterations omitted).

72. ELISA NOVIC, *THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE* 55 (2016); see also Elisa Novic, *Physical-Biological or Socio-Cultural “Destruction” in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations*, 17 J. GENOCIDE RSCH. 63, 70 (2015).

73. Prosecutor v. Krstić, Case No. ICTY-98-33-A, Decision in the Appeals Chamber, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

74. See generally INT'L CRIM. CT., RULES OF PROCEDURE AND EVIDENCE (2019), <https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf> [<https://perma.cc/2N3T-VLNW>].

75. ICC Elements of Crimes, *supra* note 64.

76. *Tribal Governance*, NAT'L CONG. AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance> [<https://perma.cc/S2DG-3XCW>] (last visited May 17, 2023) (noting the Constitution recognizes that tribal nations are sovereign governments, just like Canada or California); see also

categorized them as such upon colonization.⁷⁷ Indigenous people have been perceived as a separate racial group.⁷⁸ The United Nations' understanding of Indigenous people would lend itself to a categorization of Indigenous people as an ethnic group.⁷⁹ Despite these colonial definitions, Indigenous identities transcend these overly narrow and arbitrary categories.⁸⁰

Indigenous perspectives were intentionally excluded by colonial states, like Canada, in determining a definition of genocide and intent.⁸¹ Perhaps not

Principles Respecting the Government of Canada's Relationship with Indigenous People, GOV'T CAN.: CAN.'S SYS. OF JUST., <https://www.justice.gc.ca/eng/cs-jc/principles-principes.html> [<https://perma.cc/BC4U-R7T7>] (last visited May 17, 2023); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 512 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (attempting to create a definition of national group as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties"). Scholars have also argued for an alternative definition of national group based on self-determination. See David Lisson, *Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459, 1461 (2008).

77. See Patricia Urteaga Crovetto, *The Social Construction of Ethnic Groups and Indigenous Peoples in the Southeastern Peruvian Amazonia*, PONTIFICAL CATH. U. PERU at 1, 3–11, 23, 29 (2007); V. Adefemi Isumonah, *The Making of the Ogoni Ethnic Group*, 74 AFR.: J. INT'L AFR. INST. 433, 433, 434–43 (2004); see also Françoise Morin & Bernard Saladin d'Anglure, *Ethnicity as a Political Tool for Indigenous Peoples*, in THE POLITICS OF ETHNIC CONSCIOUSNESS 157, 157 (Cora Govers & Hans Vermeulen eds., 1997); Agnieszka Szpak, *National, Ethnic, Racial, and Religious Groups Protected Against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals*, 23 EUR. J. INT'L L. 155, 159 (2012).

78. See Eric Jensen, *Measuring Racial and Ethnic Diversity for 2020 Census*, U.S. CENSUS BUREAU (Aug. 4, 2021), <https://www.census.gov/newsroom/blogs/random-samplings/2021/08/measuring-racial-ethnic-diversity-2020-census.html> [<https://perma.cc/9NK6-5PGW>]; *Visible Minority and Population Group Reference Guide, Census of Population, 2016*, STATS. CAN. (Oct. 25, 2017), <https://www12.statcan.gc.ca/census-recensement/2016/ref/guides/006/98-500-x2016006-eng.cfm> [<https://perma.cc/V84Q-VRKB>]. See generally Yin Paradies, *Racism and Indigenous Health*, in OXFORD RESEARCH ENCYCLOPEDIA OF GLOBAL PUBLIC HEALTH (David V. McQueen ed., 2016); Chris Cunneen, *Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues*, 17 CURRENT ISSUES CRIM. JUST. 329 (2006); Szpak, *supra* note 77.

79. See U.N. PERMANENT F. ON INDIGENOUS ISSUES, WHO ARE INDIGENOUS PEOPLES?, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf [<https://perma.cc/J95B-ZC4X>] (last visited May 17, 2023) (defining factors that create indigeneity as recognized by the U.N., including "self-identification as indigenous peoples at the individual level and acceptance by the community as their member; historical continuity with pre-colonial and/or pre-settler societies; strong link to territories and surrounding natural resources; distinct social, economic or political systems; distinct language, culture and beliefs; forming non-dominant groups of society; resolving to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities" (alterations omitted)).

80. For examples of modern identities expressed through art transcending narrow and arbitrary definitions, see generally TERESE MARIE MAILHOT, *HEART BERRIES* (2018); JAKE SKEETS, *EYES BOTTLE DARK WITH A MOUTHFUL OF FLOWERS* (2019); AYI KWEI ARMAH, *THE BEAUTIFUL ONES ARE NOT YET BORN* (1968); NATALIE DIAZ, *WHEN MY BROTHER WAS AN AZTEC* (2012); Eduardo Vivieros de Castro, *Cosmological Deixis and Amerindian Perspectivism*, 4 J. ROYAL ANTHRO. INST. 469 (1998); Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998); Bette Jacobs, *Indigenous Identity: Summary and Future Directions*, 35 STAT. J. IAOS 147 (2019); Jeff J. Cornstassel & Tomas Hopkins Primeau, *The Paradox of Indigenous Identity: A Levels-of-Analysis Approach*, 4 GLOB. GOVERNANCE 139 (1998); Crovetto, *supra* note 77; Isumonah, *supra* note 77; and Szpak, *supra* note 77.

81. See NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, *supra* note 50, at 47; Shamiran Mako, *Cultural Genocide and Key International Instruments: Framing the Indigenous Experience*, 19 INT'L J. ON MINORITY GRP. RTS. 175, 178, 182–83 (2012); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 183–84 (2d ed. 2000); EDWARD C. LUCK, *CULTURAL GENOCIDE AND THE PROTECTION OF CULTURAL HERITAGE* 24 (2d ed. 2018).

coincidentally, the Rome Statute does not effectively account for the most common perpetrators of crimes against Indigenous people, including institutional government policies and corporations. If the Indigenous perspective had been included, then perhaps the ICC would have been better equipped to address the slow, systemic, industrial genocides facing Indigenous people. The international legal system, including the ICC, remains an extension of the colonialist powers that created them.⁸²

2. Element 2: Parts (b) and (c) of Article 6

After dispatching intent, the ICC must evaluate the actual harm to ensure it fits squarely into the harms outlined in Article 6. The ICC has not convicted any individuals of genocide, has only one alleged genocide crime under investigation, and has one arrest warrant pending custody of the suspect prior to trial.⁸³ The analysis of what criminal activity constitutes genocidal harm under the Statute is thus limited. This Note will focus on parts (b) and (c) of Article 6 of the Statute as follows: “(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”⁸⁴

Both parts (b) and (c) have been subject to international legal scrutiny and, as such, have established definitions. Perpetrators can cause serious bodily or mental harm by mental or physical torture, rape and sexual violence, inhuman or degrading treatment, and “harm that damages health or causes disfigurement or serious injury to the external or internal organs of members.”⁸⁵ Infliction of living conditions calculated to bring about group destruction can include “deliberate deprivation of resources indispensable for survival, such as food or medical services, . . . systematic expulsion from homes,”⁸⁶ “the acts of contamination of the wells and water pumps [or] the forcible transfer of hundreds of thousands of civilians,”⁸⁷ “subjecting a group of people to a subsistence diet, . . . and the reduction of

82. See Anghie, *supra* note 40, at 518 (“My argument here is that the practices of cultural subordination and economic exploitation, which are essential aspects of colonialism, are not epiphenomenal aberrations in the international system that were remedied by the project of decolonization and self-determination. Rather, they continue to play a role in contemporary international relations and generate important analytic categories that have an enduring and crucial significance to our understanding of international law as a whole.”).

83. See *Darfur, Sudan*, INT’L CRIM. CT. (Mar. 2005), <https://www.icc-cpi.int/darfur> [<https://perma.cc/4F2E-N9VD>].

84. Rome Statute of the International Criminal Court art. 6(b)–(c), July 17, 1998, 2187 U.N.T.S. 38544.

85. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgment Issued, ¶ 545 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016); see, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998); Prosecutor v. Kayishema et al., Case No. ICTR-95-1-T, Judgment, ¶ 108 (Int’l Crim. Trib. for Rwanda May 21, 1999); Prosecutor v. Ndindiliyimana et al., Case No. ICTR-00-56-T, Judgment and Sentence, ¶ 2075 (Int’l Crim. Trib. for Rwanda May 17, 2011); Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Judgment and Sentence, ¶ 1703 (Int’l Crim. Trib. for Rwanda May 13, 2012).

86. ICC Elements of Crimes, *supra* note 64, at 114.

87. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ¶¶ 37–39 (July 12, 2010).

essential medical services below minimum requirement.”⁸⁸ The inquiry for both crimes is case specific. The studies below do not discuss complementarity; though it is important to determining jurisdiction, it is beyond the scope of this Note.⁸⁹ Below, case studies evidence the severity of harm necessary to create a prosecutable scenario of ecocide as genocide in the ICC.

III. CASE STUDIES: AMAZON RAINFOREST, NORTHERN ALBERTA, NIGER RIVER DELTA

Indigenous futures are, and have been, decimated at the global level.⁹⁰ Indigenous people protect eighty percent of the world’s biodiversity and some of the world’s most extractive, industry-rich regions.⁹¹ Indigenous bodies are the line between healthy ecosystems and extractive industry destruction. Indigenous people protect themselves, the land, and the world from encroaching climate crises. The international legal system rejects Indigenous cries for help, in no small part because it is the product of colonialism.⁹² The tension of this Note resides in calling for a colonial system to fix a colonial problem: the destruction of Indigenous people. Certainly, the ICC is not the only outlet for change, and likely it is not the best outlet for change. Better solutions may include direct reparations to impacted communities, the global return of land to Indigenous communities, the deconstruction of the international nation-state system, and learning from Indigenous knowledge to shift state policies to accommodate for this knowledge. Nonetheless, below are cases that communicate this tension and indicate the need for some movement toward justice. The cases below, involving ecocide as genocide in Brazil, Canada, and Nigeria, respectively, evidence how the above definitional understanding of ecocide, genocide, and ecocide as prosecutable genocide can be applied to real-world situations. Should the ICC follow its own analysis, the below case studies evidence that communities do have a route to justice at the ICC.

