

# CRIMES AGAINST HUMANITY IN A DEMOCRATIC CONTEXT

**Marlon Alberto Weichert**

- *The systematic pattern of violence in Brazil* •

## ABSTRACT

*Although Brazil appears to enjoy democratic normality, the reality is that violence affects one segment of the population in a systematic and generalised way: young, black, poor people. The author presents data collected in annual research on violence in the country, providing evidence that this social group is the preferred victim (of homicides in general, of police violence and of mass imprisonment). The systematic nature of this violence, as well as the failure of the Brazilian state to reverse this it, are elements that make it possible to characterise this situation within the concept of crime against humanity as described in the Rome Statute and signed by Brazil in 2002.*

## KEYWORDS

Violence | Young, black and poor | Crimes against humanity | Brazil

## 1 • Introduction

The concept of a crime against humanity was developed primarily in the ambit of international criminal law after the Second World War in response to the grave violations of human rights perpetrated by the Nazi government in Germany. According to the rules of war crimes in place at that time, the persecution of segments of the civil population in their own country was not punishable. The concept of a crime against humanity was applied to prevent the persecution of national citizens from going unpunished.<sup>1</sup> The first international document to establish the concept was the Statute of the Nuremberg Trials.<sup>2</sup>

This definition was gradually refined, with adjustments, over the course of the second half of the twentieth century, until the 7<sup>th</sup> article of the Rome Statute in 1998, which created the International Criminal Court and which was ratified and promulgated by Brazil in 2002.<sup>3</sup> It defined that:

### *Crimes against Humanity*

*For 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:*

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

Until recently the legal community linked the practice of crimes against humanity to the context of armed conflict and authoritarian regimes (dictatorships). However, a new front is now being explored in international criminal law, in terms of countries that, whilst appearing to be in a situation of democratic normality, show conditions of systematic or generalised violence against specific segments of the population.

In the ambit of the International Criminal Court, the Office of the Prosecutor has conducted preliminary examinations into the possible classification of crimes against humanity with regards to repressive violence in the Ukraine in public protests carried out against the government in 2014. Another example is the case of Honduras where the Office of the Prosecutor examined incidences of violence that occurred between 2010 and 2014, sparked in the wake of the *coup d'état*, but which continued even after democratic “normality” had been restored. The Prosecutor closed the case on the basis that there was not sufficient evidence that the serious acts were part of an attack against sectors of the population,<sup>4</sup> but emphasised that the situation in Honduras was borderline, in other words it could almost be considered a crime against humanity.

In 2016, the international organisation Open Society Foundations (OSF), in partnership with five Mexican human rights institutions,<sup>5</sup> published a report under the name “Undeniable Atrocities – Confronting Crimes against Humanity in Mexico”,<sup>6</sup> the result of a four-year long piece of research in the country into the nature and extent of the persisting violence. They concluded that there are reasons to believe that, in line with analytical standards used by the Prosecutor’s Office at the International Criminal Court, both the state and non-state players had committed crimes against humanity. According to the report, in nine years (between December 2006 and 2015), 150 thousand people were intentionally killed in Mexico by the drug cartels and by the federal and state security forces, in addition to the perpetration of numerous cases of enforced disappearances and torture.<sup>7</sup>

In this article we used the recent interpretation of both the International Criminal Court and also of non-governmental human rights organisations regarding the above mentioned cases and reflected on the situation of violence in Brazil and the risk of it also being classified as the practice of crimes against humanity.

## 2 • Violence in Brazil

Between 2004 and 2007 approximately 206,000 people were victims of homicide in Brazil, the same figure as in 62 armed conflicts around the world<sup>8</sup> and much higher than the Mexican example referred to by the OSF.

