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Fossil Fuel Corporations (“FFCs”) have known about the negative impacts fossil fuel emissions have on the environment since at least the 1970s.<sup>1</sup> Fossil fuel companies, rather than alert the world and adjust their operations, decided to bury this information and develop strategies to continue profiting from the destruction of the environment.<sup>2</sup> For decades, FFCs have been knowingly engaging in practices that directly harm millions of people. Specifically, they have spent billions of dollars<sup>3</sup> on actively marketing and advertising against climate change policy and initiatives, financial contributions to campaigns, and anti-climate trade groups such as the American Petroleum Institute.<sup>4</sup>

In this paper I will argue that the corporate officers of FFCs that have engaged and also continue to engage in a course of conduct which hinders global systemic climate change reform should be held accountable for crimes against humanity in the International Criminal Court (“ICC”).

Part I of the note will discuss the harmful role international FFCs play in climate change, as well as their actions to hinder policies aimed at combating climate change. Part II will show that the decisions of executive officers satisfy the elements to hold someone accountable for crimes against humanity. Part III will discuss the limitations of the Rome Statute which only

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<sup>1</sup> *Exxon and the Oil Industry Knew About Climate Change*, Greenpeace, <https://www.greenpeace.org/usa/global-warming/exxon-and-the-oil-industry-knew-about-climate-change/>.

<sup>2</sup> Sara Jerving et al., *What Exxon Knew About the Earth’s Melting Arctic*, Los Angeles Times (Oct. 9, 2015), <https://graphics.latimes.com/exxon-arctic/>.

<sup>3</sup> InfluenceMap, *Big Oil’s Real Agenda on Climate Change: How the Oil Majors Have Spent \$1bn Since Paris on Narrative Capture and Lobbying on Climate 2* (2019).

<sup>4</sup> *Id.* at 3-4.

permits individuals to be tried in the ICC, but not corporations, as well as other international precedent for criminally prosecuting corporations and their officers. Part IV discusses what holding FFCs accountable for crimes against humanity would actually look like, including how to identify which executives should be held accountable.

## PART I

### **Climate Change**

Climate change is often seen and referred to as a mounting danger – something lingering below the surface, perhaps growing in strength, but not yet revealing itself or its devastating impacts. This is a misguided and dangerous avoidance of the reality that the consequences of climate change are already here, and they are calamitous. That climate change can sometimes seem intangible is a challenge that has gotten in the way of arriving at a universal concurrence that combating it should be the world’s foremost priority. Further muddying the water are factors that amplify the impact of climate change such as increasing population growth, poverty, poor governance, and conflict. There are, however, observable, tangible examples that show the impact of climate change. Specifically, climate change experts have worked to quantify the effects of natural disasters and air pollution’s harmful impact on the human body and overall lifespan. While many States, International Organizations (“IOs”), and Non-Governmental Organizations (“NGOs”) have accepted that dramatic action is needed to avoid irreversible damage, efforts to effectuate necessary action are systemically and deliberately stymied by FFCs.

In 2008, over 20 million people had been displaced by climate-related natural disasters, and natural disasters had more than doubled over the previous two decades.<sup>5</sup> Ocean surface temperatures have risen due to climate change because they have absorbed over “93% of the

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<sup>5</sup> Frank Laczko & Christine Aghazarm, *Migration, Environment, and Climate Change: Assessing the Evidence*, International Organization for Migration, 9 (2009), [https://publications.iom.int/system/files/pdf/migration\\_and\\_environment.pdf](https://publications.iom.int/system/files/pdf/migration_and_environment.pdf).

excess heat from greenhouse gas emissions” for over four decades.<sup>6</sup> Heightened ocean surface temperatures are leading to stronger hurricane development, increasing precipitation, and intensity.<sup>7</sup> Hurricane Sandy alone had a death toll of 285<sup>8</sup> and caused \$62 billion in damage in the U.S. and \$315 million in the Caribbean.<sup>9</sup> The 2017 hurricane season displaced approximately 3 million people in sixteen countries.<sup>10</sup> Heat absorbed by the ocean also causes the water to expand as it becomes warmer, creating a rise in the sea level.<sup>11</sup> The rising sea levels have contributed to the displacement of millions, in some cases swallowing property and farm land. In Myanmar, 1,500 residents had to move their homes due to rising water levels brought about by climate change.<sup>12</sup> In Mozambique, Tropical Cyclone Idai displaced 146,000 people and destroyed 1 million acres of crops, furthering food insecurity.<sup>13</sup> Two of nine islands in the nation of Tuvalu are almost completely underwater, threatening the livelihood of its citizens.<sup>14</sup> The increasing amount of greenhouse gas emissions contribute to food insecurity and a rising prevalence of disease in marine food sources.<sup>15</sup> Climate change has also amplified the strength of

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<sup>6</sup> *Issues Brief: Ocean Warming*, International Union for Conservation of Nature (Nov. 2017), [https://www.iucn.org/sites/dev/files/ocean\\_warming\\_issues\\_brief\\_final.pdf](https://www.iucn.org/sites/dev/files/ocean_warming_issues_brief_final.pdf) <https://www.iucn.org/resources/issues-briefs/ocean-warming>.

<sup>7</sup> *Hurricanes and Climate Change*, Union of Concerned Scientists (June 25, 2019), <https://www.ucsusa.org/resources/hurricanes-and-climate-change>.

<sup>8</sup> Tom McCarthy, *'Sandy' to be Retired as Hurricane Name by World Meteorological Organization*, The Guardian (Apr. 12, 2013), <https://www.theguardian.com/world/2013/apr/12/hurricane-sandy-name-retire>.

<sup>9</sup> Associated Press, *What We Know About Superstorm Sandy A Month Later*, The Weather Channel (Nov. 29, 2012), <https://weather.com/news/news/superstorm-sandy-one-month-20121129>.

<sup>10</sup> *Global Report on Internal Displacement*, Internal Displacement Monitoring Center, 43 (2018), <https://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf>.

<sup>11</sup> *Sea Level Rise*, National Geographic, <https://www.nationalgeographic.org/encyclopedia/sea-level-rise/> (last visited April 2, 2020).

<sup>12</sup> Rozanna Latiff & Zaw Naing Oo, *Rising Sea Levels Put Myanmar's Villages on Frontline of Climate Change*, Reuters (Feb. 26, 2020), <https://www.reuters.com/article/us-climate-change-myanmar-erosion/rising-sea-levels-put-myanmars-villages-on-frontline-of-climate-change-idUSKCN20L040>.

<sup>13</sup> John Podesta, *The Climate Crisis, Migration, and Refugees*, Brookings (July 25, 2019), <https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>.