88. *Akayesu*, Case No. ICTR-96-4-T, ¶ 506.

89. “[Complementarity] provides that a case is inadmissible before the ICC if it is currently under investigation by a state with jurisdiction over it.” *Complementarity*, CORNELL L. SCH.: LEGAL INFO. INST. (Oct. 2022), <https://www.law.cornell.edu/wex/complementarity> [<https://perma.cc/L48N-4AZS>]. In short, complementarity is complicated, but allows the ICC to decline jurisdiction of a case where the state with jurisdiction over the crime is doing its due diligence to remedy the harm. It is beyond the scope of this Note because this Note is a theoretical conceptualization of the possibility of investigation and prosecution of a certain type of crime. If the theories espoused in this Note are adopted, then complementarity would necessarily be evaluated.

90. “Indigenous futures” is a term that envelops visions of flourishing Indigenous peoples’ individual and collective future. See UNDP REG’L BUREAU FOR ASIA & THE PAC., *INDIGENOUS FUTURES: REIMAGINING DEVELOPMENT IN ASIA AND THE PACIFIC FORESIGHT BRIEF 4* (2022), <https://www.undp.org/asia-pacific/publications/indigenous-futures-reimagining-development-asia-and-pacific-foresight-brief> [<https://perma.cc/A5FJ-39GD>].

91. See Climate Academy by Grounded, *supra* note 3; Langton & Rhea, *supra* note 3.

92. Systems for rights enforcement exist but are often inadequate and receive pushback from harming states, including Canada. See James S. Phillips, *The Rights of Indigenous Peoples Under International Law*, 26 GLOB. BIOETHICS 120, 122 (2015).

A. JAIR BOLSONARO, DEFORESTATION, FIRES, AND BRAZIL'S AMAZONIAN
INDIGENOUS PEOPLES

It's a shame that the Brazilian cavalry hasn't been as efficient as the Americans, who exterminated the Indians.

There is no Indigenous territory where there aren't minerals. Gold, tin, and magnesium are in these lands, especially in the Amazon, the richest area in the world. I'm not getting into this nonsense of defending land for Indians.

— Jair Bolsonaro⁹³

Bolsonaro, the former right-wing president of Brazil, has admitted guilt for his genocidal crimes in every way save for a formal confession to the ICC. Three significant policy objectives marked his administration: promoting extractive industries in the Amazon, rollbacks of Indigenous protections, and implementing military officials into civil society cabinets.⁹⁴ Bolsonaro has directly and intentionally incited genocide, using ecocide as a tool, against Amazonian tribes.

1. Element 1: Intention of the Harming Parties

Multiple federations and coalitions of Indigenous people in the Amazon have filed a complaint with the ICC asking it to investigate Bolsonaro for his crimes of genocide, committed using ecocide as a genocidal tool.⁹⁵ Bolsonaro intentionally passed legislation that was calculated to lead to the destruction of Indigenous peoples in the Amazon, intending to exterminate the communities to access their resource-rich lands.⁹⁶ Bolsonaro “commanded an anti-Indigenous policy that deliberately exposed the [N]ative peoples to neglect, harassment, invasion, and violence since before the pandemic.”⁹⁷ Bolsonaro’s own Senate condemned his actions, stating “[t]here is no disguise sufficient to cover up the president’s

93. *What Brazil's President, Jair Bolsonaro, Has Said About Brazil's Indigenous Peoples*, SURVIVAL INT'L, <https://www.survivalinternational.org/articles/3540-Bolsonaro> [<https://perma.cc/C9S8-8TH9>] (last visited May 17, 2023).

94. See Mariana Simões, *Brazil's Bolsonaro on the Environment, in His Own Words*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/27/world/americas/bolsonaro-brazil-environment.html>; Reuters Staff, *Brazilian President-Elect Adds Fifth Military Man to Cabinet*, REUTERS (Nov. 26, 2018), <https://www.reuters.com/article/us-brazil-politics-appointment/brazilian-president-elect-adds-fifth-military-man-to-cabinet-idUSKCN1NV22H> [<https://perma.cc/ES9S-42KG>]; HUM. RTS. ADVOC. COLLECTIVE (CADHU) & ARNS COMM'N, *supra* note 5, at 3, 5.

95. See HUM. RTS. ADVOC. COLLECTIVE (CADHU) & ARNS COMM'N, *supra* note 5, at 73; Flavio Siqueira, *Does Jair Bolsonaro Commit Crimes Against Humanity by Devastating the Amazon Rainforest?*, OPEN GLOB. RTS., <https://www.openglobalrights.org/does-bolsonaro-commit-crimes-against-humanity-by-devastating-the-amazon/> [<https://perma.cc/WTN3-B8Q6>] (last visited May 17, 2023).

96. See *Brazil: Reject Anti-Indigenous Rights Bill: Proposal a Major Setback to Land Rights Recognition*, HUM. RTS. WATCH (Aug. 24, 2021), <https://www.hrw.org/news/2021/08/24/brazil-reject-anti-indigenous-rights-bill> [<https://perma.cc/Z78D-BFG7>]; SENADO FEDERAL CPI DA PANDEMIA, RELATÓRIO FINAL: COMISSÃO PARLAMENTAR DE INQUÉRITO DA PANDEMIA (2021), <https://legis.senado.leg.br/comissoes/mnas?codcol=2441&tp=4> [<https://perma.cc/W36P-LYCG>]; Fernanda Wenzel, *Bolsonaro Evades Genocide Blame Amid Indigenous Deaths by Invaders, COVID-19*, MONGABAY NEWS (Oct. 25, 2021), <https://news.mongabay.com/2021/10/bolsonaro-evades-genocide-blame-amid-indigenous-deaths-by-invaders-covid-19/> [<https://perma.cc/56N3-69KZ>].

97. Wenzel, *supra* note 96.

avowed willingness to target the Indigenous people, . . . [t]he hate speech and constant harassment reveal the hostile zeal against the Indigenous people, driven by greed and intolerance.”⁹⁸

Bolsonaro explicitly and implicitly called for the destruction of Amazonian land, with the intent of holistically destroying all Indigenous people and land-protectors in the Amazon. Bolsonaro has pushed for legislation aiming to steal Indigenous land and “allow[ing] for forced contact with uncontacted tribes and the theft of indigenous territories for mining, agribusiness, and more.”⁹⁹ In 2020, he sent a bill to Congress to “open Indigenous territories to mining, dams, and other projects with heavy environmental impacts.”¹⁰⁰ The Administration has ensured that enforcement agencies are ineffective, understaffed, and underfunded in a coordinated effort to promote resource extraction in the Amazon at the expense of Indigenous people.¹⁰¹ Threats to environmental protectors increased under Bolsonaro’s regime, to the extent that loggers viewed Bolsonaro’s statements promoting violence as authorization to act.¹⁰² At the Rio de Janeiro Trade Association, Bolsonaro, when referring to Indigenous people, stated “[t]hey are outcasts and we must treat them like terrorists. . . . Private property is sacred. We must criminalize the actions of those marginal people as terrorism. If they intrude onto private lands, they’ll get ‘lead’ [bullets].”¹⁰³ It is unequivocally clear that Bolsonaro’s policies were enacted to destroy Indigenous communities and take their land for resource extraction, either through sanctioned or constructively sanctioned violence in the form of incitement of private persons into crimes against environmental protectors.

2. Element 2: Parts (b) and (c) of Article 6

Bolsonaro’s intent to commit genocide, by using ecocide, was in many ways successful; the devastating impact of his administration on Indigenous Amazonians is unequivocal. Bolsonaro’s intent led to (b) serious bodily or mental harm to members of the group and (c) conditions of life calculated to bring physical destruction in whole or in part. Under Bolsonaro’s instruction or constructive instruction,

98. *Id.*

99. *Stop Brazil’s Genocide: President Bolsonaro Has “Declared War” on Brazil’s Indigenous Peoples*, SURVIVAL INT’L, <https://perma.cc/J4TY-S9PY> (last visited May 17, 2023); see also Maria Laura Canineu & Andrea Carvalho, *Bolsonaro’s Plan to Legalize Crimes Against Indigenous Peoples*, HUM. RTS. WATCH (Mar. 1, 2020, 5:00 AM), <https://www.hrw.org/news/2020/03/01/bolsonaros-plan-legalize-crimes-against-indigenous-peoples> [<https://perma.cc/82C8-QZ4U>].

100. *Brazil: Events of 2020*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2021/country-chapters/brazil> [<https://perma.cc/ZLZ8-D35F>] (last visited May 17, 2023).

101. See *Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil’s Amazon*, HUM. RTS. WATCH (Sept. 17, 2019), <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> [<https://perma.cc/7YMQ-47AK>].

