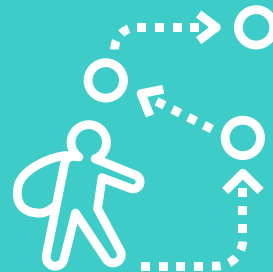


Inputs to the Concept Note for the CED
General Comment

Enforced disappearances in the context of migration

Contributions from:
**The Federal Public
Defenders' Office of
Brazil**



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São Paulo, Federative Republic of Brazil, June 05th, 2023.

From the Federal Public Defender's Office

To the United Nations Committee on Enforced Disappearances (CED)

Reference: **Call for inputs on the First Draft “Enforced disappearances in the context of migration” (CED General Comment CED General Comment n°1)**

I-INTERNATIONAL LEGAL FRAMEWORK

The Federative Republic of Brazil (hereafter ‘Brazil’ or ‘the State’) has signed and ratified CED - Convention for the Protection of All Persons from Enforced Disappearance concerning the subject-matter of this report through its Decree 8767 of May 11th, 2016. Also, the State has neither accepted to this date the individual complaint in CED, Art.31 but has accepted CED, Art.32 - Interstate communication procedure under the International Convention for the Protection of All Persons from Enforced Disappearance. In addition, the State has signed and ratified the International Convention for the Elimination of all Forms of Racial Discrimination; the International Convention for the Elimination of all Forms of Discrimination against Women; the Convention on the Rights of the Child; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; and the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

Brazil has not signed or acceded to CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In the Universal Periodic Review – 4th cycle there were several recommendations concerning the ratification of human rights treaties by the State, *inter alia*, the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Furthermore, Brazil has signed and ratified the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees as well as it is a State Party to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

In the Inter-American system of human rights, Brazil has signed and ratified the Inter-American Convention on Forced Disappearance of Persons through its Decree 8766 of May 11th, 2016 as well as other human rights treaties concerning the subject-matter of this report.

II-DOMESTIC LEGAL FRAMEWORK

The Federal Constitution of Brazil establishes in its article 134 that the Public Defender's Office is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defence, in all levels, of the needy. Moreover, Complementary Law 80/1994 altered by Complementary Law 132/2009 determines in its article 1st that '[t]he Public Defender's Office is a permanent institution, essential to the jurisdictional function of the State, being entrusted, as an expression and instrument of the democratic regime, fundamentally with legal guidance, the promotion of human rights and the defence, at all levels, judicial and extrajudicial, of individual and collective rights, in full and free of charge, to those in need.' Amongst its institutional functions, the Federal Public Defender's Office may plead before the bodies of international human rights systems. To properly implement its functions, the Federal Public Defender's Office has several Working Groups that tackle many of the issues in this report such as the Working Group on Migration and Statelessness.

III-CONTRIBUTIONS ON THE FIRST DRAFT 'ENFORCED DISAPPEARANCES IN THE CONTEXT OF MIGRATION'

The draft establishes that '[t]o prevent the risk of migrants' becoming victims of enforced disappearance in the context of immigration detention, it must be ensured that they are always able to communicate with their relatives, consular authorities, legal representatives, or any other person whom they could inform about their fate or whereabouts'¹ and that State parties should guarantee 'the right of the person deprived of liberty, or any person with a legitimate interest to take proceedings before a court in order to challenge the lawfulness of the deprivation of liberty. This right should not be restricted under any circumstances and should be guaranteed irrespective of the place of deprivation of liberty and the person's migratory status.'²

In 2017, Brazil has approved the new Migration Law which includes three main compulsory withdrawal measures from the Brazilian territory: repatriation, deportation, and expulsion. Repatriation consists in an administrative measure for the return of a person in a situation of impediment to the country of origin or nationality. Repatriations should be communicated to the Federal Public Defender's Office when it they are not immediate or when they involve persons in a situation of refuge or statelessness, in fact or in law; to a minor under 18 (eighteen) years of age unaccompanied or separated from his family, except in cases where it proves favorable for the guarantee of his rights or for the reintegration of their family of origin; or for those who need humanitarian reception, nor, in any case, a measure of return to a country or region that may pose a risk to the life, personal integrity or freedom of the person.

Deportation is a measure resulting from an administrative procedure that consists of the

¹ Committee on Enforced Disappearances, General comment on enforced disappearances in the context of migration, *Draft 1* Para. 15

² Committee on Enforced Disappearances, General comment on enforced disappearances in the context of migration, *Draft 1* Para. 16

compulsory removal of a person who is in an irregular migratory situation in national territory. It should be communicated to the Federal Public Defender's Office which will aid the deportee in all administrative deportation procedures. The expulsion consists of an administrative measure for the compulsory withdrawal of a migrant or visitor from the national territory, combined with the impediment of re-entry for a specified period. The Federal Public Defender's Office will be notified of the initiation of the expulsion process if there is no appointed defender.