<sup>14</sup> Eleanor Ainge Roy, *'One Day We'll Disappear': Tuvalu's Sinking Islands*, The Guardian (May 16, 2019), <https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change>.

<sup>15</sup> *Issues Brief: Ocean Warming*, International Union for Conservation of Nature (Nov. 2017), [https://www.iucn.org/sites/dev/files/ocean\\_warming\\_issues\\_brief\\_final.pdf](https://www.iucn.org/sites/dev/files/ocean_warming_issues_brief_final.pdf) <https://www.iucn.org/resources/issues-briefs/ocean-warming>.

heat waves which create excess deaths, such as 70,000 in Europe alone during the heat wave of 2003.<sup>16</sup>

Tragically, a 2020 Greenpeace report states that air pollution generated by burning fossil fuels is responsible for approximately 4.5 million premature deaths every year.<sup>17</sup> The Greenpeace report calculated adjusted levels of fine particles, greenhouse gases, and nitrogen dioxide due to fossil-fuel related air pollution in tandem with concentrated-response functions to arrive at its determinations.<sup>18</sup> Concentrated-response functions relate a pollutant concentration to the response or impact of that pollutant.<sup>19</sup> The study further calculated that, on average, fossil-fuel related air pollution was responsible for the following in 2018 alone: 16.1 million children living with asthma, including 4 million new cases; 8.3 million asthma related emergency room visits; and 2 million preterm births.<sup>20</sup>

While their estimations are slightly more conservative, the World Health Organization (“WHO”) still projects that climate change will cause approximately 250,000 deaths per year between 2030 and 2050.<sup>21</sup> WHO also states that direct damage costs to health will be between \$2-4 billion by 2030.<sup>22</sup>

A large portion of the international community has thankfully come to recognize the importance of taking dramatic actions to curb the progress of climate change. The Secretary General of the United Nations (“UNSG”) reports that global temperature rise must be limited to

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<sup>16</sup> *Climate Change and Health*, World Health Organization (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

<sup>17</sup> Aidan Farrow et al., *Toxic Air: The Price of Fossil Fuels*, Greenpeace 1 (2020), <https://storage.googleapis.com/planet4-southeastasia-stateless/2020/02/21b480fa-toxic-air-report-110220.pdf>.

<sup>18</sup> *Id.* at 26.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Climate Change and Health*, World Health Organization (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

<sup>22</sup> *Id.*

1.5 degrees Celsius “by the end of the century to avoid irreversible and catastrophic impacts.”<sup>23</sup> In order to achieve this ambitious yet necessary goal, carbon dioxide emissions need to be cut by “45 percent by 2030 and reach net zero in 2050.”<sup>24</sup> These goals are even more ambitious than those proposed in the Paris Climate Agreement. To achieve these goals, the UNSG instructs that the way forward is to decarbonize large economic sectors such as travel and energy; focus on creating new, climate resilient infrastructure while replacing old infrastructure; and implement fossil fuel taxes, (also known as a carbon tax).<sup>25</sup>

The United Nations’ (“UN”) proposed climate change policies will not come to fruition without implementation at the nation-state level and holding FFCs accountable. Many of the major emitters of fossil fuels are simply not taking the actions necessary to keep global warming to 1.5 Celsius.<sup>26</sup> The U.S. and Russia, the second and fourth largest producers of carbon dioxide respectively,<sup>27</sup> have climate change policies that are woefully inadequate. Russia is on track to have a fourteen percent increase in carbon dioxide emissions by 2030,<sup>28</sup> while the U.S., beyond submitting formal notification to the UN to withdraw from the Paris Agreement,<sup>29</sup> is projected to emit twelve times the amount of carbon dioxide than was planned in the 2009 Clean Power Plan.<sup>30</sup> China is the largest emitter of carbon dioxide,<sup>31</sup> and while the country is on track to meet

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<sup>23</sup> *Report of the Secretary General on the 2019 Climate Action Summit and the Way Forward in 2020*, United Nations 5 (2019), [https://www.un.org/en/climatechange/assets/pdf/cas\\_report\\_11\\_dec.pdf](https://www.un.org/en/climatechange/assets/pdf/cas_report_11_dec.pdf).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 9-10.

<sup>26</sup> Kieran Mulvaney, *Climate Change Report Card: These Countries are Reaching Targets*, National Geographic (Sept. 19, 2019), <https://www.nationalgeographic.com/environment/2019/09/climate-change-report-card-co2-emissions/>.

<sup>27</sup> *Each Country’s Share of CO2 Emissions*, Union of Concerned Scientists (updated Oct. 10, 2019), <https://www.ucsusa.org/resources/each-country-s-share-co2-emissions>.

<sup>28</sup> Climate Action Tracker, <https://climateactiontracker.org/countries/russian-federation/current-policy-projections/> (last visited April 2, 2020).

<sup>29</sup> Michael Pompeo, *On the U.S. Withdrawal from the Paris Agreement*, U.S. Department of State (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>.

<sup>30</sup> *Trump Administration Rolls Back the Clean Power Plan*, Yale Environment 360 (Aug. 21, 2018), <https://e360.yale.edu/digest/the-trump-administration-rolls-back-the-clean-power-plan>.

<sup>31</sup> *Each Country’s Share of CO2 Emissions*, Union of Concerned Scientists (updated Oct. 10, 2019), <https://www.ucsusa.org/resources/each-country-s-share-co2-emissions>.

its target set in the Paris Agreement, this goal still falls short of the 1.5 degrees Celsius<sup>32</sup> target set by the UNSG.

There is, however, a much more ominous force hindering the international community, specifically the United States, from fully combating climate change for the existential threat that it is – billions of dollars spent by some of the world’s largest FFCs to control the public and political narrative on climate change. Historically, U.S. policy has had a significant impact on the decisions of other nations, so it is no surprise that FFCs and their lobbying groups would choose to focus their influence on squashing any of its environmentally friendly initiatives. Some of the larger FFCs have spent over 3.6 billion on advertisements over the past three decades to deceptively promote fossil fuel emitting natural gas as a safe alternative to coal.<sup>33</sup> A 2019 report shows that, in just over a year, ExxonMobil had spent 9.6 million on political Facebook advertisements in the U.S. alone<sup>34</sup> that promote initiatives and petitions aimed at protecting their offshore drilling and increased fossil fuel production.<sup>35</sup> Exxon, Shell, British Petroleum (“BP”), Chevron, and Total, together have spent over \$1 billion on misleading marketing and lobbying to influence climate change policy.<sup>36</sup> FFCs, through Facebook and other social media platforms, employ targeted messaging campaigns against legislation aimed at combating climate change by restricting oil and natural gas projects.<sup>37</sup> For example, Colorado Proposition 112, an initiative

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<sup>32</sup> Kieran Mulvaney, *Climate Change Report Card: These Countries are Reaching Targets*, National Geographic (Sept. 19, 2019), <https://www.nationalgeographic.com/environment/2019/09/climate-change-report-card-co2-emissions/>.