102. *Id.*

103. Salo de Carvalho, David R. Goyes & Valeria Vegh Weis, *Politics and Indigenous Victimization: The Case of Brazil*, 61 BRIT. J. CRIMINOLOGY 251, 261 (2021) (omission in original) (citation omitted).

invasions and property damage on Indigenous lands increased from 109 documented accounts in 2018 to 256 documented accounts in 2019.¹⁰⁴ Other accounts put this number much higher, noting that the Yanomami people experienced 20,000 invasions from 2019 to 2020.¹⁰⁵ These invasions have been linked to high levels of mercury in tribal members, including in children's blood.¹⁰⁶ These invasions brought burning of Indigenous lands, contamination leading to disease, and broad biological warfare via the spread of disease to uncontacted Indigenous peoples.¹⁰⁷ In 2019, the murder rate of Indigenous people reached an eleven-year high, and the murders often followed encroachment on Indigenous lands.¹⁰⁸ Bolsonaro's policies restricted access to food and medicine, creating unlivable conditions on Indigenous land.¹⁰⁹ Deforestation in the Amazon "increased by 90 percent in June 2019 and 278 percent in July 2019 over the same months in 2018."¹¹⁰ Deforestation and illegal mining, unpunished and supported by the government, led to the violent murder of Indigenous peoples.¹¹¹ Incited by Bolsonaro's anti-Indigenous and pro-occupation legislation, Amazonian tribes faced severe physical and mental harm and were subjected to conditions of life that made living on their land impossible. Because Bolsonaro intentionally planned, sanctioned, and encouraged these circumstances and attacks, his role in executing ecocide as a tool for genocide is prosecutable. Bolsonaro called for the

104. CONSELHO INDIGENISTA MISSIONÁRIO, REPORT ON VIOLENCE AGAINST INDIGENOUS PEOPLES IN BRAZIL 2019 DATA 6 (2021), https://cimi.org.br/wp-content/uploads/2021/01/Report-Violence-against-the-Indigenous-Peoples-in-Brazil_2019-Cimi.pdf [<https://perma.cc/Z9FS-R375>]; see Lily Grisafi, *Prosecuting International Environmental Crime Committed Against Indigenous Peoples in Brazil*, 5 COLUM. HUM. RTS. L. REV. ONLINE 26, 31 (2020).

105. See Brazil: 439,000 Signature Petition to Be Handed in to Congress for Yanomami Covid Campaign, SURVIVAL INT'L (Dec. 2, 2020), <https://www.survivalinternational.org/news/12514> [<https://perma.cc/68H8-68QJ>] (explaining that the Yanomami people petitioned to have 20,000 miners expelled from their land and indicated that 20,000 non-Yanomami miners had invaded Yanomami land).

106. MISSIONÁRIO, *supra* note 104, at 80–108.

107. See Grisafi, *supra* note 104, at 37; Lucas Ferrante & Philip Martin Fearnside, *Brazilian Government Violates Indigenous Rights: What Could Induce a Change?*, 152 J. GEOGRAPHICAL SOC'Y BERLIN 200, 201 (2021); Lucas Ferrante & Philip Martin Fearnside, *Military Forces and COVID-19 as Smokescreens for Amazon Destruction and Violation of Indigenous Rights*, 151 J. GEOGRAPHICAL SOC'Y BERLIN 258, 259 (2020); Bonnie St. Charles, *You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings*, 21 CHI. J. INT'L L. 227, 228–29 (2020).

108. See Statement, Off. of the High Comm'r for Hum. Rts., Statement by UN High Commissioner for Human Rights Michelle Bachelet on Killing of Indigenous Leader in Amapá, Brazil (July 29, 2019), <https://www.ohchr.org/en/statements/2019/07/statement-un-high-commissioner-human-rightsmichelle-bachelet-killing-indigenous> [<https://perma.cc/2FUF-QJSJ>]; de Carvalho, et al., *supra* note 103; *Relatório Cimi: Violência contra os povos indígenas no Brasil tem aumento sistêmico e contínuo*, CONSELHO INDIGENISTA MISSIONÁRIO (Sept. 27, 2018), <https://cimi.org.br/2018/09/relatorio-cimi-violencia-contra-os-povos-indigenas-no-brasil-tem-aumento-sistemico-e-contínuo/> [<https://perma.cc/7DNC-TD86>].

109. Katie Surma, *Are Brazil's Amazon Policies 'Crimes Against Humanity'?*, UNDARK (June 24, 2021), <https://undark.org/2021/06/24/ecocide-3/> [<https://perma.cc/WU4C-527Q>]; see de Carvalho et al., *supra* note 103; Denis Abessa, Ana Famá & Lucas Buruaem, *The Systematic Dismantling of Brazilian Environmental Laws Risks Losses on All Fronts*, 3 NATURE ECOLOGY & EVOLUTION 510, 511 (2019); Gabriela Russo Lopes & Mairon G. Bastos Lima, *Necropolitics in the Jungle: COVID-19 and the Marginalisation of Brazil's Forest Peoples*, 39 J. SOC'Y LATIN AM. STUD. 92, 93–95 (2020).

110. de Carvalho et al., *supra* note 103, at 262 (citation omitted).

111. HUM. RTS. WATCH, *supra* note 101.

physical destruction of Indigenous people and then holistically encouraged ecocide, knowing ecocide would result in the requisite genocidal harm indicated in part (b) and (c) of the Rome Statute.

B. STEPHEN HARPER, THE ALBERTA TAR SANDS, AND ALBERTA'S FIRST NATION PEOPLES

Under former Prime Minister Stephen Harper, the Canadian government continued its slow, systemic, industrial genocide of Alberta's First Nations people, including the Beaver Lake Cree Nation, Fort McKay First Nation, Athabasca Chipewyan Nation, and others.¹¹² Canada was founded on the destruction of Indigenous people, and this intentional destruction continues to this day. Harper's government continually granted tar sand extraction permits, despite Indigenous protest, in the oil-rich region of the Athabasca River.¹¹³ Many Indigenous communities depend on the Athabasca River for food, water, and religious practice. The river is the lifeblood of the region and communities. Without the river, the communities' existence is threatened. The method of oil extraction leads to tar sands—sludgy, bituminous pits that make the land unlivable by increasing disparate health impacts, causing cancer, shortening life spans, and bringing in an influx of violence against Indigenous women from extractive industry outposts or man camps. In authorizing these permits, the government, under Stephen Harper's leadership, intended for the destruction of the Indigenous people on this land so that the government could reap the profits of extraction. Below, the government's intent and harm are analyzed.

1. Element 1: Intention of the Harming Parties

The intention of the harming parties in this case, former Prime Minister Stephen Harper and a handful of former Alberta Department of Energy ministers, including Frank Oberle, Diana McQueen, and Ken Hughes, is evidenced through their leadership roles in a government policy and plan intended to exterminate Indigenous people in Alberta. Intent is difficult to prove in this case, perhaps due to Canada's international image as a human rights advocate. It could also be because of Canada's instrumental role in the Genocide Convention and working intentionally to exclude the Indigenous perspective in planning.¹¹⁴ Nonetheless,

112. See Jennifer Huseman & Damien Short, "A Slow Industrial Genocide": *Tar Sands and the Indigenous Peoples of Northern Alberta*, 16 INT'L J. HUM. RTS. 216, 216–37 (2012) (indicating that the Athabasca tar sands have been a slow industrial genocide).

113. See generally Jen Preston, *Neoliberal Settler Colonialism, Canada and the Tar Sands*, 55 RACE & CLASS 44 (2013) [hereinafter Preston, *Neoliberal Settler Colonialism*] (discussing ongoing permitted projects by Harper under his government); Jen Preston, *Racial Extractivism and White Settler Colonialism: An Examination of the Canadian Tar Sands Mega-Projects*, 31 CULTURAL STUD. 353, 369 (2017) (discussing Harper's advertising expenditure for these permitted tar sand projects); Martin Lukacs & Tim Groves, *RCMP Spied on B.C. Natives Protesting Pipeline Plan, Documents Show*, TORONTO STAR (May 9, 2012), https://www.thestar.com/news/canada/2012/05/09/rcmp_spied_on_bc_natives_protesting_pipeline_plan_documents_show.html [<https://perma.cc/C2VE-6639>] (indicating that Indigenous people were protesting the ongoing oil projects).

114. See LUCK, *supra* note 81 (noting that Canada opposed the inclusion of cultural genocide because of its harms to Indigenous people); Mako, *supra* note 81; see also NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, *supra* note 50; SCHABAS, *supra* note 81 (noting that Canada

sufficient evidence of intent exists to indicate that the harming parties could be prosecuted for genocide because of the ecocide they orchestrated against the Indigenous peoples of Alberta.

The actions of these individuals occurred within a longstanding manifest pattern directed by the government against Indigenous peoples that could itself effect destruction.¹¹⁵ This longstanding manifest pattern, in combination with the current proven environmental harm, is sufficient to indicate culpability for genocide using ecocide. Canada's colonialist history and present have created a system of violent residential schools and a widespread unchecked epidemic of missing and murdered Indigenous women that threatens to destroy Canada's Indigenous peoples.¹¹⁶ The government continues to fight any attempts at legal accountability for its actions.¹¹⁷ The founders of Canada intended to extinguish Indigenous people to access the petroleum and minerals on their land.¹¹⁸

excluded Indigenous voices and cultural genocide because of the perceived impact they could have against Canada for its actions against Indigenous people).

115. See sources cited *supra* note 114; Dean Neu, "Presents" for the "Indians": Land, Colonialism, and Accounting in Canada, 25 ACCT., ORGS. & SOC'Y 2, 163–84 (2000); see also *Truth and Reconciliation Commission of Canada*, GOV'T CAN., <https://www.rcaanc-cimac.gc.ca/eng/1450124405592/1529106060525> [<https://perma.cc/CS8P-ESB5>] (last visited May 17, 2023) (discussing Canada's class-action settlement compensating those affected by the Indian Residential Schools). See generally Iain Vickers, Seeing Reconciliation as Decolonization: Moving Beyond Symbolism in the Implementation of Canada's Truth and Reconciliation Commission's Calls to Action (Dec. 17, 2021) (research paper, Georgetown University) (on file with author) (discussing the creation of Truth and Reconciliation Commission to promote reconciliation and healing between Indigenous and non-Indigenous communities, churches, and governments).

