

BOFAXE

COVID-19 at the International Criminal Court

BRAZIL'S HEALTH POLICY AS A CRIME AGAINST HUMANITY? (I)

— On 27 July 2020, an umbrella group of Brazilian unions and social organizations filed [a criminal complaint](#) with the International Criminal Court (ICC). In the complaint, the group that represents more than one million Brazilian medical professionals urges the Office of the Prosecutor to start investigations into the President of Brazil, Jair Bolsonaro. They allege that his (non-)handling of the coronavirus pandemic constitutes a “crime against humanity”. After giving some background information on the situation in Brazil, this Bofax shows that the high legal threshold of a crime against humanity is not met in the present case. Recalling that international criminal law and the ICC are concerned only with the most egregious crimes, it argues that the recent complaint could contribute to a false image of the ICC. Instead, the failure of Bolsonaro’s health politics must be framed as a human rights issue.

Brazil and the pandemic

Brazil’s failure to respond to the pandemic is well-documented (see [here](#) and [here](#)). The country has the second highest numbers in confirmed COVID-19 cases and in deaths. Data from the [Johns Hopkins University](#) currently shows over 3.1 million reported infections and over 104,000 deaths. Bolsonaro has repeatedly downplayed the virus, ignored urges to wear a protective mask, and spread misinformation about the nature of the virus as well as its potential treatment through social media channels. For Bolsonaro, preventing an economic crisis – which would, it is feared, follow from lock-down measures – weighs heavier than all public health concerns. Other episodes of Bolsonaro’s policy include the appointment of members of the military to high-ranking positions within the Ministry of Health, including the minister, without previous medical expertise. At the beginning of July, the far-right President even vetoed two laws, restricting the introduction of a general obligation to [wear face masks](#) in public and stopping a programme to [protect indigenous peoples](#) from the virus.

A crime against humanity?

From the outset, it is more than difficult to imagine the Prosecutor of the ICC to begin investigations into Bolsonaro. The claim of a “crime against humanity” appears far-fetched. But before addressing the legal merit of this allegations, a few words on the Court’s procedure are appropriate. Non-state groups, such as the Brazilian authors of the criminal complaint, cannot initiate investigations themselves. They may, however, provide information to the ICC Prosecutor who, in turn, selects cases on her own initiative. Under Article 15(1) of the Rome Statute, she “may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.” If she deems the information received serious enough to conclude that there is, per Article 15(3) of the Rome Statute, “a reasonable basis to proceed with an investigation”, the Prosecutor submits a request for authorization of an investigation to the Pre-Trial Chamber.

What are the chances of the prosecutor taking up the case? First, it should be noted that neither territorial nor personal jurisdiction of the Court is an issue. Brazil is a member State of the Rome Statute and acting heads of states do [not enjoy immunity](#) before the ICC. The principle of subsidiarity enshrined in Article 17 of the Rome Statute, on the other hand, could be a real obstacle. The ICC may only admit a case when the State, which has jurisdiction over that case, is unwilling or unable genuinely to carry out the investigation or prosecution. Whether Brazilian authorities are unwilling, however, appears questionable in light of [other ongoing investigations](#) against the President.

Setting this issue aside, the crux of the case is whether the alleged conduct of Bolsonaro could fall within the jurisdiction *ratione materiae* of the Court or, in other words, whether it could qualify as a crime against humanity. According to the complaint, Bolsonaro’s “attitude of contempt, neglect, and denial, has brought disastrous consequences, with the resulting intensification of the spread of the illness, completely straining the health services, which were unable to meet the minimum conditions to assist the population, causing deaths without further controls.”

Without artificially prolonging the analysis, it is helpful to recall the legal yardstick. Article 7(1) of the Rome Statute defines “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” and lists, under *litera k*, the catch-all provision of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Importantly, the notion of “attack”, despite its connotation, does not require the act in question to constitute a military attack. Article 7(2)(a) of the Statute merely defines it very broadly as a “course of conduct”. Notably, in [Akoyseu](#), the International Criminal Tribunal for Rwanda noted that an “attack may also be non violent in nature, like imposing a system of apartheid” (para 581). This suggests that State policies could very well constitute an “attack”. Certainly, Bolsonaro’s actions and inactions are part of a widespread and systematic course of conduct, potentially affecting the entire Brazilian population. One might even argue, in light of Brazil’s number of cases and deaths, that the administration’s failure to adopt measures to mitigate against the pandemic causes “great suffering” and “serious injury” to physical health. On the other hand, while a fish rots from the head down, not every failure, such as those based on structural problems within the Brazilian health system, can be traced back to Bolsonaro who came into office only on January 1, 2019. What is more, the responsibility of the individual citizen to adhere to hygiene and social distancing rules, even if difficult for people who live in poverty and dense settlements, must also be taken into account.

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