<sup>33</sup> Emily Holden, *How the Oil Industry has Spent Billions to Control the Climate Change Conversation*, The Guardian (Jan. 8, 2020), <https://www.theguardian.com/business/2020/jan/08/oil-companies-climate-crisis-spending>.

<sup>34</sup> InfluenceMap, *Social Media and Political Capture 1* (2019).

<sup>35</sup> Facebook Ad Library, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&impression\\_search\\_field=has\\_impressions\\_lifetime&q=Offshore%20drilling%20is%20important%20to%20maintaining%20America%27s%20position%20as%20the%20world%27s%20231%20energy%20producer](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&q=Offshore%20drilling%20is%20important%20to%20maintaining%20America%27s%20position%20as%20the%20world%27s%20231%20energy%20producer) (last visited April 2, 2020).

<sup>36</sup> InfluenceMap, *Big Oil’s Real Agenda on Climate Change: How the Oil Majors Have Spent \$1bn Since Paris on Narrative Capture and Lobbying on Climate at 2*.

<sup>37</sup> *Id.* at 18.

directing new oil and gas projects to be a minimum distance of 2,500 feet from occupied buildings, was eventually defeated<sup>38</sup> with support from FFCs' advertisements.<sup>39</sup>

Perhaps the most damning aspect of FFCs impact on the environment is that the industry has known about the catastrophic damage its product would cause for over sixty years. Experts from the University of Bristol, George Mason University, and Harvard University collaborated to expose FFCs efforts to mislead the American public on the warming effects of greenhouse gases.<sup>40</sup> The work explains that Exxon's scientists knew the danger presented to the environment by the industry's polluting products since the 1950s.<sup>41</sup> Furthermore, Exxon internal memos illustrate the company's strategy to cast doubt on climate science and manipulate the media to support their narrative.<sup>42</sup>

There are observable, tangible examples that show the impact of climate change. Climate change experts have worked to quantify the effects of natural disasters and air pollution's harmful impact on the human body and overall lifespan, resulting in hundreds of thousands of displaced people and potentially millions of premature deaths. While it is promising that many states, IOs, and NGOs have accepted that dramatic action is needed to avoid irreversible damage, FFCs systemic and deliberate action to impede efforts to effectuate necessary action are clear and quantifiable and should be subject to international criminal liability.

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<sup>38</sup> Ballotpedia,

[https://ballotpedia.org/Colorado\\_Proposition\\_112,\\_Minimum\\_Distance\\_Requirements\\_for\\_New\\_Oil,\\_Gas,\\_and\\_Fracking\\_Projects\\_Initiative\\_\(2018\)](https://ballotpedia.org/Colorado_Proposition_112,_Minimum_Distance_Requirements_for_New_Oil,_Gas,_and_Fracking_Projects_Initiative_(2018)) (last visited April 2, 2020).

<sup>39</sup> Facebook Ad Library,

[https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&impression\\_search\\_field=has\\_impressions\\_lifetime&q=Proposition%20112%20would%20effectively%20ban%20oil%20and%20natural%20gas%20development%20in%20Colorado%20and%20eliminate%20as%20many%20as%20147%20000%20jobs.%20On%20November%206th%20C%20vote%20NO%20on%20Proposition%20112!](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&q=Proposition%20112%20would%20effectively%20ban%20oil%20and%20natural%20gas%20development%20in%20Colorado%20and%20eliminate%20as%20many%20as%20147%20000%20jobs.%20On%20November%206th%20C%20vote%20NO%20on%20Proposition%20112!) (last visited April 2, 2020).

<sup>40</sup> John Cook et al., *America Misled: How the Fossil Fuel Industry Deliberately Misled Americans About Climate Change*, George Mason University Center for Climate Change Communication (2019), [https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America\\_Misled.pdf](https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America_Misled.pdf)

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* at 7-8.

## PART II

### **FFCs Perpetration of Crimes Against Humanity**

As long as there is a successful impetus for the ICC to exercise jurisdiction, FFCs' activities satisfy the elements of the crime against humanity of other inhumane acts.<sup>43</sup> FFC executives take actions which cause and will continue to cause serious physical and mental suffering with a widespread and systemic impact on the world's civilian population, all while maintaining full knowledge and awareness of the detrimental consequences.

An individual can be held accountable for crimes against humanity if, with knowledge of the "attack," they intentionally committed inhumane acts which cause great suffering, or serious mental or physical injury<sup>44</sup> as part of a widespread or systematic attack directed against any civilian population.<sup>45</sup> The ICC provides the following elements for the crime against humanity of other inhumane acts:

(1) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (2) such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; (3) the perpetrator was aware of the factual circumstances that established the character of the act; (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>46</sup>

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<sup>43</sup> Rome Statute, Art. 7 § 1(k).

<sup>44</sup> Id.

<sup>45</sup> Id. § 1.

<sup>46</sup> Elements of Crimes, International Criminal Court 12 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

The Trial Chamber of the ICC has previously clarified that the crime of inhumane acts was included and intended to be used as a “residual clause for serious acts which are not otherwise” included within crimes against humanity.<sup>47</sup> While it may initially seem more intuitive to prosecute FFC executives under the crime against humanity of murder, case law supports the notion that it is difficult to find someone guilty of this crime unless the individual being prosecuted committed the act themselves or clearly ordered the killing of a person,<sup>48</sup> and that the death occurred without a lawful justification<sup>49</sup> or resulted from an unlawful act.<sup>50</sup>

For these reasons, short of amending the statute, the actions of FFC executives most reasonably fall under other inhumane acts. There is substantial support for the principle that the Prosecutor can prosecute peacetime environmental destruction.<sup>51</sup> Specifically, the drafters of the Rome Statute deliberately removed the requirement of a nexus between crimes against humanity and armed conflict to enable liability for criminal acts that take place during times of both war and peace.<sup>52</sup> In a 2016 policy paper, far beyond speculation about whether environmental crimes can be considered crimes against humanity, the Office of the Prosecutor of the ICC declared its intent to prioritize crimes that “result in...the destruction of the environment” moving forward.<sup>53</sup>

Concerning the first element, one can instinctually assume that there will be some difficulty in quantifying great suffering, and while serious physical and mental injury may be a slightly more tangible standard, case law is needed to establish precedent and standards. Previous

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<sup>47</sup> Prosecutor v. Bagosora, et al., Case No. ICTR-98-41-T, Judgement and Sentence ¶ 2218 (Dec. 18, 2008), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-41/trial-judgements/en/081218.pdf>.