116. See Jonathan Paquette, Devin Beaugard & Christopher Gunter, *Settler Colonialism and Cultural Policy: The Colonial Foundations and Refoundations of Canadian Cultural Policy*, 23 INT'L J. CULTURAL POL'Y 269, 269–84 (2017); Andrew Woolford & Jeff Benvenuto, *Canada and Colonial Genocide*, 17 J. GENOCIDE RSCH. 373, 373–75, 379 (2015); Travis Hay, Cindy Blackstock & Michael Kirlaw, *Dr. Peter Bryce (1853–1932): Whistleblower on Residential Schools*, 192 CANADIAN MED. ASS'N J. E223, E223–24 (2020) (noting that "'of a total of 1537 pupils reported upon nearly 25 per cent are dead, of one school with an absolutely accurate statement, 69 per cent of ex-pupils are dead, and that everywhere the almost invariable cause of death given is tuberculosis.' . . . Put simply, Bryce 'exposed the genocidal practices of government-sanctioned residential schools, where healthy Indigenous children were purposefully exposed to children infected with TB, spreading the disease through the school population.'" (citations omitted)); NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, *supra* note 50.

117. See Sasha Boutilier, Note, *Free, Prior, and Informed Consent and Reconciliation in Canada*, 7 W.J. LEGAL STUD. 1, 1–2 (2017) (noting that Canada objected to UNDRIP until 2016); *Canada: Events of 2019*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2020/country-chapters/canada> [<https://perma.cc/5Q8W-RQST>] (last visited May 17, 2023) ("In September, the Canadian Human Rights Tribunal found that the federal government willfully and recklessly discriminated against Indigenous children living on reserves by failing to provide funding for child and family services. The Trudeau government filed an application seeking a judicial review of the ruling in October."); *Canada: Events of 2020*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2021/country-chapters/canada>? [<https://perma.cc/TQE4-UDHZ>] (last visited May 17, 2023) (noting that Trudeau has not implemented any recommendations made by the National Inquiry for MMIW, and that "[t]he water supplied to many First Nations communities on lands known as reserves is contaminated, hard to access, or at risk due to faulty treatment systems. The poor water and sanitation conditions have a disparate and negative impact on at-risk populations, including children").

118. Nicholas Kusnetz, *Indigenous Groups Say Big Oil's Pollution Threatens Their Existence in Canadian Forest*, NBC NEWS (Nov. 21, 2021, 6:00 AM), <https://www.nbcnews.com/news/world/>

These actions of Alberta's leaders occurred within a historical context of Indigenous extermination—a context that is itself a central consideration in finding intent to commit genocide.¹¹⁹ As indicated in Section II.C.1, individuals can be held accountable for their knowledge of genocide, in this case the knowledge that Indigenous people would be destroyed by continuing to expand the tar sands.¹²⁰ Former Prime Minister Harper and the higher level energy officials of Alberta knew that their actions were bringing about the destruction of Alberta's First Nations. The governments of Alberta and Canada were repeatedly sued by First Nations for violating treaty rights, with the tar sands violations named explicitly in the lawsuits.¹²¹ Despite this, Harper secretly used taxpayer dollars for a public outreach campaign to promote the tar sands.¹²² He promoted pipelines

indigenous-groups-say-big-oils-pollution-threatens-existence-canadian-rcna5946 [https://perma.cc/UYS5-TPR6] (“In 1891, the superintendent general of Indian affairs recommended drafting a treaty, ‘with a view to the extinguishment of the Indians’ title,’ to open access to petroleum and other minerals.”); Nicholas Kusnetz, *The Deep Toll of Tar Sands on Canada's Indigenous People*, UNDARK (Nov. 22, 2021), https://undark.org/2021/11/22/ecocide-tar-sands/ [https://perma.cc/E7EC-AX3T] (“When a team was sent up the Athabasca eight years later to sign what would become Treaty 8, a member of the party named Charles Mair described giant escarpments rising on either side, ‘everywhere streaked with oozing tar, and smelling like an old ship.’”); see DENNIS F.K. MADILL, BRITISH COLUMBIA INDIAN TREATIES IN HISTORICAL PERSPECTIVE (1981), https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/treC-B_1100100028953_eng.pdf [https://perma.cc/JA55-SDRX].

119. See *Prosecutor v. Jelisić*, Case No. ICTY-IT-95-10-T, Judgment, ¶ 73 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

120. See Kreß, *supra* note 62, at 694 (recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis); Schabas, *supra* note 62 (noting that knowledge-based intent is important in interpreting the elements of genocide).

121. See Brett Forester, *Despite Promise of Reconciliation, Trudeau Spent Nearly \$100M Fighting First Nations in Court During First Years in Power*, APTN NEWS (Dec. 18, 2020), https://www.aptnnews.ca/national-news/trudeau-spent-nearly-100m-fighting-first-nations-in-court-during-first-years-in-power/ [https://perma.cc/6T6N-LUT7] (“Last December, he submitted an order paper question that revealed Canada chalked up \$5.1 million since 2007 fighting Cindy Blackstock and First Nations kids at the Canadian Human Rights Tribunal, though documents Blackstock obtained suggest the figure could be closer to \$8 or \$9 million. . . . Under Harper, INAC spent \$92.4 million on litigation between 2012 and 2015.”); Oscar Baker III, *First Nations Drinking Water Settlement Open for Claims from Communities, Individuals*, CANADIAN BROAD. CO. (Mar. 11, 2022, 7:30 PM), https://www.cbc.ca/news/indigenous/first-nations-water-drinking-settlement-1.6382206 [https://perma.cc/HBX8-W6ZC] (“After a years-long fight for clean drinking water, Indigenous communities and individuals in Canada are a step closer to receiving money from a class-action lawsuit that was settled with the federal government for \$8 billion last year.”); Michael Toledano, *How Canada's First Nations Might Halt the Development of the Tar Sands*, VICE (May 6, 2014), https://www.vice.com/en/article/av47e5/indigenous-lawsuits-could-paralyze-the-tar-sands [https://perma.cc/X5M8-TYLA]; Bob Weber, *Fort McKay First Nation Sues Alberta Government, Says Oilsands Project Threatens Sacred Site*, CANADIAN PRESS (Dec. 11, 2018, 2:23 PM), https://globalnews.ca/news/4751414/fort-mckay-first-nation-moose-lake-lawsuit/ [https://perma.cc/B6JE-64NU].

122. Martin Lukacs, *Revealed: Canadian Government Spent Millions on Secret Tar Sands Advocacy*, GUARDIAN (Aug. 11, 2015, 1:49 PM), https://www.theguardian.com/environment/true-north/2015/aug/11/canadian-government-spent-millions-on-secret-tar-sands-advocacy [https://perma.cc/RFU9-5BQM]; *Oil and Gas Ad Campaign Cost Feds \$40M at Home and Abroad*, CANADIAN BROAD. CO. (Nov. 28, 2013), https://www.cbc.ca/news/politics/oil-and-gas-ad-campaign-cost-feds-40m-at-home-and-abroad-1.2442844 [https://perma.cc/B4GF-H6CU].

from the tar sands directly and violently through Indigenous lands.¹²³ Under Harper's government, the oil industry successfully lobbied for environmental rollbacks.¹²⁴ Not only did Harper's government work directly with the oil industry to promote its destructive campaign against Northern Alberta's First Nations, but it also targeted Indigenous organizations with "arbitrary audits [and by] muzzl[ing] government scientists."¹²⁵ Racism and aggression toward Indigenous people marked Harper's government, including cutting funding to Indigenous causes and claiming Canada had "no history of colonialism."¹²⁶ The Harper government labeled First Nations leaders as "rogues" and "threats to national security,"¹²⁷ while simultaneously passing legislation that mandated punishment and imprisonment for national security threats, including threats to infrastructure and the economy.¹²⁸ Harper cut funding to organizations that called out his violence against First Nations peoples.¹²⁹ Harper's government did not consult with First Nations

123. See, e.g., Craig Proulx, *Colonizing Surveillance: Canada Constructs an Indigenous Terror Threat*, 56 ANTHROPOLOGICA 83, 87–89 (2014) (discussing pro-industry regulations passed during Harper's tenure that "de-fanged" environmental protections and "reduce[d] indigenous consultation barriers to capitalist resource extraction and oil and gas pipeline construction on First Nations land and unceded, so-called Crown lands"); see also Andrew Crosby & Jeffrey Monaghan, *Settler Colonialism and the Policing of Idle No More*, 43 SOC. JUST. 37, 38–41 (2016) (noting "structural violence" and dispossessing Indigenous people of land for resource extraction are essential tools and goals of settler colonialism).

124. See Nicolai Graham, William K. Carroll & David Chen, *Carbon Capital's Political Reach: A Network Analysis of Federal Lobbying by the Fossil Fuel Industry from Harper to Trudeau*, 14 CANADIAN POL. SCI. REV. 1, 4 (2020).

125. Lukacs, *supra* note 122.

126. Pamela Palmater, *Harper's 10 Year War on First Nations*, HARPER DECADE (July 16, 2015), <http://www.theharperdecade.com/blog/2015/7/14/harpers-10-year-war-on-first-nations> [https://perma.cc/VDR6-WDMJ]; see also David Ljunggren, *Every G20 Nation Wants to be Canada, Insists PM*, REUTERS (Sept. 25, 2009), <https://www.reuters.com/article/columns-us-g20-canada-advantages/every-g20-nation-wants-to-be-canada-insists-pm-idUSTRE58P05Z20090926> [https://perma.cc/6GMP-DA7V].

127. Palmater, *supra* note 126; see also Proulx, *supra* note 123, at 89 ("The state went into damage-control mode as it was caught ascribing a terror identity to indigenous organizations not engaged in terrorism.").

128. See Proulx, *supra* note 123, at 88–89; Ira Timothy, *Bill C-51 is About Control, Not Terrorism*, ASS'N IROQUOIS & ALLIED INDIANS (Mar. 24, 2015), <https://www.aiai.on.ca/bill-c-51-is-about-control-not-terrorism/> [https://perma.cc/UE5X-BRFD]; Michael McClurg & Senwung Luk, *Bill C-51 Could Be a Blank Cheque to the Government to Stifle Indigenous Dissent*, OLTHUIS KLEER TOWNSHEND LLP, <https://www.oktlaw.com/bill-c-51-blank-cheque-government-stifle-indigenous-dissent/> [https://perma.cc/US5L-5TU3] (last visited May 17, 2023).