Brazil, “a country without conflicts about religion or ethnicity, colour or race, without territorial or frontier disputes, without civil war or violent political confrontation,

manages to slaughter more citizens than most of the armed conflicts in the world.”<sup>9</sup> In fact, according to World Health Organisation data, in 2012 Brazil was responsible for around 13.5 per cent of all homicides committed in the world (although it represents 2.8 per cent of the world’s population) and around 38.85 per cent of those perpetrated in Latin American countries.<sup>10</sup> The country is the 7th most violent in the world, after El Salvador, Trinidad and Tobago, Colombia, The Virgin Islands (USA), Guatemala and Venezuela, all of which are in South and Central America and is the “champion” of deaths by homicides among the twelve most populous countries.<sup>11</sup>

Even more relevant, for the purposes of the concept of crimes against humanity is that violence in Brazil is selective. According to the Brazilian Forum for Public Security, in 2015 54 per cent of victims of violent death were young people.<sup>12</sup> The 2015 Map of Violence research confirmed this panorama and showed that in 2012, 285 per cent more young people (15 to 29 years old) were victims of homicide than people who were not young. In other words, “for every person who is not young and who dies, around four young people die.”<sup>13</sup> It is also selective in terms of skin colour, as 73 per cent of fatal victims are “*preto*” or “*pardo*” people.<sup>14</sup>

In short, violence is heavily weighted against young black people, almost always poor, who are the victims of homicide in 41 percent of cases,<sup>15</sup> with around 2.5 young black people for every young white person, according to the 2012 Map of Violence,<sup>16</sup> while 51 per cent of the population in the country is black.<sup>17</sup>

In addition, the country has high incarceration rates with 607,000 people in prison in 2014, placing it as the fourth highest prison population on the planet, behind the United States,<sup>18</sup> China<sup>19</sup> and Russia.<sup>20</sup> In terms of the incarceration rate, it was in thirty-fourth place among 222 countries and territories, with 300 prisoners for every hundred thousand inhabitants.<sup>21</sup> Among the twenty countries that have the highest populations of prisoners, it is fourth behind the United States,<sup>22</sup> Russia<sup>23</sup> and Thailand.<sup>24 25</sup>

It is not a coincidence that young, black poor people are the most affected. In fact 67 per cent of the prison population is made up of black people and 56 per cent are young people between 18 and 29 years of age, although this age group represents only 21.5 per cent of the whole population.<sup>26</sup> There are 2.5 young people in prison for every person who is not young.<sup>27</sup> Finally 68 per cent have not completed basic schooling and 15 per cent have never been to school, which points to their social background.<sup>28</sup>

State violence is superimposed on this scenario. In 2015, 3,345 civilians were killed by the police, more than 9 people per day, 5.7 per cent of the total number of deaths.<sup>29</sup> Although qualitative analyses of the national scope are not available on the profile of victims of state violence, a recent study carried out in the municipality of São Paulo, showed that 64 per cent of deaths in police interventions were black people<sup>30</sup> (although black people represent only 37 per cent of the municipal population).<sup>31</sup> Furthermore, 85 per cent of those killed are young people, under 30 years of age. In every 100,000 young

people who live in the city, 21 were killed by the police in 2014. The rate for those over 30 years old is 2 in every 100 thousand inhabitants.

Therefore, there is one social group – young, black, poor people – who suffer the three forms of violence: they are the preferred victims for homicides in general, homicides practised by public forces and also make up the majority of those imprisoned.

### 3 • Similarities with crimes against humanity

As seen above, the most severe violence in Brazil, either resulting from general criminality or from state intervention, targets practically the same segment of society – the young, black, poor population. The vulnerability of this youth has been highlighted by a number of social sectors as a silent “genocide”.<sup>32</sup> The National Congress, by means of Parliamentary Commissions of Inquiry within the Chamber of Deputies and the Federal Senate pinpoint this.

The Parliamentary Commission of Inquiry in the Chamber of Deputies, assigned to ascertain the causes, reasons, consequences, social and economic costs of violence, death and disappearance of young, black poor people in Brazil, known as the “Parliamentary Commission of Inquiry on Violence against Young, Black, Poor people”, concluded in its report published in July 2015, that:

*The statistics and arguments on the myth of institutional racial cordiality, previously presented, provide the context and indicators that poor, black people in this country, particularly its youth, have been victim of a particular, different type of genocide.*