<sup>48</sup> Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgement and Sentence ¶ 558 (Dec. 7, 2007), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-74/trial-judgements/en/071207.pdf>.

<sup>49</sup> *Id.*

<sup>50</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement ¶ 589 (Sept. 2, 1998).

<sup>51</sup> E.g. Caitlin Lambert, *Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?*, *Leiden Journal of International Law*, 30 (2017), 707-729.

<sup>52</sup> *Id.*

<sup>53</sup> International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, ¶ 41 (2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

tribunals have clarified that the harm must result in “grave and long-term disadvantage to a person's ability to lead a normal and constructive life.”<sup>54</sup> Precedent dictates that sexual violence,<sup>55</sup> mutilation, forced prostitution, degrading treatment, and overall serious physical and mental injury, among other acts, can satisfy this element.<sup>56</sup> Regarding injury to mental health, the precedent to hold someone accountable for third party mental harm was established in *Prosecutor v. Kayishema et al.* The Chamber found that an individual who caused civilians to witness the murder of their friends or witness them be severely injured could satisfy a serious mental suffering standard as long as “the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.”<sup>57</sup> Further, the Trial Chamber held that gross acts of sexual violence on an individual was an attack on the human dignity of an entire community and caused serious mental suffering.<sup>58</sup>

FFC executives are fully aware that their acts will cause serious physical and mental suffering. As shown above, climate change causes a wide range of serious physical injury from asthma in children to millions of premature deaths. Such injuries unquestionably result in “grave and long-term disadvantage to a person's ability to lead a normal and constructive life.”<sup>59</sup> Beyond the direct mental impact of those effected by climate change as well as showing that an individual’s physical injuries can then cause mental harm, there is precedent that third parties can establish mental harm caused by executive officers of FFCs. In this regard, the actions of FFC executives have forced civilians to watch their children suffer from asthma unnecessarily and be

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<sup>54</sup> Prosecutor v. Krstic, Case No.IT-98-33-T, Judgement ¶ 513 (Aug. 2, 2001).

<sup>55</sup> Prosecutor v. Akayesu, Case No.ICTR-96-4-T, Judgement ¶ 688 (Sept. 2, 1998), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

<sup>56</sup> Prosecutor v. Kvočka et al., Case No.IT-98-30/1-T, Judgement ¶ 208 (Nov. 2, 2001), <https://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>.

<sup>57</sup> Prosecutor v. Kayishema, et al., Case No.ICTR-95-1-T, Judgement ¶ 153 (May 21, 1999), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-95-1/trial-judgements/en/990521.pdf>.

<sup>58</sup> Prosecutor v. Kajelijeli, Case No.ICTR-98-44A-T, Judgement and Sentence ¶ 936 (Dec. 1, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf>.

<sup>59</sup> Prosecutor v. Krstic, Case No.IT-98-33-T, Judgement ¶ 513 (Aug. 2, 2001).

rushed to the emergency room, and see friends and family die prematurely because of emissions created by the FFCs product. In this regard, FFC executives are fully aware that their actions will cause serious physical and mental suffering and are reckless as to whether such suffering would result, satisfying the standard set forth in *Kayishema*.

Next, the act must be of a character similar to other acts referred to in article 7, paragraph 1, of the Rome Statute.<sup>60</sup> Some of the other acts listed are murder, extermination, enslavement, and severe deprivation of physical liberty.<sup>61</sup> Ecocide, the deliberate decimation of the environment and its species, was initially considered during the original drafting of the Rome Statute.<sup>62</sup> That damaging the environment was at one time under consideration to be the fifth crime against peace<sup>63</sup> is a starting point to support the seriousness of the harmful impact of climate change. Furthermore, as discussed above, millions of civilians are dying prematurely due to fossil fuel emissions, and the deliberate interference by FFC executives with progress that would stop people from dying is tantamount to murder. Finally, less wealthy nations more frequently and directly feel the impacts of climate change, drawing similarities to the crime of persecution.

The third and fourth elements of the crime establish the required *mens rea* to make a showing of other inhumane acts. The Rome Statute states that “‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>64</sup> While and individual does not need to “intend to discriminate on one of the enumerated grounds...” they must at a minimum know that their actions are “part of a widespread or systematic attack

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<sup>60</sup> Elements of Crimes, International Criminal Court 12 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>61</sup> Rome Statute, Art. 7.

<sup>62</sup> Natasha Lennard, *Ecocide Should be Recognized as a Crime Against Humanity But We Can't Wait for The Hague to Judge*, The Intercept (Sept. 24, 2019), <https://theintercept.com/2019/09/24/climate-justice-ecocide-humanity-crime/>.

<sup>63</sup> Anja Gauger et al., *Ecocide is the Missing 5th Crime Against Peace*, Human Rights Consortium 11 (2012), [https://sas-space.sas.ac.uk/4830/1/Ecocide\\_research\\_report\\_19\\_July\\_13.pdf](https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf).

<sup>64</sup> Rome Statute, Art. 30 § 3.

against civilians....”<sup>65</sup> In other words, an individual satisfies the *mens rea* of crimes against humanity if they understand and are aware of “the overall context of [their] act.”<sup>66</sup>

To make a showing for the crime against humanity of other inhumane acts, an individual’s conduct must have been committed as part of a widespread or systematic attack directed against a civilian population. A widespread and systemic attack does not require the use of armed or military force. Rather, an attack against a civilian population “is understood to mean a course of conduct involving the multiple commission of acts... against any civilian population, pursuant to or in furtherance of...[an] organizational policy to commit such attack.”<sup>67</sup>

Widespread has been clarified to mean that the attack is of a large scale reaching many victims,<sup>68</sup> while systemic describes the organized nature of an attack.<sup>69</sup>

FFCs have been aware of the harmful impact their product and actions have on the environment and people’s lives for decades. Equipped with this knowledge, FFC executive officers deliberately implemented a corporate strategy aimed at misleading the public by spending billions on marketing and lobbying to hinder progressive climate change policy. FFC executive’s actions are undeniably widespread, as some estimates claim that fossil fuel emissions are responsible for 4.5 million premature deaths a year. Even the most conservative estimates by WHO, calculate emission being responsible for roughly 250,000 annually. Furthermore, the FFCs’ strategy to combat climate change initiatives is the epitome of systematic – pervading their influence into social media and governments in order to distort climate science and spending millions to ensure the failure of any legislative measure which might hurt their profits.

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<sup>65</sup> Prosecutor v. Ndingabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence ¶ 478 (July 15, 2004), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-71/trial-judgements/en/040715.pdf>.