129. See Kristy Kirkup, *Fact Check: Did the Harper Government Remove First Nations Education Money?*, CTV NEWS (Mar. 16, 2016, 7:47 AM), <https://www.ctvnews.ca/politics/fact-check-did-the-harper-government-remove-first-nations-education-money-1.2819252> [https://perma.cc/ELD8-A56H]; THE ASSEMB. OF FIRST NATIONS, BILL C-38 PART THREE: QUESTIONS AND ANSWERS ON CHANGES TO ENVIRONMENTAL LAWS 2, <https://perma.cc/83ZJ-TTFV> (last visited May 18, 2023); Palmater, *supra* note 126 ("In 2010, shortly after the Native Women's Association of Canada (NWAC) captured the world's attention in reporting that at least 600 Indigenous women and girls had been murdered or gone missing, Harper's Conservatives cut the organization's funding.").

people before continuing and promoting the extractive tar sands.¹³⁰ There is no legal universe where the Harper government coincidentally rolled back environmental regulations, publicly slandered Indigenous people, enacted funding cuts to organizations working to combat violence against Indigenous women, did not consult with First Nations communities before granting tar sands permits, and labeled First Nations leaders as “rogues” and “threats to national security.” These purposeful activities and policies indicate that Harper and actors within his Administration meet the requisite intent for prosecution in the ICC for genocide via ecocide.

2. Element 2: Parts (b) and (c) of Article 6

Harper and his government intentionally continued to grant unfettered access to the tar sands with the knowledge, and likely the purpose, of exterminating First Nations people who reside on the land. The Harper government, in its continued permitting of the Alberta Tar Sands, in part destroyed the Nations by “[c]ausing serious bodily or mental harm to members of the group” and “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”¹³¹

First, First Nations are extremely vulnerable to the uptick in violence against women due to extractive industries, particularly the tar sands.¹³² Second, the

130. See Renee Lewis, *United Nations: Canada Needs Indigenous Consent for Pipeline Projects*, AL JAZEERA AM. (May 12, 2014, 5:00 PM), <http://america.aljazeera.com/articles/2014/5/12/un-canada-indigenous.html> [https://perma.cc/JRM8-D6TE]; Grace Li Xiu Woo, *Decolonization and Canada's Idle No More Movement*, 4 ARCTIC REV. ON L. & POL. 2, 181–83, 184, 190, 196–97, 205 (2013); Preston, *Neoliberal Settler Colonialism*, *supra* note 113, at 47; Huseman & Short, *supra* note 112, at 228; Larissa K. Stendie, *Public Participation, Petro-Politics and Indigenous Peoples: The Contentious Northern Gateway Pipeline and Joint Review Panel Process 24–27* (May 2013) (M.Phil. thesis, University of Oslo) (available at <https://www.duo.uio.no/bitstream/handle/10852/35958/L.StendiexxSUMxTHESISxxMayx2013.pdf?sequence=1&isAllowed=y> [https://perma.cc/FAA9-KK4U]).

131. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 38544 (defining “genocide”).

132. See Summer Blaze Aubrey, Note, *Violence Against the Earth Begets Violence Against Women: An Analysis of the Correlation Between Large Extraction Projects and Missing and Murdered Indigenous Women, and the Laws That Permit the Phenomenon Through an International Human Rights Lens*, 10 ARIZ. J. ENV'T L. & POL'Y 34, 66 (2019) (“Native women and children are trafficked at astronomical rates. Rates of trafficking increase dramatically when man camps are used at extraction projects. Currently, those exact rates are difficult to ascertain due to a lack of funding, lack of training, jurisdictional issues, and a general lack of awareness regarding the issue. However, Native peoples, Indigenous communities, allies, activists, etc., are bringing attention to the issue, unfortunately by bringing attention to the loved ones they have lost.”); Lily Grisafi, Note, *Living in the Blast Zone: Sexual Violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 535 (2019) (“As oil and gas companies financially benefit from their fast and loose hiring practices, which allow for rapid intake of laborers during extraction booms, these companies should also be held responsible for the high cost these practices place on Native women.”); see also Lana Ray, *Pipelines, Prostitution and Indigenous Women: A Critical Analysis of Contemporary Discourse*, 33 CANADIAN WOMAN STUD. 107, 107–08 (2019) (“While the . . . connections I have made between prostitution, oil and pipeline development, and domination are not new, they provide a framework for understanding how both prostitution and oil and pipeline development (re)assert dominion over Indigenous women and land through their dehumanization, objectification, secularization and othering, and thus are acts of violence.”); Ashley Noel Mack & Tiara R. Na’puti, “*Our Bodies Are Not Terra Nullius*”: *Building a*

environmental impact of the tar sands is killing First Nations communities, slowly but effectively.¹³³

Extractive industries near Indigenous communities bring an influx of white men lodged in camps, which have an astronomical impact on the epidemic of missing and murdered Indigenous women.¹³⁴ This pattern is confirmed worldwide, but because harm against Indigenous women is underreported and unstudied, the impact cannot be proven in the specific case of the tar sands.¹³⁵ However, in Canada, there are an estimated 4,000-plus missing and murdered Indigenous women, and Indigenous women are 4.5 times more likely to be murdered than non-Indigenous women.¹³⁶

The tar sands create conditions that are harming First Nations people by degrading their air, land, and water quality, causing diseases, shortages, and early death.¹³⁷ Polycyclic aromatic hydrocarbons (PAHs), chemical compounds that

Decolonial Feminist Resistance to Gendered Violence, 42 WOMEN'S STUD. COMM'N 347, 362 (2019) ("Much of her work has been to resist the 'tar sands extraction and expansion in Alberta,' but during that time she 'has seen the impact' extractive industry 'has had on the sexual health and safety of women.' . . . 'With the expansion of extractive industries, not only do we see desecration of the land, we see an increase in violence against women. Rampant sexual violence against women and a variety of social ills result from the influx of transient workers in and around workers' camps.'") (quoting ERIN MARIE KONSMO & A.M. KAHEALANI PACHECO, WOMEN'S EARTH ALL. & NATIVE YOUTH SEXUAL HEALTH NETWORK, VIOLENCE ON THE LAND, VIOLENCE ON OUR BODIES: BUILDING AN INDIGENOUS RESPONSE TO ENVIRONMENTAL VIOLENCE 31 (2016), <http://landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf> [<https://perma.cc/X288-M2PB>]); Brandi Morin, *Pipelines, Man Camps, and Murdered Indigenous Women in Canada*, AL JAZEERA (May 5, 2020), <https://www.aljazeera.com/features/2020/5/5/pipelines-man-camps-and-murdered-indigenous-women-in-canada> [<https://perma.cc/CDQ8-46U8>] (describing experiences of First Nations women subjected to "years of sexual exploitation" at the hands of workers in the tar sands' "man camps").

133. See e.g., Huseman & Short, *supra* note 112, at 230 ("The tar sands mega-project is undoubtedly the worst offender in this regard. As we have seen, the environmental impact of the tar sands is enormous and the impact on the lives of the indigenous peoples is equally dramatic. . . . Tar sands development has entirely changed the Athabasca delta and watershed landscape with massive deforestation of the boreal forests, open-pit mining, depletion of water systems and watersheds, toxic contamination, destruction of habitat and biodiversity, and the severe forcible disruption of the indigenous Dene, Cree and Métis trap-line cultures: 'The river used to be blue. Now it's brown. Nobody can fish or drink from it. The air is bad. This has all happened so fast.'" (citations omitted)).

134. See Morin, *supra* note 132 (describing sexual violence inflicted on Indigenous women in extractive industries' "man camps"). For more on the epidemic of missing and murdered Indigenous women, see *supra* note 114 and accompanying text.

135. See, e.g., Hevyn L. Heckes, *Missing and Murdered Indigenous Women (and Children) – A Global Problem* (Dec. 8, 2021) (undergraduate paper, University of New Mexico) (available at https://digitalrepository.unm.edu/ugresearchaward_2022/1 [<https://perma.cc/J7L9-4FMH>]).

136. See Sara Doesburg & Jaslyne Golaz, *Missing and Murdered Indigenous Women in Canada (MMIW)*, in *THE BALL IS IN Y(OUR) COURT: SOCIAL CHANGE THROUGH AND BEYOND SPORT* (Mary Louise Adams ed., 2020).

137. See Stephen Leahy, *This Is the World's Most Destructive Oil Operation – and It's Growing*, NAT'L GEOGRAPHIC (Apr. 11, 2019), <https://www.nationalgeographic.com/environment/article/alberta-canadas-tar-sands-is-growing-but-indigenous-people-fight-back> (discussing the impact on the land by acid rain and air pollution); Ed Struzik, *With Tar Sands Development, Growing Concern on Water Use*, YALE ENV'T 360 (Aug. 5, 2013), https://e360.yale.edu/features/with_tar_sands_development_growing_concern_on_water_use [<https://perma.cc/M9TQ-ESV8>] (discussing linking tar sand to "potentially harmful changes in the Mackenzie River Basin, including water pollution, wetlands destruction, and changes in drainage patterns in the Mackenzie headwaters"); Sara Birrell, *As the Toll of the Tar Sands*

cause cancer and other health impacts, are found in extreme quantities in regional lake sediment.¹³⁸ Toxic pollutants, including arsenic and mercury, are present at heightened levels in the flesh of animals within the region.¹³⁹ Cancer rates in surrounding communities have risen thirty percent since the start of the tar sands and continue to climb.¹⁴⁰ One doctor's study found that heightened rates of leukemia, lymphoma, lupus, colon cancer, and Graves' disease were directly attributable to increased carcinogens from the tar sands industry in a downstream village's drinking water.¹⁴¹ The European Union planned to label the tar sands one of the most environmentally harmful extractive industry sites globally, but "abandoned [the plan] after years of opposition led by major [tar sands oil] producer Canada."¹⁴² Ninety percent of the Beaver Lake Cree Nation's land is

on Indigenous Communities Grows, Canada Continues to Fail in its Obligations to Undrip, COUNCIL CANADIANS (Nov. 9, 2022), <https://canadians.org/analysis/as-the-toll-of-the-tar-sands-on-indigenous-communities-grows-canada-continues-to-fail-in-its-obligations-to-undrip/#:~:text=The%20tar%20sands%20and%20their,Indigenous%20communities%20in%20the%20region> [<https://perma.cc/H97P-65YL>] ("The tar sands and their tailings ponds, which seep into the groundwater, poisoning the water, poisoning the fish, poisoning the building blocks of life itself, have been directly linked to increased rates of rare, deadly cancers in the predominantly Indigenous communities in the region."); NAT. RES. DEF. COUNCIL, *TAR SANDS CRUDE OIL: HEALTH EFFECTS OF A DIRTY AND DESTRUCTIVE FUEL 5* (2014), <https://www.nrdc.org/sites/default/files/tar-sands-health-effects-IB.pdf> [<https://perma.cc/HL8P-T2BW>] (pointing out that the U.S. Environmental Protection Agency recognizes that the chemicals produced in the tar sands can lead to premature death).

