

BOFAXE

COVID-19 at the International Criminal Court

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

That being said, the lack of effective State responses to the pandemic remains a crucial factor for the worsening of the situation. It appears conceivable that disastrous political failures could amount to “inhumane acts” in principle. The ICC’s Pre-Trial Chamber noted in 2008 that such acts may indeed be found in “serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law” (para 448). Human rights are arguably violated in Brazil due to the administration’s passive stance towards the virus. For instance, Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Brazil is a party, expressly requires States to take steps to treat and control epidemic diseases. Yet, these violations do not amount to a level serious enough to qualify as acts of similar nature and gravity as other acts referred to in Article 7(1) of the Rome Statute. As the ICC emphasized, the residual notion of other inhumane acts “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity” (para 269).

Lastly, criminal liability requires a *mens rea* element. The perpetrator must have acted intentionally to inflict great suffering or serious injury as well as have been aware of the factual circumstances that establish the “similar nature” of the conduct in question. To recall, the complaint invokes Bolsonaro’s “contempt, neglect and denial.” Negligence, however, is not intent. Apart from the question of whether Bolsonaro actually believes in the things he does and says, his misguided politics, despite their recklessness and adverse effects on the population, arguably do not constitute an attack launched intentionally against the population.

Between symbolism and misconceptions

However futile it might be in the end, the complaint, together with the international media echo it has created, says something about the somewhat peculiar public perception of the ICC and international criminal law more generally. On the one hand, the complaint and allegation of a “crime against humanity” send a strong symbolic message. The very idea of the ICC’s involvement appears to increase public awareness and pressure. For Brazil, the complaint could contribute to its administration’s increasingly disastrous internal and external image that could, ultimately and hopefully, lead to a change in policy. The pressure on Bolsonaro is already high – not only because of his (non-)response to the coronavirus (see, e.g., [here](#)). What is more, the fact that the union group chose to address the ICC could be interpreted as a positive sign toward an increasingly positive public image of the Court. At second glance, however, such an image could turn out to be quite detrimental to the Court. The Prosecutor can only but disappoint hopes and projections created by such “criminal complaints”, potentially fostering the image of the Court as a passive and, ultimately, failed institution.

A human rights issue

International criminal law is not a last resort to scrutinize domestic politics and failures in leadership. This is not the mandate of the ICC. It is, instead, concerned with individual criminal responsibility for some of the worst crimes imaginable. This is not to suggest, however, that the situation in Brazil is a purely domestic issue. On the contrary, the severe impact of Bolsonaro’s disastrous health policy on the most vulnerable members of society makes it a serious human rights concern. Recognizing the manifold human rights law implications of the pandemic and framing political failures not as criminal but as human rights violations not only stands on legally sound ground but also offers institutional advantages. States are, as the Committee on Economic, Social and Cultural Rights recently stressed, under an obligation to take measures to prevent or at least to mitigate, the adverse impacts on the enjoyment of human rights, including the right to health. In particular, it noted that “States should take a range of urgent measures. In particular, responses to the pandemic should be based on the best available scientific evidence to protect public health” (para. 10). There is a strong case that the Brazilian government has not adopted such responses and thus violated human rights enshrined in both the American Convention on Human Rights and the ICESCR. The Inter-American Human Rights system is, therefore, much more promising than a letter to The Hague. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have the authority to request, in urgent cases, precautionary or provisional measures. In the context of the pandemic, the Commission already adopted precautionary measures in favour of indigenous peoples, requesting Brazil to adopt the necessary measures to protect the rights to health, life and personal integrity of the members of these peoples.

The recent criminal complaint is limited to signalling public outcry. It will disappear into thin air at the Prosecutor’s office. Problematically, this could not only devalue the court in the eyes of the public, but also bolster Bolsonaro’s position. A more promising avenue is to frame Brazil’s policy failures as a human rights issue. Combined domestic and international pressure is needed to counter the misguided policies of far-right politicians, not only in Brazil. And a human rights-based narrative and reliance on human rights institutions, such as the Inter-American Human Rights system, are more suitable to facilitate such pressure. Rather than focussing on an individual perpetrator, human rights law is concerned precisely with the protection of individuals from the acts and omissions of States. Civil society and international actors would do well to focus their efforts on reminding Bolsonaro of this.

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