The draft also establishes that '[t]he Committee recalls that the obligations to search for disappeared persons, conduct an effective investigation into alleged disappearances, including those falling within article 3 of the Convention, and prosecute and punish the perpetrators, are fundamental to ending this heinous crime and preventing its re-occurrence.'³

Brazil does not have a specific penal provision that criminalizes Enforced Disappearance even though it has instituted the National Policy for Finding Disappeared Persons and the creation of the National Register of Disappeared Persons, by Law No. 13812/2019. The policy identifies as a missing person every human being whose whereabouts are unknown, regardless of the cause of their disappearance, until their recovery and identification have been confirmed by physical or scientific means. Although the State has signed and ratified CED it still has not complied with Article 4 of such convention which establishes that '[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.'

The Committee on Enforced Disappearances has recommended that the State party take the measures necessary: (a) To speed up the adoption of an autonomous offence of enforced disappearance, ensuring that its definition is fully compatible with article 2 of the Convention and that it provides for appropriate penalties that take into account its extreme seriousness; (b) To ensure that the application of the adopted offence in cases of enforced disappearance that commenced prior to its entry into force but continued thereafter is not subject to any limitations, including those that may be imposed on the basis of the Amnesty Law.⁴ Similarly, during the trial of the case Gomes Lund and others versus Brazil, the Inter-American Court of Human Rights ordered the Brazilian State to typify the crime of forced disappearance in its internal system.⁵ Parliament is still in the process of adopting an autonomous offence of enforced disappearance but it has not approved a law in this regard.

These international paradigms point to the scenario of a structural practice in the Brazilian State, reinforced by a dictatorial period that used forced disappearances as a State political weapon. It is worth highlighting the following excerpt from the Final Report of the National Truth Commission: 'The practice of forced disappearance, as a systemic and widespread phenomenon, has marked the recent history of Latin America. Implemented as a state policy during the military dictatorships that ravaged the Southern Cone, as well as during the armed

³ Committee on Enforced Disappearances, General comment on enforced disappearances in the context of migration, *Draft 1* Para. 36

⁴ Committee on Enforced Disappearances, Concluding observations on the report submitted by Brazil under article 29 (1) of the Convention, para. 15

⁵ IACHR. *Gomes Lund vs Brazil*. Judgment of November 24, 2010. Available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf.

conflicts in Central America, this practice consisted in the detainment, followed by the execution and concealment of the corpses of thousands of people. In order not to leave traces, the States concealed the bodies of the victims – through, among others means, the creation of cemeteries and clandestine ditches, the identification of people as homeless, and the dumping of bodies on the bottom of lakes, rivers, or the sea (thrown from aeroplanes and helicopters). Thousands of political prisoners have died like this, and to this day, in most cases, there is no news of their whereabouts.⁶

The Inter-American Convention on the Forced Disappearance of Persons was incorporated into domestic law by Decree 8,766, of May 11, 2016. Article IX provides that “Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.”

Any violation of the treaty may be subject to appraisal by the InterAmerican Commission on Human Rights pursuant to Article XIII and, equally, by the Inter-American Court of Human Rights, since the Federative Republic of Brazil recognized its mandatory competence through Decree 4,463, of 8 November 2002, in accordance with Article 62 of the American Convention on Human Rights (Pact of San José), of 22 November 1969.

The state through Decree 4.388, of September 25, 2002 also promulgated the Rome Statute of the International Criminal Court which in its article 7(1)(i) establishes that enforced disappearance of people is a crime against humanity. The following are elements of the crime of enforced disappearance as adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court:

1. The perpetrator: (a) has arrested, detained, or abducted one or more persons; or (b) has refused to acknowledge the arrest, detention or kidnapping, or to give information about the fate or whereabouts of that person or persons.
2. (a) Such arrest, detention, or kidnapping was followed or accompanied by a refusal to acknowledge such deprivation of liberty or to give information about the fate or whereabouts of such person or persons; or (b) such refusal was preceded or accompanied by such deprivation of liberty.
3. The perpetrator was aware that: (a) Such arrest, detention, or abduction would be followed in the ordinary course of events by a refusal to recognize such deprivation of liberty or to give information about the fate or whereabouts of such person or persons; or (b) such refusal was preceded or accompanied by such deprivation of liberty.
4. Such arrest, detention, or abduction was carried out by, or with the permission, support, or acquiescence of, a State or a political organization.
5. Such refusal to recognize that deprivation of liberty or to give information about the fate or whereabouts of such person or persons has been executed by, or with the permission or support of, that State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for an extended period of time.
7. The act was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the act was part of or intended for it to be part of a widespread or systematic attack against a civilian population.

⁶ BRASIL. Comissão Nacional da Verdade. Report. Brasília: CNV, 2014, p. 290

The Committee on Enforced Disappearances has also recommended that the State takes the measures necessary to explicitly recognize enforced disappearance as a crime against humanity in its domestic legislation.⁷ Even though Brazil is State party to the Rome Statute and therefore subject to the jurisdiction of the International Criminal Court it has not enforced disappearance of people is a crime against humanity.

To comply to the General Comment issued by CED, the State should guarantee that all situations of compulsory withdrawal measures should be communicated to the Federal Public Defender's Office and should also ensure the adoption of an autonomous offence of enforced disappearance, ensuring that its definition is fully compatible with article 2 of the Convention and that it provides for appropriate penalties that take into account its extreme seriousness amongst other measures.

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⁷ Committee on Enforced Disappearances, Concluding observations on the report submitted by Brazil under article 29 (1) of the Convention, para. 17