138. See Joshua Kurek, Jane L. Kirk, Derek C.G. Muir, Xiaowa Wang, Marlene S. Evans & John P. Smol, *Legacy of a Half Century of Athabasca Oil Sands Development Recorded by Lake Ecosystems*, 110 PROCS. NAT'L ACAD. SCIS. 1761, 1761–62 (2013); Nicholas Kusnetz, *The Deep Toll of Tar Sands on Canada's Indigenous People*, UNDARK (Nov. 22, 2021), <https://undark.org/2021/11/22/ecocide-tar-sands/> [<https://perma.cc/E7EC-AX3T>]; cf. Bob Weinhold, *Alberta's Oil Sands: Hard Evidence, Missing Data, New Promises*, 119 ENV'T HEALTH PERSPS. 126, 129 (2011) ("Total industry-estimated volumes of SO_x, NO_x, PM_{2.5}, CO, volatile organic compounds, polycyclic aromatic hydrocarbons (PAHs), lead, mercury, and cadmium put the oil sands industry in anywhere from third to twelfth place—depending on the pollutant—among all Canadian industrial sources.").

139. See Kusnetz, *supra* note 138.

140. See *What Are the Tar Sands*, INDIGENOUS ENV'T NETWORK (Jan. 1, 2010), <https://www.ienearth.org/what-are-the-tar-sands> [<https://perma.cc/CT78-ZPG5>]; Renee Lewis, *Canada Tar Sands Linked to Cancer in Native Communities, Report Says*, AL JAZEERA AM. (July 8, 2014, 6:00 PM), <http://america.aljazeera.com/articles/2014/7/8/canada-oil-cancer.html> [<https://perma.cc/Q694-BU9M>] (reporting on study demonstrating that "cancer occurrence increased significantly with participant employment in oil sands and with increased consumption of traditional foods and locally caught fish"); cf. Scott Haggett, *High Cancer Rates Confirmed Near Canada's Oil Sands*, REUTERS (Feb. 6, 2009, 4:49 PM), <https://www.reuters.com/article/us-health-oilsands/high-cancer-rates-confirmed-near-canadas-oil-sands-idUSTRE51568020090206> [<https://perma.cc/ZT9U-Y3SQ>] (reporting elevated cancer levels in Fort Chipewyan, Alberta village downstream from tar sands, although government cautioned "more monitoring of the community is needed to see if the higher number of cancers is a trend").

141. See Huseman & Short, *supra* note 112, at 224–25. *But see id.* at 225 (noting that while an Alberta government report validated the doctor's findings on elevated disease levels, it declined to embrace the doctor's conclusions on causation from tar sands). It is important to note that the government is the perpetrating party, so a government report may not be particularly reliable and could be attempting to deflect blame.

142. Barbara Lewis, *EU Abandons 'Dirty' Label for Tar Sands Oil*, REUTERS (Oct. 7, 2014, 7:30 AM), <https://www.reuters.com/article/us-energy-eu-canada-tarsands/eu-abandons-dirty-label-for-tar-sands-oil-idUSKCN0HW0YS20141007> [<https://perma.cc/44WG-T5EY>].

consumed with deep, black, bituminous oil pits.¹⁴³ The tar sands pollute drinking water and food sources, effectively creating food shortages in a region that largely subsists on traditional food gathering methods.¹⁴⁴ The Harper Administration purposefully executed policies and activities with the intent, as established in Section III.B.1, to commit harms constituting genocide under persuasive case law. It is unlikely Harper will be prosecuted; however, this case study serves as an example of how, and why, actors associated with states that have positive human rights recognition can, and should, still be held accountable for criminal behavior.

C. BRIAN ANDERSON, POLLUTION, VIOLENT REPRESSION AND THE Ogoni OF THE NIGER RIVER DELTA

Shell often used the destruction of global Indigenous people to access the resources on Indigenous land.¹⁴⁵ Under the leadership of Brian Anderson, Shell, in its unyielding search for new resources, committed ecocide crimes in Nigeria.¹⁴⁶ Though these crimes occurred before the ICC's creation—and are thus ineligible for prosecution in the ICC—this Note analyzes them because they are exceptionally egregious and provide a relevant example of how this Note's framework is applicable to crimes committed by private companies, rather than just to crimes committed by governments.

These crimes must be examined both because of their lasting impact today and because they evidence the limited jurisdiction of the ICC and why the ICC is not and cannot be the only solution for the harm the Ogoni suffered at the hands of Brian Anderson, Shell, and Shell's proxies. Anderson colluded with the Nigerian government to make the Ogoniland region of the Niger River Delta unlivable for the Ogoni people by egregious environmental harm combined with violent repression of anti-Shell peaceful protests. Anderson's actions and words indicate the required intent, both knowledge- and purpose-based, for ICC prosecution. The results of Anderson's words and actions directly caused the requisite harm required to be considered genocide, with many of these harms occurring in the form of ecocide.

1. Element 1: Intention of the Harming Parties

In the 1990s, under the leadership of Brian Anderson, then chairperson for Shell Nigeria, Shell colluded with the Nigerian government to exterminate the

143. See Susan Smitten, *Tarsands vs. Treaty: A Just Transition Case Study*, BRIARPATCH MAG. (Apr. 29, 2019), <https://briarpatchmagazine.com/articles/view/tarsands-trial> [<https://perma.cc/8NFE-ADAR>].

144. See Leahy, *supra* note 137.

145. See Jaco Prinsloo, *In Their Legal Victory over Shell, South Africa's Indigenous Communities Continue to Assert Their Power*, HAKAI MAG. (Feb. 7, 2022), <https://hakaimagazine.com/news/in-their-legal-victory-over-shell-south-africas-indigenous-communities-continue-to-assert-their-power> [<https://perma.cc/W7U6-ATA8>]; Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211, 233 (2007); *Native Alaskans Say Oil Drilling Threatens Way of Life*, BBC (July 20, 2010), <https://www.bbc.com/news/world-us-canada-10549107> [<https://perma.cc/D2CY-TWSW>].

146. Brian Anderson was CEO of Nigerian Dutch Royal Shell, a subsidiary of then-Royal Dutch Shell.

Ogoni people with the intent to access their resource-rich land unfettered.¹⁴⁷ Anderson met with Nigeria's military leadership and raised the issue of the Ogoni people in the Delta.¹⁴⁸ Amnesty International gathered internal evidence from Shell that shows Anderson and his team advocated for the Nigerian government to handle peaceful protests, even knowing that this would entail murder, rape, torture, and the burning of villages.¹⁴⁹ Shell, under Anderson, undoubtedly knew of the Nigerian military's actions, because it provided the military with transportation and, occasionally, payments.¹⁵⁰ Anderson lobbied the Nigerian government for military support to suppress protests by the Ogoni people, who were simply trying to ensure their survival from Shell's genocidal environmental practices.¹⁵¹ This advocacy for violence against the Ogoni people was compounded by Shell intentionally creating an environment so hostile to life that the Ogoni people could not survive.¹⁵² Shell regularly practiced gas flaring in the region, an illegal practice due to its detrimental impacts on human health, including causing miscarriages and congenital malformations.¹⁵³ Anderson himself admitted that he raised the issue of the Ogonis with Nigeria's president and came away from the meeting "with the sense that Abacha 'will intervene with either the military or the police.'"¹⁵⁴ Months after this, the Nigerian government executed Ken Saro-Wiwa, an Ogoni leader Anderson had named.¹⁵⁵ Shell, and thus Anderson as the leader of Nigerian Shell at the time, was intentional in its calls for military aid in suppressing the Ogoni people and violently polluting Ogoniland through illegal environmental practices.¹⁵⁶

Currently, Shell refuses to clean up the environmental devastation still occurring in Ogoniland.¹⁵⁷ Shell maintains that it remediated the region, but the

147. See *Investigate Shell for Complicity in Murder, Rape and Torture*, AMNESTY INT'L (Nov. 28, 2017), <https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> [https://perma.cc/C3MU-9E8H].

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. See U.N. Hum. Rts. Council, *Joint Written Statement Submitted by the Europe-Third World Centre (CETIM), a Non-Governmental Organization in General Consultative Status, Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN), a Non-Governmental Organization in Special Consultative Status*, U.N. Doc. A/HRC/26/NGO/100 (May 26, 2014); Barisere Rachel Konne, Note, *Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*, 47 CORNELL INT'L L.J. 181, 188–89 (2014).

153. See Méliissa Godin, *Lawyers Are Working to Put 'Ecocide' on Par with War Crimes. Could an International Law Hold Major Polluters to Account?*, TIME (Feb. 19, 2021, 7:56 AM), <https://time.com/5940759/ecocide-law-environment-destruction-icc/> [https://perma.cc/EZ5A-8KD8]; see also Omosivie Maduka & Charles Tobin-West, *Is Living in a Gas-Flaring Host Community Associated with Being Hypertensive? Evidence from the Niger Delta Region of Nigeria*, 2 BMJ GLOB. HEALTH 1, 1 (2017).