<sup>66</sup> Prosecutor v. Kayishema et al., Case No. ICTR-95-1-T, Judgement ¶ 133 (May 21, 1999), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-95-1/trial-judgements/en/990521.pdf>.

<sup>67</sup> Elements of Crimes, International Criminal Court 5 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>68</sup> Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence ¶ 871 (Dec. 1, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf>.

<sup>69</sup> Id. at ¶ 872.

FFC executives take actions which cause serious physical and mental suffering with a widespread and systemic impact on the world's civilian population, all while maintaining full knowledge and awareness of the detrimental consequences. FFC executive's actions clearly satisfy the elements of crimes against humanity and, absent the ability to hold corporations liable as legal persons, the ICC Office of the Prosecutor should prioritize their prosecution.

### Part III

#### **Corporate Liability Under the Rome Statute**

The most practical reason for holding FFC executives liable for crimes against humanity rather than corporations is the immediate need for accountability. The Rome Statute creating the ICC came into force July 1, 2002. Article twenty-five provides that the "Court shall have jurisdiction over natural persons...."<sup>70</sup> Therefore, absent an amendment to the Rome Statute, the ICC can only prosecute individuals, and there remains a significant jurisdictional road-bump in its ability to hold corporations accountable for crimes against humanity. For this reason, the most immediate and logical path forward is for the ICC to begin prosecuting executive officers of FFCs. Corporate criminal liability was deliberately left out of the Rome Statute, and except for a recent Special Tribunal for Lebanon ("STL") decision there is no precedent for holding corporations criminally liable. Furthermore, a division persists over whether international corporations can even be held civilly liable for torts. There are also, however, significant obstacles to prosecuting executive officers of FFCs. Specifically, there is limited precedent in the ICC for prosecuting individual executive officers; the ICC is intended to be a court of last resort; and there is significant resistance to holding FFC executives criminally liable both in the ICC and in nation-states.

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<sup>70</sup> Rome Statute, Art. 25 § 1.

The Rome Statute, beyond permitting the ICC to charge an executive officer through either individual<sup>71</sup> or superior responsibility,<sup>72</sup> provides ample verbiage to allow for the prosecution of executive officers of FFCs. The article provides that the commission of a crime can be done: “as an individual, jointly with another or through another person;” by anyone that “orders, solicits, or induces” the commission or attempted commission of a crime; by anyone that “aids, abets, or otherwise assists in its commission or attempted commission, including providing the means for its commission;” or by someone that “in any other way contributes” to a crime or even an attempted crime by a group with a common purpose.<sup>73</sup> While there is no jurisdictional restriction to prosecuting individual corporate officers, the same cannot be said about corporations themselves.

There continues to be a split over whether corporations can be held criminally liable in international courts such as the ICC. Following World War Two, the German corporations IG Farben and Krupp faced criminal charges for their complicity in war crimes perpetrated by the Nazi Party. The tribunals decisively determined that corporations should not be subject to criminal liability because “corporations act through individuals....”<sup>74</sup> During the development of the ICC, the committee rejected a French proposal that would enable the court to have jurisdiction over corporations if a natural person in a position of control over the corporation had been convicted of a charged crime.<sup>75</sup> The committee’s rejection of the French proposal seems to support to the guiding principle on the side of the argument against corporate responsibility that

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* Art. 28.

<sup>73</sup> *Id.* Art. 25.

<sup>74</sup> Law Reports of Trials of War Criminals, The U.N. War Crimes Commission, Volume X, 52 (1949), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-10.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf).

<sup>75</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Meetings of the Committee of the Whole*, 1st Meeting, U.N. Doc. A/Conf.183/C.1/SR.1 (Vol. II) ¶ 33 (June 15- July 17, 1998), [https://legal.un.org/docs/?path=../diplomaticconferences/1998\\_icc/docs/english/vol\\_2/a\\_conf183\\_c1\\_sr1.pdf&lang=EF](https://legal.un.org/docs/?path=../diplomaticconferences/1998_icc/docs/english/vol_2/a_conf183_c1_sr1.pdf&lang=EF).

there is “no criminal responsibility which [can]not be traced back to individuals.”<sup>76</sup> On the other side of the coin is the argument to enable corporate liability in international criminal law. In 2016, the STL, by entering a conviction for contempt against the Akhbar Beirut Corporation, is the first international criminal tribunal to reach a final conviction for a corporation.<sup>77</sup> The STL expressed that limiting criminal liability only to individuals within a corporation may result in “unacceptable impunity for criminal actions.”<sup>78</sup> Relevant considerations regarding corporate accountability persist, primarily how to impose criminal punishment on a legal entity. Corporate punishment would likely be in the form of fines and, as discussed below, fines imposed on the wealthiest entities the world has ever seen would barely serve as a deterrent, if at all, and likely be disregarded as a business cost. While the STL precedent may represent the beginning of a growing trend to prosecute corporations under international criminal law, penalties would likely be ineffective and insufficient, and there is international agreement that immediate, drastic action is necessary to combat climate change – humanity simply does not have the luxury of time to wait for developing international legal precedent.

There are multiple avenues to initiate the investigation into FFC executive officers. The Prosecutor can receive referrals from a member-state party<sup>79</sup> and the UN Security Council,<sup>80</sup> and the Prosecutor may also act on its own to initiate investigations, *proprio motu*, once it has received authorization from Pre-Trial Chambers.<sup>81</sup> The executive officers of many FFCs are U.S. citizens, and the U.S. is not a member-state of the Rome Statute. While the non-member status of

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<sup>76</sup> Wouter Vandenhoe, *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime*, 85 (2015).

<sup>77</sup> Matthew Gillett, *Testing the Limits of the Law Against Those Who Test the Tribunal's Limits*, J Int Criminal Justice (2017) 15 (4): 775.

<sup>78</sup> In the Case Against New TV S.A.L. and Karma Mohamed Tahsin alKhayat, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 83 (Special Trib. for Leb. Oct. 2, 2014), [https://www.stl-tsl.org/crs/assets/Uploads/20141002\\_F0012\\_PUBLIC\\_AP\\_Dec\\_on\\_InteLoc\\_Appl\\_Jurisdic\\_Cont\\_Proceed\\_EN\\_AR\\_FR\\_Joomla.pdf](https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf).

<sup>79</sup> *Id.* Art. 14.

<sup>80</sup> *Id.* Art. 13.

<sup>81</sup> *Id.* Art. 15 § 3.

the U.S. and other nations such as Saudi Arabia and Iran presents a significant jurisdictional hurdle – discussed further below – the alleged crime need only have been committed within the territory of a member-state for the ICC to have jurisdiction.<sup>82</sup> Given the far reaching impact of FFCs’ activities on the environment, any member-state with sufficient supportive documentation<sup>83</sup> of crimes committed in their territory by any other state, member or not, may refer a situation to the Prosecutor.