*The crime as detailed in the 1956 Law, number 2889 which led to the consolidation of the provisions of the International Convention on the Prevention and Punishment of the Crime of Genocide, established in Paris on 11 December 1948 at the Third Session of the General Assembly of the United Nations (Decree no 30.822. of 1952) cannot legally be cited. Here follows sociological recognition, testifying to the outrage at the unfettered killing of young, black poor people in Brazil and the condemnation of this population in the absence of policies to foster their well-being. (...)*

*The genocide encountered by this Commission is the symbolic killing of an entire group in the midst of an absurd number of actual deaths.<sup>33</sup>*

Likewise, the Federal Senate’s Parliamentary Commission of Inquiry “Youth Murder” concluded in its Final Report, presented in June 2016, that:

*We have verified through the work of the Commission that, although Brazil stands out for the total number of homicides*

*among young people and that violence has spread to all cities and all social groups, there is a preferred victim, the number of deaths in this group being startling and worrying.*

*From the outset the Commission encountered a cruel and undeniable reality: the Brazilian state is directly or indirectly provoking the genocide of the young black population.*

*Once the work was complete, all the public hearings had been carried out, when all the specialists had been heard and numerous documents collected, this bleak picture became clear and we could not find any national or regional public policy aimed at analysing and changing it.<sup>34</sup>*

In weighing up this grave scenario, it does not seem – in the light of international law, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and the Rome Statute – that the situation described falls strictly into the legal definition of genocide, as this demands that action is taken “with the intention to destroy, entirely or in part, one national, ethnic, racial or religious group”. Although it is recognised that there are systematic murders of poor people in the city peripheries, the subjective aspect of an “intention to destroy an ethnic or racial group” is an obstacle to defining this as an international crime.

There are, however, serious reasons for concern in terms of the Brazilian authorities’ repeated failure to recognise and act to avoid a systematic pattern of violent acts against this civil population from continuing to operate and from increasing. In this sense a risk is emerging of this situation becoming such that it could be defined as a crime against humanity.

As seen, article 7, of the Rome Statute defines the hypothesis of a crime against humanity as any act of *homicide* or of *persecution of a group or community that can be identified, for political, racial reasons or on the basis of other criteria universally recognised as unacceptable in international law committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*

Paragraph 2, of article 7, states that:

*a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;*

(...)

*g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;*

According to the jurisprudence of the International Criminal Court, these definitions imply that the following requirements must be present in order to define a crime against humanity: (a) an attack directed against a civil population, (b) a state or organisational policy, (c) that the attack is widespread or systematic, (d) a connection between the individual act and the attack and (e) knowledge of the attack by the agent.<sup>35</sup>

It is not within the scope of this article to carry out an extensive analysis of the definition cited here nor of its relevance to the actual situation of Brazilian state violence. However, it should be noted that the repetition of homicides and other violent acts faced by the poor, predominantly black youth,<sup>36</sup> in large Brazilian cities appears to be adopting a systematic pattern.<sup>37</sup> In effect, in the wording of the International Criminal Court, systematic refers to the “organised nature of acts of violence and the unlikelihood that they are random occurrences”. It goes on to say that a systematic attack can often be identified in the practise of a pattern of crimes, in the sense that the regular repetition of similar criminal conducts is not accidental.<sup>38</sup> In the case under examination the violent death of black and brown youths appears to have become systematic, especially when it is considered that the figure has now reached 23,000 dead, the majority direct victims of the state.

The term “attack” is not restricted to military operations. The International Criminal Court understands this term to refer to a situation in which the multiple commission of violent acts as described in article 7(1) of the Rome Statute involves, in other words, a campaign or operation carried out against the civil population. Victims of the attack may be groups that can be identified according to nationality, ethnicity or some other distinguishing feature,<sup>39</sup> which could include the category of youths who are killed in poor neighbourhoods or on the outskirts of Brazilian cities, which are largely inhabited by black and brown people.

