



## From Brasília to The Hague: How Brazil's President Could Face a Crimes Against Humanity Charge on the World Stage

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On October 26, 2021, a panel of Brazilian senators formally voted to recommend charges against President Jair Bolsonaro over his response to the COVID-19 pandemic.<sup>1</sup> In a seven to

four vote, the senators supported a nearly 1,300-page report that recommended charges against President Bolsonaro, seventy-seven other individuals, and two corporations.<sup>2</sup> The report came after a six-month investigation into the Brazilian government's actions, which it characterized as a failed attempt at achieving herd immunity.<sup>3</sup> Brazil's death toll from the COVID-19 pandemic stands at the second-highest in the world, with over 600,000 Brazilians succumbing to the disease to date.<sup>4</sup> Many Brazilians—particularly those who lost loved ones to COVID-19—are looking for somebody to be held accountable.<sup>5</sup> Thus, the question arises: how likely is it that legal responsibility and accountability for the COVID-19 pandemic in Brazil will be officially doled out to President Bolsonaro?

The report recommended a series of charges against President Bolsonaro. The proposed charges include charlatanism, irregular use of public funds, social rights violations, and crimes against humanity.<sup>6</sup> However, the likelihood of these charges being formally brought against President Bolsonaro (and other named parties) is relatively low. This is due to the fact that Prosecutor-General Augusto Aras will decide whether most of the charges—all except the charge of crimes against humanity—should be filed.<sup>7</sup> Prosecutor-General Aras was appointed by President Bolsonaro and is predicted to protect his political ally by not bringing forth charges.<sup>8</sup> Aras would be following the footsteps of the four senators who voted against the indictments, all of whom are also allies of President Bolsonaro. However, less influenced by President Bolsonaro is the International Criminal Court, the venue in which the charge of crimes against humanity would be filed and adjudicated.<sup>9</sup>

The International Criminal Court is a landmark international law institution. According to the International Criminal Court, it “investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war

crimes, crimes against humanity and the crime of aggression.”<sup>10</sup> Crimes against humanity has undoubtedly achieved *jus cogens* status; it is considered universally forbidden, and its prohibition automatically applies to all states.<sup>11</sup> According to the United Nations Office on Genocide Prevention and the Responsibility to Protect, the Rome Statute—which established the International Criminal Court in 1998—provides the most conclusive definition for crimes against humanity.<sup>12</sup> Article 7 of the Rome Statute states, “[f]or the purpose of this Statute, ‘crime against humanity’ means 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[,]” then proceeds to list the acts.<sup>13</sup> The acts include murder, extermination, and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>14</sup>

Considering his actions regarding the pandemic, it is possible that President Bolsonaro’s response to COVID-19 meets the aforementioned definition of a crime against humanity. As detailed in the report, since President Bolsonaro promoted hydroxychloroquine “as ‘practically the only government policy to fight the pandemic, [he] strongly collaborated for COVID-19’s spread in Brazilian territory’ and as a result is ‘the main person responsible for the errors committed by the federal government during the pandemic.’”<sup>15</sup> Other actions include the “government’s discouragement of sanitary measures, including going against scientific advice including the use of social distancing and the use of masks” and “unnecessary delays in buying vaccines—the product of both the president’s denialism and government officials’ corruption in dealings with laboratories.”<sup>16</sup> Assuming the senate panel forwards their recommendation for charges to the International Criminal Court, there is a reasonable chance that Bolsonaro’s

COVID-19 response will be deemed widespread or systematic, and having caused great suffering or injury to body or physical health.

Now, many are awaiting the decision of whether charges will be filed. After the report was submitted to Prosecutor-General Aras on October 27, 2021, Aras confirmed that he received it, and that he has thirty days to decide and announce any action he will take. Due to President Bolsonaro's political influence and allyship with Aras, it is unlikely that he will be domestically charged with the recommendations contained in the report; he is more likely to be charged with one count of crimes against humanity by the International Criminal Court.

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<sup>1</sup> Rodrigo Pedrosa, *Brazilian commission votes in favor of recommending criminal charges against Bolsonaro*, CNN (Oct. 28, 2021), <https://www.cnn.com/2021/10/26/americas/brazil-bolsonaro-covid-cpi-vote-intl-latam/index.html> [<https://perma.cc/A9SP-RBWD>].

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

<sup>3</sup> *Id.*; Débora Álvares, *Brazil senators recommend Bolsonaro face charges over COVID*, ASSOCIATED PRESS (Oct. 26, 2021), <https://apnews.com/article/coronavirus-pandemic-crime-caribbean-health-brazil-80823c6b0d77567d5912373f9d756cbe> [<https://perma.cc/UE5B-95FF>].

<sup>4</sup> Álvares, *supra* note 2.

<sup>5</sup> 'Somebody needs to be blamed': *Bolsonaro probe gives Covid families solace*, NBC NEWS, (Oct. 28, 2021) <https://www.nbcnews.com/news/latino/somebody-needs-blamed-bolsonaro-probe-gives-covid-families-solace-rcna4005> [<https://perma.cc/8KDU-EZEA>].

<sup>6</sup> Rodrigo Pedrosa et al., *Brazilian senators recommend Bolsonaro be charged with crimes against humanity over pandemic*, CNN (Oct. 20, 2021), <https://www.cnn.com/2021/10/20/americas/brazil-bolsonaro-covid-19-intl-hnk/index.html> [<https://perma.cc/7JG6-R9P8>].

<sup>7</sup> Álvares, *supra* note 2.

<sup>8</sup> *Id.*

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

<sup>10</sup> *About the Court*, International Criminal Court, <https://www.icc-cpi.int/about> [<https://perma.cc/N93P-D7GJ>] (last visited Oct. 31, 2021).

<sup>11</sup> *Crimes Against Humanity*, United Nations Office on Genocide Prevention and the Responsibility to Protect, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> [<https://perma.cc/R89J-37WL>] (last visited Oct. 31, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> *Rome Statute of the International Criminal Court*, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9 at Article 7.

<sup>14</sup> *Id.* at Article 7(1)(k).

<sup>15</sup> Álvares, *supra* note 2.

<sup>16</sup> Pedrosa, *supra* note 1; Hugo Albuquerque, *Bolsonaro Massacred Brazilians. Brazil's Senate Wants to Try Him for Crimes Against Humanity.*, Jacobin Magazine (Oct. 29, 2021), <https://www.jacobinmag.com/2021/10/bolsonaro-brazil-covid-19-deaths-senate-elites-lula> [<https://perma.cc/GR88-JSF2>].