154. *Was Shell Complicit in Murder?*, AMNESTY INT'L (Nov. 28, 2017), <https://www.amnesty.org/en/latest/news/2017/11/was-shell-complicit-in-murder/> [https://perma.cc/9M7C-WVRQ].

155. *Id.*

156. See *id.*

157. See Konne, *supra* note 152, at 184–85.

remediation of the region does not meet international or Shell's internal standards, indicating that Shell's historical intent to destroy may extend into today, or at the least that harmful negligence exists today.

2. Element 2: Parts (b) and (c) of Article 6

In its collusions with the Nigerian government in the 1990s, Shell—and by his role in the organization, Brian Anderson—caused or incited genocide, via ecocide and physical violence related to environmental destruction, including countless deaths, systemic raping, and the torching of thousands of houses.¹⁵⁸ Anderson caused or incited serious bodily or mental harm to the Ogoni, and deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part. The Dutch ambassador informed Shell that the army, which had received financing and transport from Anderson and Shell, killed around 800 Ogoni people in July 1994.¹⁵⁹ Anderson explicitly raised the issue of Ogoni protest leaders with the Nigerian government, and not months later, the Nigerian government executed the leaders.¹⁶⁰ The Ogoni people were systematically and violently harmed by the Nigerian government at the request of Anderson and Shell. Not only this, but Shell adopted a scorched Earth environmental policy in Ogoniland that led to severe mental and physical harm and conditions on the land that do not support life. Shell ignored Nigerian law to practice gas flaring, repeatedly paying the fine for their illegal actions.¹⁶¹ Gas flaring causes a range of human health issues, and the practice of gas flaring in the region brought life expectancy to thirteen years below the national average.¹⁶² Shell polluted the water and food sources with impunity.¹⁶³

Though Shell's most extreme actions occurred in the past, Shell is still enacting retributive harm to the Ogoni by refusing to rehabilitate land that cannot support agriculture and water that is undrinkable from petroleum contamination and

158. *Was Shell Complicit in Murder?*, *supra* note 154.

159. *Id.*

160. *Id.*

161. See *Gas Flaring*, OIL CHANGE INT'L, <https://priceofoil.org/thepriceofoil/human-rights/gas-flaring/> [<https://perma.cc/SJF5-CRRP>] (last visited May 18, 2023); Monica Mark, *Nigeria's Penalty for Gas Flaring Will Not Curb Emissions, Say Campaigners*, *GUARDIAN* (May 31, 2012, 10:35 AM), <https://www.theguardian.com/environment/2012/may/31/nigeria-penalty-gas-flaring> [<https://perma.cc/AV66-HKT9>]; Eferiekose Ukala, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices*, 2 *WASH. & LEE J. ENERGY, CLIMATE & ENV'T* 97, 105, 114–15 (2011).

162. Godin, *supra* note 153; Konne, *supra* note 152, at 182. See generally Christopher Byrnes, Elizabeth Deligio, Brother Anthony Kote-Witah & Charity Ryerson, 'We All Stand Before History': *Corporate Impunity as a Colonial Legacy – The Case of the Niger Delta*, *HARV. HUM. RTS. J. ONLINE*, Apr. 19, 2019, at 1.

163. See Byrnes, et al., *supra* note 162, at 2, 7–8; *Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, *HUM. RTS. WATCH REPS.* (July 1995), <https://www.hrw.org/reports/1995/Nigeria.htm> [<https://perma.cc/P5GP-SRC5>]; Joya Uraizee, *Combating Ecological Terror: Ken Saro-Wiwa's Genocide in Nigeria*, 44 *J. MIDWEST MOD. LANGUAGE ASS'N* 75, 79–80 (2011).

carcinogen levels over 900 times the World Health Organization guidelines.¹⁶⁴ Shell continues oil flaring in the region, which causes “increased rates of cancer, blood disorders, skin diseases, acid rain, and [congenital disabilities]—leading to a life expectancy of 41 in the region, 13 years fewer than the national average.”¹⁶⁵ In 2008, Shell spilled 280,000 barrels of oil into the region’s groundwater and did not attempt remediation until 2017.¹⁶⁶ Since the cleanup started, sixty more spills have occurred in Ogoniland, spilling an estimated 2,200 barrels of oil.¹⁶⁷ Between 2010 and 2020, Shell only began remediation, an estimated thirty-year process, on eleven percent of the contaminated areas, and has not fully decontaminated any site.¹⁶⁸ Shell hired sixteen firms to remediate the land.¹⁶⁹ Eleven of these firms have no expertise in oil pollution remediation or related areas.¹⁷⁰ In 2016, the Nigerian government launched a program to ensure Ogoni people had drinking water and basic necessities.¹⁷¹ The program has been mostly ineffective.¹⁷² The majority of remediation sites were shut down by May 2020, with some closing because of COVID-19, but most closing prior to the pandemic.¹⁷³ Thousands of Ogoni people do not have access to drinking water and face extreme health consequences from Shell’s refusal to meet the urgent recommendations of the United Nations.¹⁷⁴ Most, if not all, living Ogoni people have

164. U.N. ENV’T PROGRAMME, ENVIRONMENTAL ASSESSMENT OF Ogoniland 10–12 (2011), <https://www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report> [<https://perma.cc/6ATA-AAYG>] (commonly referenced as the UNEP Report).

165. Godin, *supra* note 153; *see also* Maduka & Tobin-West, *supra* note 153, at 1 (discussing a possible relationship between gas-flaring and hypertension).

166. *See* John Vidal, *Shell Oil Spills in the Niger Delta: ‘Nowhere and No One Has Escaped’*, *GUARDIAN* (Aug. 3, 2011, 7:23 AM), <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> [<https://perma.cc/Q2QD-XLLS>]; *Shell to Start Cleaning Up 2008 Nigeria Oil Spills in April, Says Official*, *REUTERS* (Mar. 24, 2017, 12:57 PM), <https://www.reuters.com/article/us-shell-nigeria-spill/shell-to-start-cleaning-up-2008-nigeria-oil-spills-in-april-says-official-idUSKBN16V2AA> [<https://perma.cc/FTN2-G5KW>].

167. *See* Oluwole Ojewale & Alize Le Roux, *Endless Oil Spills Blacken Ogoniland’s Prospects*, *INST. FOR SEC. STUD.* (Mar. 24, 2022), <https://issafrica.org/iss-today/endless-oil-spills-blacken-ogonilands-prospects> [<https://perma.cc/GH72-3UWW>].

168. *See* AMNESTY INT’L, ENV’T RTS. ACTION/FRIENDS OF THE EARTH NIGERIA, FRIENDS OF THE EARTH EUR. & MILIEUDEFENSIE/FRIENDS OF THE EARTH NETH., *NO CLEAN-UP, NO JUSTICE: AN EVALUATION OF THE IMPLEMENTATION OF UNEP’S ENVIRONMENTAL ASSESSMENT OF Ogoniland, NINE YEARS ON 6–7, 9, 11* (2020), <https://www.justice.gov/eoir/page/file/1294376/download> [<https://perma.cc/8YUN-FRZH>].

169. *See* Press Release, Amnesty Int’l UK, Nigeria: Shell Still Failing to Clean Up Pollution in Niger Delta (June 17, 2020, 11:00 PM) (available at <https://www.amnesty.org.uk/press-releases/Nigeria-shell-still-failing-clean-pollution-niger-delta> [<https://perma.cc/5Q5W-36B6>]).

170. *Id.*

171. AMNESTY INT’L ET AL., *supra* note 168, at 15 (“It took more than a year—until December 2016—to establish the new HYPREP [Hydrocarbon Pollution Restoration Project], as a project under the Federal Ministry of Environment, tasked with the implementation of the UNEP report.”).

172. *See* Press Release, *supra* note 169; AMNESTY INT’L ET AL., *supra* note 168, at 7.

173. *See* AMNESTY INT’L ET AL., *supra* note 168, at 7.

174. *See* Press Release, *supra* note 169; AMNESTY INT’L ET AL., *supra* note 168, at 23 (“To date, ‘no households have improved access to clean drinking water’ according to UNEP’s assessment of HYPREP’s progress.”).

experienced egregious pollution for the entirety of their lives.¹⁷⁵ This pollution creates a group condition of life calculated to bring about its physical destruction via the detrimental health impacts discussed above.

The above case studies firmly indicate the need for justice. Whether this justice is delivered by the ICC should be determined by the impacted communities. However, the above case studies prove that the ICC could, jurisdictionally, deliver justice. The harming parties are leaders in plans that intend to destroy Indigenous communities residing on the land they seek to access for resource extraction. The harming parties systematically create environmental harm that scorches the land and is intended to destroy the land protectors, categorically Indigenous people. Though the ICC demands a high level of intent and harm, the case studies describe the requisite harm and intent. The perpetrators are committing ecocide, and accompanying physical violence, that is intended to destroy Indigenous peoples.

IV. VICTIM PERSPECTIVE ON ICC GENOCIDE PROSECUTIONS

The survivor perspective regarding prosecutions in the ICC is of the utmost importance. International law can often focus on international versions of justice and leave out the impacted communities, and unfortunately, legal academia can do the same.¹⁷⁶ In seeking to avoid this pitfall, this Part will assess how the victims of the above crimes would receive the prospect of international criminal prosecution based on litigation history and public commentary. This question is ever complicated. Tribal representatives do not always speak for the entirety of the tribe, nor can tribal coalition representatives speak for all Indigenous people in the coalition. What follows here is an attempt to consider this question and should not be construed as anything but the recognition of a problem and an inadequate attempt to address it.