There is ICC precedent for prosecuting an individual primarily for their capacity as executive officer, albeit also serving as a political official. In 2013, the ICC began the trial of Joshua Arap Sang for crimes against humanity in connection with attacks carried out in Kenya between 2007-2008 following the results of the country’s presidential election.<sup>84</sup> After the Prosecutor submitted a request for authorization pursuant to article 15,<sup>85</sup> the ICC pre-trial chamber found sufficient grounds to charge Sang, radio personality and head of operations at Kass FM in Nairobi,<sup>86</sup> with the crimes against humanity of murder, forcible transfer, and persecution organized meetings.<sup>87</sup> He allegedly used his access as a broadcaster to inflame the violent atmosphere in Kenya by organizing meetings, fanning violence, and broadcasting fake news.<sup>88</sup> The majority of the Trial Chamber, with one dissenting judge, terminated the case for insufficient evidence, although one judge acknowledged that the weakness in the prosecution’s case may be the result of witness interference and political meddling.<sup>89</sup> While this case did not

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<sup>82</sup> *Id.* Art. 12 § 2.

<sup>83</sup> *Id.* Art. 14 § 2.

<sup>84</sup> Alleged Crimes, International Criminal Court, <https://www.icc-cpi.int/kenya/rutosang/pages/alleged-crimes.aspx> (last visited April 3, 2020).

<sup>85</sup> Case Information Sheet, International Criminal Court, <https://www.icc-cpi.int/CaseInformationSheets/RutoSangEng.pdf> (last visited April 3, 2020).

<sup>86</sup> Joshua Arap Sang, American Bar Association-International Criminal Court Project, <https://www.aba-icc.org/cases/case/the-prosecutor-v-ruto-and-sang/> (last visited April 3, 2020).

<sup>87</sup> *Id.*

<sup>88</sup> Alleged Crimes, International Criminal Court, <https://www.icc-cpi.int/kenya/rutosang/pages/alleged-crimes.aspx> (last visited April 3, 2020).

<sup>89</sup> *Ruto and Sang case: ICC Trial Chamber V(A) Terminates the Case Without Prejudice to Re-Prosecution in Future*, International Criminal Court (April 5, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1205>.

conclude with the conviction of an executive officer it shows that the ICC is willing to prosecute executive officers and also provides lessons learned, specifically the importance of strong evidence and available witnesses.

While there is developing precedent for prosecuting executive officers for crimes against humanity, a significant remaining jurisdictional issue is that the ICC is meant to be a court of last resort. The Rome Statute begins by clarifying that the ICC is meant to be “complementary to national criminal jurisdictions.”<sup>90</sup> The ICC is meant to be utilized as a court of last resort when grave human rights offenses cannot be addressed by the courts in the state that would have had jurisdiction. When considering the totality of circumstances surrounding FFCs’ impact on the environment, the urgent need to take significant action, and the absence of universally implemented binding fossil fuel reduction legislation – specifically in the largest producing states – the lack of accountability for climate change should satisfy the ICC’s complementary standard.

The dilution of corporate liability coupled with the urgency of climate change satisfies the ICC’s “last resort” standard. While there is a growing trend of bringing civil lawsuits against corporations for climate change<sup>91</sup> any damages or settlement is likely to be insignificant, and ineffective in changing behavior. Furthermore, the decision in *Kiobel v. Royal Dutch Petroleum* dealt a significant blow to holding corporations tortuously liable under the Alien Tort Statute (“ATS”).<sup>92</sup> The Court held that nation-state legislation and jurisdiction are inherently not intended to proscribe to extraterritorial conduct.<sup>93</sup> This presumption against extraterritorial application of the ATS serves to significantly limit the scope of lawsuits victims of human rights violations can bring against corporations. Therefore, even if there were laws in place to hold FFC

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<sup>90</sup> Rome Statute, Art. 1.

<sup>91</sup> Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, Grantham Research Institute on Climate Change and the Environment (2019), [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf).

<sup>92</sup> *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).

<sup>93</sup> *Id.* at 115.

executives accountable, charges could only be brought against U.S. citizens. While the decision is local to the U.S., it is not a novel concept that local nation-state precedent influences international law, and *vice versa*, especially that which is set in the Supreme Court. The Restatement (Third) of Foreign Relations explains that international law develops from the law of the international community, and “results from a general practice of states followed by them from a sense of legal obligation.”<sup>94</sup>

The ICC, due to the urgency of climate change and a brew of other circumstances, has become a court of last resort, and as such holds the responsibility of developing and strengthening the precedent of holding corporate executives accountable for crimes against humanity. Many of the largest FFCs are state owned, including Saudi Aramco, National Iranian Oil Co., and PetroChina. While there may be a means of civil recourse, however limited, criminal liability within the state of state-owned corporations is facially contradictory – if the state had laws barring the activities of the FFCs, state owned FFCs would not exist. Finally, at least half of the G20 nations are not on track to meet their emission targets,<sup>95</sup> and the U.S. has simply withdrawn from the Paris Agreement all together. At a 2018 UN Climate Change Conference, the U.S., Russia, Saudi Arabia, and Kuwait blocked the nearly 200 nations involved in the convention from acknowledging a UN Intergovernmental Panel on Climate Change (“IPCC”) report which calls for more dramatic action to keep global temperatures from rising more than 1.5 degrees Celsius.<sup>96</sup> The recent case of *Juliana v. United States* makes it clear that criminal liability for FFCs in a U.S. jurisdiction is unlikely to occur in the near future.<sup>97</sup> The 9th

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<sup>94</sup> Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

<sup>95</sup> Emissions Gap Report, U.N. Environment Programme 9 (2018), [http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018\\_FullReport\\_EN.pdf?sequence=1&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018_FullReport_EN.pdf?sequence=1&isAllowed=y).

<sup>96</sup> Jean Chemnick, *U.S. Stands with Russia and Saudi Arabia Against Climate Science*, E&E News (Dec. 10, 2018), <https://www.scientificamerican.com/article/u-s-stands-with-russia-and-saudi-arabia-against-climate-science/>.

<sup>97</sup> *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

Circuit Court of Appeals held that the plaintiffs, seeking declaratory and injunctive relief against the government for violating, among other things, their 5th Amendment rights did not have Article III standing.<sup>98</sup> It is alarmingly clear that individual state actors are not willing to hold corporations accountable for their harmful impact on the environment. The complete lack of accountability in nation-states where the FFCs responsible for some of the highest levels of fossil fuel emissions are headquartered should satisfy the ICC’s “court of last resort” standard.