Finally, there is an essential requirement that conduct is in accordance with, or complies with, a state or organisational policy, in committing the attack.<sup>40</sup> When the International Criminal Court applies this rule, it has been decided that the policy does not necessarily need to be expressed, precisely or clearly. It can be inferred by the occurrence of a series of events, *inter alia* (i) a generic history of circumstances and a wide political context within which the crimes are committed, (ii) coordinated military offensives, repeated in a temporal and geographical way and (iii) the scale of acts of violence perpetrated among others.<sup>41</sup>

Here it seems rash to state that the Brazilian state – or organisations tolerated by it – have an active policy to systematically persecute the civil population or black youths. There is no indication that high level public agents incite or disseminate this type of state intervention. However, it must be noted that the Assembly of States Parties in September 2002, defined the so-called “Elements of Crimes” of the Rome Statute and on the topic of the *policy to commit an attack*, highlighted

that this clause requires that the state or an organisation actively promote or encourage such attacks. However, in a footnote it states that in exceptional circumstances this policy may be implemented by omission. The simple omission by the absence of action would not be sufficient, but rather a deliberate failure to act, which would consciously prompt the said attack.<sup>42</sup>

In the case of Brazil it is relevant to note that two Parliamentary Commissions of Inquiry in the National Congress point to the omission of the state in curbing violence against black youths, as well as the occurrence of the systematic execution of this population by agents of public security forces. The same point was made by The National Council for Human Rights, a collegiate body, created by law to function as a guardian of human rights at a national level.<sup>43</sup> Federal and state governments also receive frequent demands and complaints from civil society on these incidents and on the systematic practice of extermination and imprisonment of this population.

The state knows and recognises that violent persecution occurs – through murder and mass imprisonment, in inhuman conditions – of the young, black male population and despite having the legal right to act, fails to adopt specific measures. This persistent, repeated failure reveals a tolerance towards this violent persecution, or, in the language of the International Criminal Court, a deliberate failure to take action to change this scenario. It is quite clear that this failure, or tolerance, produces the effect of encouraging and feeding into the spiral of violence. A policy of non-action exists and is often disguised in the reinforcement of strategies that have proved to be either ineffective or to compound the situation. The death of a black youth, usually poor, seems to be less important to public authorities. Failure to act in the face of such a serious, known situation is a political option.

The continued failure by the authorities to foster changes in policies on crime, public security and justice, or in the way in which these are carried out, could be seen as representing a deliberate decision to maintain a policy of persecution of the young, poor/black civil population, according to the interpretation of the “Elements of Crimes” and the jurisprudence of the International Criminal Court.

Therefore, this persistent failure to act could qualify – little by little – as a policy to encourage the continuity of violent, systematic attacks on a civil population, approaching the definition in article 7 (1) and (2) of the Rome Statute and interpreted by the States Parties in the document “Elements of Crimes”.



## NOTES

1 • William J. Fenrick, "Should Crimes Against Humanity Replace War Crimes?" *Columbia Journal of Transnational Law* 37, no. 3 (1999): 767-85.

2 • "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations: (...) (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

3 • "Decreto nº 4.388, de 25 de Setembro de 2002," Brazil, Presidency of the Republic, September 25, 2002, accessed May 21, 2017, [http://www.planalto.gov.br/ccivil\\_03/decreto/2002/D4388.htm](http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm).

4 • According to the Office of the Prosecutor's report: "Against a backdrop of high levels of violent crime and the prevalence of large numbers of criminal groups, the Office found scant information indicating links and common features between the alleged crimes, including in relation to their characteristics, nature, aims, targets, alleged perpetrators, times and locations, so as to demonstrate the existence of a 'course of conduct' within the meaning of article 7(2) (a) of the Statute. In this respect, the alleged crimes fail to evidence a certain pattern of behaviour indicating that they were committed as part of a campaign or operation carried out against the civilian population." See "Report on Preliminary Examination Activities (2015)," International Criminal Court, November 12, 2015, Accessed April 4, 2017, p. 278, <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.

5 • Namely: The Mexican Commission for the Defence

and Promotion of Human Rights, The Diocesan Centre for Human Rights Fray Juan de Larios, I(dh)eas Strategic Litigation in Human Rights, Fundación para la Justicia y el Estado Democrático de Derecho y Ciudadanos en Apoyo a los Derechos Humanos-CADHAC.

6 • "Undeniable Atrocities – Confronting Crimes against Humanity in Mexico," Open Society Foundations, August 8, 2016, accessed April 4, 2017, <https://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-2nd-edition-20160808.pdf>.