This Note demonstrates that the special intent necessary for genocide offers a secondary form of justice in addition to the retributive justice that the ICC offers. Retributive justice in the form of prosecutions is important, but prosecutions for genocide also offer the promise of international recognition that communities were targeted for extermination because of prejudice. Prosecutions for genocide offer restorative justice in recognizing that the communities targeted for extermination are distinctive, and that the harms enacted against them were exceptionally harmful.

175. See AMNESTY INT'L ET AL., *supra* note 168, at 11.

176. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745–47 (1989); see, e.g., Brigitte Herremans & Tine Destrooper, *Stirring the Justice Imagination: Countering the Invisibilization and Erasure of Syrian Victims' Justice Narratives*, 15 INT'L J. TRANSITIONAL JUST. 576, 577 (2021) (discussing the marginalization of Syrian victims' experiences in traditional justice narratives).

In proposing that the prosecutions occur for genocide rather than crimes against humanity, the hope is that a form of justice via recognition may also occur. Too often, Indigenous peoples voice their pain into a void without adequate recognition for the harm colonial governments and business systems have expensed to them. By arguing that prosecutions for genocide may be applicable, this Note hopes to offer an outlet for both retributive and symbolic justice to recognize the gravity of harm incurred. In no small part, this Note was inspired by the hope that someday the United States will be recognized as a perpetrator of genocide against Indigenous peoples.

There is evidence that the Indigenous people of Alberta, though not a monolith, may, in general, be favorable to criminal prosecutions, but there is little evidence on favorability for international prosecutions. The Indigenous people of Alberta have repeatedly sued the Canadian government and the Alberta regional government for violations of treaties and human rights due to the continued tar sands.¹⁷⁷ The governments have rebuked these lawsuits, which has led to complicated, expensive, and emotionally tolling legal battles.¹⁷⁸

This indicates that the Nations are receptive to legal remedies for the harm that legally entrench their demands for recognition. However, this does not shed light on how the Nations may feel about international criminal prosecutions. International criminal prosecutions may not offer the version of justice the tribes seek. The coalition of Nations sought international support and recognition by inviting Natural Resources Defense Council (NRDC), a U.S.-based environmental advocacy organization, to Alberta to speak about the tar sands' impact.¹⁷⁹ The communities worked with NRDC to publicize the harm against them and to make their story internationally compelling, including utilizing the support of Archbishop Desmond Tutu and the Dalai Lama to restrict the United States' support for the sands.¹⁸⁰ The Nations' litigation focuses on protecting treaty rights to live, fish, and hunt in the region rather

177. See, e.g., *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2011 ABCA 29, paras. 1, 9 (Can. Alta. C.A.); see also Steph Kwetásel'wet Wood, 'Are You Poor Enough?': *First Nations Face Compounding Financial Hardship When Defending Rights in Court*, NARWHAL (June 12, 2021), <https://thenarwhal.ca/first-nations-canada-indigenous-rights-beaver-lake/> [<https://perma.cc/RL25-683B>]; Nicholas Kusnetz, *Canada's Tar Sands: Destruction So Vast and Deep It Challenges the Existence of Land and People*, INSIDE CLIMATE NEWS (Nov. 21, 2021), <https://insideclimatenews.org/news/21112021/tar-sands-canada-oil/> [<https://perma.cc/7T8B-AL8R>]; c.f. *Lameman v. Alberta*, 2011 ABQB 40, paras. 3–5 (Can. Alta. Sup. Trial Ct.) (suing Alberta for violation of treaty rights caused by various land developments); *Thomas v. Rio Tinto Alcan Inc.*, 2015 BCCA, paras. 4, 22–26 (Can. B.C.C.A.) (suing private operator of a hydroelectric dam for violation of Aboriginal rights caused by water diversion).

178. See, e.g., Wood, *supra* note 177 (discussing fears that "a First Nation must exhaust all the funds it has to operate as a government to assert its rights in the colonial court system"); Kusnetz, *supra* note 177 ("Despite receiving a favorable ruling five years later, the case [between The Beaver Lake Cree Nation and federal and provincial governments] is still awaiting trial, with a court date scheduled for 2024.").

179. See Melissa Denchak, *The Dirty Fight Over Canadian Tar Sands Oil*, NAT. RES. DEF. COUNCIL (Dec. 31, 2015), <https://www.nrdc.org/stories/dirty-fight-over-canadian-tar-sands-oil> [<https://perma.cc/ZCG8-EMM8>].

180. *Id.*

than the criminal nature of the actions. The international advocacy focused primarily on stopping the continued issuance of permits because the production was set to triple by 2030.¹⁸¹ This perhaps indicates that the Nations are uninterested in the retributive justice that international criminal prosecutions offer. Regardless, this Note has evidenced how it could be an option, should the communities choose to utilize it. This Note unequivocally recommends the communities' perspective on justice be the justice that is given to them.

The Indigenous people of the Amazon are favorable to prosecutions in the ICC. In the Amazon, the case for victim-centered justice is more transparent, though facing the contentious issue of who speaks for the communities. Still, in the case of the Amazon, the largest coalition of Brazilian Amazonian leaders hired attorneys to bring a complaint alleging genocide to the ICC, based mainly on the same factors discussed above. It is never recommended to make assumptions about the form of justice victims seek, but if it is acceptable in any situation, this is the situation. Broad coalitions of Indigenous people have repeatedly asked the ICC to intervene and prosecute Bolsonaro for committing genocide against them.

The Ogoni people want prosecutorial justice and would likely be receptive to ICC prosecutions. However, the case of the Ogoni people in the ICC is essentially moot because the ICC cannot assert jurisdiction over Shell executives from the 1990s. The crimes, though still currently having a devastating impact on the Ogoni, occurred before the enactment of the Rome Statute. However, the Ogoni have sued Shell in multiple jurisdictions for the crimes it committed.¹⁸² These legal challenges have only amounted to minor payments and limited efforts to remediate the environment to livable conditions.¹⁸³ The Ogoni people deserve

181. *See id.*

182. *See, e.g., Wiwa v. Royal Dutch Shell: Getting Away with Murder: Shell's Complicity with Crimes Against Humanity in Nigeria*, EARTHRIGHTS INT'L, <https://earthrights.org/case/wiwa-v-royal-dutch-shell/> [https://perma.cc/3RAC-5ZNM] (last visited May 18, 2023); Sandra Laville & Emmanuel Akinwotu, *Nigerians Can Bring Claims Against Shell in UK, Supreme Court Rules*, GUARDIAN (Feb. 12, 2021, 7:55 AM), <https://www.theguardian.com/business/2021/feb/12/nigeria-communities-can-bring-claims-against-shell-uk-supreme-court-rules> [https://perma.cc/9RY3-VY6Y]; Kate Hodal, *Dutch Court Will Hear Widows' Case Against Shell Over Deaths of Ogoni Nine*, GUARDIAN (May 1, 2019, 8:33 AM), <https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague> [https://perma.cc/YM9D-QRVR].

183. *See, e.g., Katie Shay, Shell Accepts Liability for Catastrophic Oil Spills in the Niger Delta*, EARTHRIGHTS INT'L (Aug. 4, 2011), <https://earthrights.org/blog/shell-accepts-liability-for-catastrophic-oil-spills-in-the-niger-delta/> [https://perma.cc/9KGE-PNLA]; Agence-France Presse, *Shell to Pay \$111m Over Decades-Old Oil Spills in Nigeria*, GUARDIAN (Aug. 11, 2021, 7:46 PM), <https://www.theguardian.com/business/2021/aug/12/shell-to-pay-111m-over-decades-old-oil-spills-in-nigeria> [https://perma.cc/F26T-LKUD]; Camillus Eboh & Felix Onuah, *U.N. Slams Shell as Nigeria Needs Biggest Ever Oil Clean-Up*, REUTERS (Aug. 4, 2011, 10:49 AM), <https://www.reuters.com/article/us-nigeria-ogoniland/u-n-slams-shell-as-nigeria-needs-biggest-ever-oil-clean-up-idUSTRE7734MQ20110804> [https://perma.cc/W2UU-S9HL]; *No Clean Up, No Justice: Shell's Oil Pollution in the Niger Delta*, AMNESTY INT'L (June 18, 2020), <https://www.amnesty.org/en/latest/news/2020/06/no-clean-up-no-justice-shell-oil-pollution-in-the-niger-delta/> [https://perma.cc/BAU9-G9M4]; U.N. ENV'T PROGRAMME, *supra* note 164, at 12.

justice in whatever form that may take. Shell deserves to be held accountable for its crimes and remedy the issues it is currently causing in the region. It is unlikely this justice will happen via the ICC, but if it is an option to associate the current harm Shell is enacting on the people due to its lack of remediation with its obvious genocidal intent in the 1990s, then perhaps this option can be explored.

Any form of justice must be survivor-centered. The ICC may not be the preferred form of justice for many impacted communities because the international legal system has historically been hostile to Indigenous people.¹⁸⁴ Despite this, if the survivors choose to pursue the ICC as a preferred form of justice, it should be an accessible route.

CONCLUSION

Governments and corporations regularly use ecocide as a genocidal tool against global Indigenous peoples. This methodology can be prosecuted in the ICC should the impacted communities be receptive to this form of justice and should sufficient evidence exist to prove intent. Ecocide is utilized to destroy Indigenous communities in no small part because of Indigenous peoples' intimate ties to the environment in which they reside. This methodology for destruction is, in certain cases, led by intentional actors, who shield their crimes behind the cloak of corporations, governments, or ambiguity. Still, intentional actors reside within these systems that enact policies and plans to destroy Indigenous people. Extractive industries are particularly involved in these dealings because colonialism and extractive industries thrive when Indigenous people are destroyed. The ICC may not be the holistic solution for justice, but should impacted parties choose to utilize it, this Note evidences that the ICC can be utilized in this way.

184. See Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 739–40 (2006) (explaining that colonialism and imperialism are core to the establishment of the international legal system, and it has operated in a way that reinforces these constructs).