In the current international criminal law arena, there is little to no precedent for holding individual executive officers accountable for crimes against humanity. To add insult to injury, there continues to be a divide over whether international corporations can even be held civilly liable for torts. This leads any rational thinker to the following question – what recourse then, if any, do victims of FFCs’ activities have? Given the troublesome dilution of corporate liability on the state and international level, jurisdiction over FFC executive officers has exceeded the courts “last resort” standard. The ICC is the contemporary standard bearer for criminal law and, among other reasons, if its jurisdiction only extends to individuals, then prosecuting individual executive officers is the fastest and most effective means to combat the harmful activities of FFCs.

Although there is limited precedent in the ICC for prosecuting individual executive officers, it is clearly within the ICC’s jurisdiction and the most effective and timely way to hold those responsible for environmental destruction accountable. While the ICC is intended to be a court of last resort the dilution of corporate liability coupled with the urgency of climate change satisfies this standard. Given the significant resistance to holding FFC executives criminally liable in nation-states, prosecution through the ICC is the most effective way to develop the international precedent of holding FFC executives accountable for crimes against humanity.

#### Part IV

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<sup>98</sup> *Id.* at 1173-74 (9th Cir. 2020).

## Accountability

Recent precedent dictates that the ICC is the only venue for FFC executives of certain nation-states to be held criminally accountable. First, it is imperative that societal norms not hinder the ICC in addressing what is clearly a crime against humanity committed by FFC executives. Next, although FCCs often change leadership, the ICCs only temporal limitation is that of acts committed before 2002 and should prosecute FCC executives that have previously and continue to deliberately engage in a course of conduct which hinders global systemic climate change reform. FFC executives satisfy the elements of crimes against humanity, and continued inaction serves to delegitimize the authority and jurisdiction of the ICC. Even if the jurisdictional issue arises of whether a state would willingly hand over one of their corporate officers, prosecuting them is better than no action at all, as it puts them on notice and restricts travel to other nations. If countries such as the US maintain bilateral immunity agreements (“BIAs”) with other nations, action is more beneficial to the standing of the ICC than inaction.

U.S. courts, holding jurisdiction over some of the worst perpetrators of crimes against humanity, have shown that they are unwilling to hold FFC executives criminally accountable for the millions of injuries and lives lost due to climate change, and this precedent serves as useful insight into FFC executives likely defense strategy if they are eventually prosecuted in the ICC. The court in *Julia* reasoned the lack of standing was due to the purported inability to solve climate change by holding one specific company accountable.<sup>99</sup> As discussed above, local precedent can serve to influence the body of international law. While it may be difficult to calculate which specific corporation led to millions of premature deaths, it is a recognized principle in criminal law that if there are multiple causes of a particular harm and either on its own would have caused the harm, then both can be considered the actual cause and held liable.

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<sup>99</sup> *Juliana v. United States*, 947 F.3d 1159, 1173-74 (9th Cir. 2020).

The inconsistency between other criminal acts and engaging in a course of conduct which hinders global systemic climate change reform can perhaps be explained by societal relativity. Some science has become so widely accepted that it is not only no longer up for discussion, but one might forget that there is any science involved. For example, some primitive societies believed that death was unnatural, occurring only as an accident rather than a natural part of life, while others believed you didn't actually die but rather just changed existence.<sup>100</sup> Now society accepts the science that when someone's heart stops and brain activity ceases, they are gone, and it is a crime if someone intentionally ends another person's life. The minds that conducted scientific observations, research, and trials to develop the widely accepted theories and principles that gravity is what keeps an object on the surface of the Earth, and that the Earth is in fact round, now all agree that climate science is real and that immediate action is necessary. Because science has identified that increased greenhouse emissions are responsible for stronger, more frequent catastrophic natural disasters and millions of deaths and displacements, those that aid, abet, or otherwise assist the proliferation of those emissions should be held accountable. Science dictates that without a dramatic decline in greenhouse gas emissions by 2030, global warming will reach 1.5 degrees Celsius above pre-industrial levels and lead to the irreversible loss of ecosystems, impacting the most vulnerable societies.<sup>101</sup>

The ICC is responsible for serving as both an arbiter and developer of international societal norms. Margaret M. deGuzman, in discussing the legitimacy of the ICC, states that in order for an organization to be legitimate it must serve the purposes and goals that are in line

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<sup>100</sup> David San Filippo, Historical Perspectives on Attitudes Concerning Death and Dying, National Louis University 4 (2006), [https://digitalcommons.nlu.edu/cgi/viewcontent.cgi?article=1028&context=faculty\\_publications](https://digitalcommons.nlu.edu/cgi/viewcontent.cgi?article=1028&context=faculty_publications).

<sup>101</sup> IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, vi (2019), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf).

with the norms and values of the international community.<sup>102</sup> This assertion, however, oversimplifies the concept of legitimacy and precedent. While the ICC must represent the norms and values of the international community to remain legitimate, a court of the ICC's standing is also responsible for setting norms and developing precedent. A review on the development of any jurisdictions legal precedent will eventually arrive at the conclusion that legitimacy and precedent is a two way street – a judiciary is not legitimate and will not last if it does not represent and acknowledge societal norms, yet societal norms are often buttressed and developed by precedent set by the judiciary. The international community at large is calling for climate change accountability, and the ICC should reinforce their legitimacy by taking significant steps to Prosecute those most responsible – FFC executives.

It must be established which FFCs are most responsible for global fossil fuel emissions in order to determine which individuals to hold criminally liable for crimes against humanity. A CDP report illustrates that in 2015, just fifty FFCs are responsible for fifty percent of greenhouse gas emissions.<sup>103</sup> The Carbon Majors Database maintains greenhouse gas emission data on FFCs,<sup>104</sup> and by calculating the amount of emissions tied to a specific activity, such as barrels of oil produced, then multiplying those emissions by the activities of individual FFCs, the CDP report can show the amount of emissions an individual FFC is responsible for.

While an FFC executive has not yet been criminally charged in the ICC for crimes against humanity, the law has been in existence since the creation of the Rome Statute. Therefore, as long as an executive – past or presently serving after 2002 – satisfies the elements of crimes against humanity there is no danger of a perception of an unfair *ex post facto* regimen

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<sup>102</sup> Margaret M. deGuzman, ARTICLE: Choosing to Prosecute: Expressive Selection at the International Criminal Court, 33 Mich. J. Int'l L. 265, 276 (2012).

<sup>103</sup> Paul Griffin, *CDP Carbon Majors Report 2017*, CDP 10 (2017), <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240>.