7 • *Ibid*, p. 10.

8 • According to the 2014 Map of Violence – Homicides and Youth in Brazil there were 206,005 homicide victims in Brazil and 208,349 deaths in armed conflict. See Julio Jacobo Waiselfisz, "Map of Violence 2014 – Homicides and Youth in Brazil." Brazil, Secretary General of the Presidency of the Republic, 2014, accessed May 21, 2017, [http://www.mapadaviolencia.org.br/pdf2014/Mapa2014\\_JovensBrasil\\_Preliminar.pdf](http://www.mapadaviolencia.org.br/pdf2014/Mapa2014_JovensBrasil_Preliminar.pdf).

9 • Julio Jacobo Waiselfisz, "Map of Violence 2012 – new patterns of violent murder in Brazil." Instituto Sangari, 2011, p. 237, May 21, 2017, [http://www.mapadaviolencia.org.br/pdf2012/mapa2012\\_web.pdf](http://www.mapadaviolencia.org.br/pdf2012/mapa2012_web.pdf).

10 • WHO data presented some differences in relation to those published by the Brazilian Forum for Public Security (FBSP) and the Map of Violence, on which this research was based. However, these are extremely valuable for comparative analyses with other countries. According to the WHO report there were around 474,000 murders in the world in 2012 and 165,617 in the countries of the Americas classified as low or average income. Brazil had 64,357 homicides. This figure is higher than the number published by the FBSP (50,241). See "Global Status Report on Violence Prevention 2014," World Health Organization, 2014, p. 231, accessed May 21, 2107, <http://apps.who.int/iris/handle/10665/145086>.

11 • Waiselfisz, 2014 *Map of Violence*, p. 94.

- 12 • Brazilian Forum for Public Security (FBSP), *Anuário Brasileiro de Segurança Pública 2016* (Sao Paulo: Brazilian Forum for Public Security, 2016): 6.
- 13 • Julio Jacobo Waiselfisz, "2015 Map of Violence – Death by fire arms." Brazil, Secretary General of the Presidency of the Republic, 2015, p. 65, accessed May 21, 2017, <http://www.mapadaviolencia.org.br/pdf2015/mapaViolencia2015.pdf>.
- 14 • Brazilian Forum for Public Security, 2016, 6. Editor's note: Black ("preto") and brown ("pardo") are used by the Brazilian Institute of Geography and Statistics as official categories of race and colour in the Brazilian national census.
- 15 • 2012 data. "Queremos Ver os Jovens Vivos!" ("We want to see young people alive") Amnesty International Brazil, 2015, accessed June 19, 2015, <https://anistia.org.br/entre-em-acao/peticao/chegadehomicidios/>.
- 16 • 2010 data. Julio Jacobo Waiselfisz, "2012 Map of Violence – The Colour of Homicide in Brazil." CEBELA, FLACSO, Secretary for Policies for the Promotion of Racial Equality for the Presidency of the Republic 2012 accessed May 21, 2017, [http://www.mapadaviolencia.org.br/pdf2012/mapa2012\\_cor.pdf](http://www.mapadaviolencia.org.br/pdf2012/mapa2012_cor.pdf). The category Black used in this report represents a combination of the categories "black" and "brown", both used by the IBGE – Brazilian Institute of Geography and Statistics. See p. 8.
- 17 • "National Research on Penitentiary Information – INFOPEN – June 2014" Brazil, Ministry of Justice, 2015, p. 50, accessed May 21, 2017, <http://www.justica.gov.br/noticias/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-dependencia-web.pdf>. Remembering that the category 'black' combines black and brown. Ibid, footnote 38.
- 18 • With 2.2 million prisoners.
- 19 • With 1.6 million prisoners.
- 20 • With 670,000 prisoners.
- 21 • International Centre for Prison Studies, *World Population List (10th edition)* (London: International Centre for Prison Studies, 2013).
- 22 • Rate of 698 per 100 thousand inhabitants.
- 23 • Rate of 468 per 100 thousand inhabitants.
- 24 • Rate of 457 per 100 thousand inhabitants.
- 25 • INFOPEN, 11-12.
- 26 • INFOPEN, 50; 48.
- 27 • "Map of Incarceration: The Youth of Brazil," Brazil, General Secretary of the Presidency of the Republic, 2014, p. 84, accessed May 21, 2017, <http://juventude.gov.br/articles/participatorio/0009/3230/mapa-encarceramento-jovens.pdf>.
- 28 • INFOPEN, 58.
- 29 • Brazilian Forum on Public Security, 6.
- 30 • The rate of the black population killed by the police 11:100 thousand, while in the white population the rate is 4:100 thousand.
- 31 • See data from research in Jacqueline Sinhoretto, Maria Carolina Schlittler and Giane Silvestre, "Juventude e Violência Policial no Município de São Paulo," *Revista Brasileira de Segurança Pública* 10, no. 1 (February-March, 2016): 10-35.
- 32 • In the light of the situation of homicides among black youths, the non-governmental organisation, Amnesty International, through its Brazilian branch, launched a campaign "Young Black People Alive". See "We want to see young people alive!", Amnesty International, November 8, 2014, accessed September 25, 2016, <https://anistia.org.br/entre-em-acao/peticao/chegadehomicidios/>.
- 33 • "Final Report of the Parliamentary Commission for the Homicide Inquiry of Young, Black, Poor People," Chamber of Deputies, July 2015, accessed September 25, 2016, <https://goo.gl/rS3Wkd>.
- 34 • "Final Parliamentary Commission for Youth Murder Inquiry," Federal Senate, June 8, 2016, p. 145-6, accessed September 25, 2016, <http://www12.senado.leg.br/noticias/arquivos/2016/06/08/veja-a-integra-do-relatorio-da-cpi-do-assassinato-de-jovens>.
- 35 • See the decision "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," International Criminal Court, March 31, 2010, paragraph. 79, p. 32, accessed May 21, 2017, <https://www.icc-cpi.int/pages/record.aspx?uri=854287>. All translations and references to this or other TPI decisions were done freely by