<sup>104</sup> *Id.* at 2.

if they were to start holding FFC executives accountable for fossil fuel emissions. It is easy to track the spending of FFCs and their executive officers – those in charge of the corporation’s direction and spending – at the time that money was spent propagating false science and combating legislation aimed at meeting internationally agreed climate standards. These officers satisfy the elements for crimes against humanity and should be held accountable.

The Rome Statute provides that individual criminal responsibility can be established if an individual “aids, abets or otherwise assists in its commission or” the attempted commission of a crime, or “[i]n any other way contributes to the commission or attempted commission” of a crime.<sup>105</sup> The science is settled – unless dramatic actions are taken now, we threaten the existence of life as we know it on Earth.<sup>106</sup> The actions of FFCs, ordained by its executive officers, clearly satisfy the standard for individual responsibility. Darren Woods became the Chief Executive Officer (“CEO”) of ExxonMobil in 2017. In 2018, under his direction, ExxonMobil spent millions of dollars promoting offshore drilling and combating legislation to limit fracking.<sup>107</sup> Mike Wirth is the CEO of Chevron Corporation, and in 2019 the company supported a campaign that supported the eventually successful blocking of a carbon tax in Washington state.

The U.S., in its effort to ensure the ICC cannot exercise its jurisdiction over any U.S. national, has entered into over 100 BIAs with other nations.<sup>108</sup> The purpose of a BIA is to have other countries that are in possession of a U.S. national wanted by the ICC deliver them to the U.S. rather than to the court. Article 98 states:

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<sup>105</sup> Rome Statute, Art. 25.

<sup>106</sup> *Id.*

<sup>107</sup> Vengattil Munsif & Dave Paresh, Exxon, Ben & Jerry's among buyers of \$256 million in political ads on Facebook, Reuters (Oct. 23, 2018), <https://www.reuters.com/article/us-facebook-advertising/exxon-ben-jerrys-among-buyers-of-256-million-in-political-ads-on-facebook-idUSKCN1MX2O8>.

<sup>108</sup> *International Criminal Court - Article 98 Agreements Research Guide*, Georgetown Law, [https://guides.ll.georgetown.edu/article\\_98](https://guides.ll.georgetown.edu/article_98) (last visited April 2, 2020).

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”<sup>109</sup>

While the abundance of BIAs is certainly a hinderance in the effort to hold FFC executive officers accountable for crimes against humanity, there is still value in at least initiating investigations by the ICC. Countries that have BIAs with the U.S. may not turn over an executive if the ICC initiates proceedings, however, this would still put the executive officer on notice and restrict their travel to any nation that the U.S. does not have an agreement with. This may encourage other FFC executive officers to change course and adhere to globally recognized climate change standards.

Most other nations, however, do not have similar BIAs. For example, Saudi Aramco is the largest oil producer and the highest contributor of fossil fuels since 1965 to 2017.<sup>110</sup> In 2009, during climate accord negotiations in Copenhagen, then Saudi Aramco ministry official Mohammad Al-Sabban claimed, “There is no relationship whatsoever between human activities and climate change.”<sup>111</sup> Because accountability does not need to be limited to currently serving executive officers, there may be grounds for prosecution of Al-Sabban upon further research. Furthermore, under the current leadership of Amin H. Nasser, Saudi Aramco is a board member

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<sup>109</sup> Rome Statute, Art. 98.

<sup>110</sup> Matthew Taylor and Jonathan Watts, *Revealed: the 20 firms behind a third of all carbon emissions*, The Guardian (Oct. 9, 2019), <https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions>.

<sup>111</sup> Lee Fang and Sharon Lerner, *Saudi Arabia Denies Its Key Role in Climate Change Even as It Prepares for the Worst*, The Intercept (Sept. 18, 2019), <https://theintercept.com/2019/09/18/saudi-arabia-aramco-oil-climate-change/>.

of the American Petroleum Institute (“API”)<sup>112</sup> – an oil lobbying firm that spends millions combating efforts to mitigate climate change.<sup>113</sup> Like the U.S., Saudi Arabia is not a member of the ICC. While the Saudi government is unlikely to hand over its citizens to the jurisdiction of the court, prosecution still puts these executives on notice and limits their ability to travel. There are, however, FFCs that have both engaged in a course of conduct which hinders global systemic climate change reform and are members of the ICC. Under the leadership of Bob Dudley, BP – headquartered in the United Kingdom which is a Rome Statute member-state – donated \$13 million to combat the implementation of a carbon tax in Washington state.<sup>114</sup> As recently as 2018, BP directly lobbied U.S. policymakers to roll back methane requirements.<sup>115</sup> Pemex, led by Octavio Romero Oropeza, is headquartered in Mexico which is also a member-state of the Rome Statute and is among the top producers of fossil fuels. There are many FFC executives that fall within the jurisdiction of the ICC, and the Office of the Prosecutor should prioritize holding these individuals immediately accountable.

The ICC is responsible for both representing and developing legal international norms, and current norms should not hinder the ICC in addressing what is clearly a crime against humanity committed by FFC executives. While corporate structure creates inherent difficulty in who to prosecute, this is not an obfuscation that cannot be brought into focus, and it must, as continued inaction serves to create more victims of climate change as well as delegitimize the authority and jurisdiction of the ICC.

## CONCLUSION

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<sup>112</sup> *Id.*

<sup>113</sup> Robinson Meyer, *The Oil Industry Is Quietly Winning Local Climate Fights*, *The Atlantic* (Feb. 20, 2020), <https://www.theatlantic.com/science/archive/2020/02/oil-industry-fighting-climate-policy-states/606640/>.

<sup>114</sup> Sandra LaVelle, *Top oil firms spending millions lobbying to block climate change policies, says report*, *The Guardian* (Mar. 21, 2019), <https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report>.

<sup>115</sup> InfluenceMap, *Big Oil’s Real Agenda on Climate Change: How the Oil Majors Have Spent \$1bn Since Paris on Narrative Capture and Lobbying on Climate* at 12.

This note puts forth the position that corporate officers of FFCs that continue to engage in a course of conduct which hinders global systemic climate change reform should be held accountable for the crime against humanity of other inhumane acts. Climate science has identified that increased fossil fuel emissions are responsible for stronger, more frequent catastrophic natural disasters and millions of deaths and displacements. Executive officers of FFCs that benefit from supporting the proliferation of emissions need to be held accountable. Science makes it clear, and the international community has agreed, that without a dramatic decline in greenhouse gas emissions by 2030, global warming will cause the irreversible loss of ecosystems, impacting the most vulnerable societies and people. Beyond the prosecution of FFC executives being within the ICCs' jurisdiction, the Office of the Prosecutor should initiate proceedings because continued inaction creates more victims of climate change and delegitimizes the authority and jurisdiction of the ICC.