the underwriter.

36 • According to the IPEA – Institute of Applied Economic Research, in 2009, among the poorest 10% of the Brazilian population, black people constituted 72 per cent. See Instituto de Pesquisa Econômica Aplicada *et al.*, *Retrato das Desigualdades de Gênero e Raça* (4ª ed.) (Brasília: Ipea, 2011): p. 35.

37 • Note that in defining crime against humanity, attack may be either widespread or systematic. These elements are disjunctive. As affirmed by the TPI, “the underlying logic of this concept is ‘to separate isolated, random acts from the notion of crimes against humanity.’” International Criminal Court, “Situation in the Republic of Kenya,” paragraph. 94, p. 40-1.

38 • See the decision of the International Criminal Court, “Situation in the Republic of Kenya,” paragraph. 96, p. 42.

39 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 80-1, p. 33.

40 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 83, p. 34.

41 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 87, p. 37. The report contains 11 different possible definitions of the policy.

42 • See “Elements of Crimes,” International Criminal Court, Article 7, footnote 6, February 1, 2001, accessed May 21, 2017, [http://www.iccnw.org/documents/ElementsofCrimes\\_English.pdf](http://www.iccnw.org/documents/ElementsofCrimes_English.pdf): “Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”

43 • See, for example, the recommendation issued by the National Council of Human Rights, considered at the 3rd Ordinary Meeting on 12 and 13 March 2015.



**MARLON ALBERTO WEICHERT** – *Brazil*

Marlon Alberto Weichert graduated with a Masters in Law at the Pontifícia Universidade Católica in São Paulo. He is a visiting researcher at the New York University School of Law, with support from the Hauser Global Program. He is a regional attorney of Brazil at the Public Prosecutor’s Office, working principally on human rights dealing with topics such as transitional justice (the right to truth, to responsibility and to memory with regards to crimes against humanity) and public security.

email: [MWeichert@mpf.mp.br](mailto:MWeichert@mpf.mp.br)

Received in April 2017.

Original in Portuguese. Translated by Jane do Carmo.



“This journal is published under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License”