



DEFENSORIA PÚBLICA DA UNIÃO EM SÃO PAULO/SP
Rua Teixeira da Silva, 217 - Bairro Paraíso - CEP 04002-030 - São Paulo - SP - www.dpu.gov.br

PETIÇÃO

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) and the Working Group on Enforced or Involuntary Disappearances

Reference: **Call for inputs with a view to issuing a joint statement on the notion of short-term enforced disappearance**

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 FOR INPUTS WITH A VIEW TO ISSUING A JOINT STATEMENT ON THE NOTION OF SHORT-TERM ENFORCED DISAPPEARANCE

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.^[1] It has also recommended that Brazil that the State party take the measures necessary to explicitly recognize enforced disappearance as a crime against humanity in its domestic legislation.^[2] Parliament is still in the process of adopting an autonomous offence of enforced disappearance but it has not approved a law in this regard.

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^[3]

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 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.'^[4]

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.

In this framework, we begin to answer the questions posed by the Committee:

How is the notion of 'short-term enforced disappearances' understood and in which contexts do they occur?

The notion of ‘short-term enforced disappearances’ is understood in Brazil as kidnapping, and this is how it will be prosecuted in Brazil. The crime against humanity of enforced disappearance as established by the Rome Statute which the State has ratified cannot be tried by domestic courts since there are no domestic provision that establish the domestic jurisdiction of such crime.

Which are the legal frameworks and practices that may lead to ‘short-term enforced disappearances’, and which are the legal frameworks and practices that might prevent them?

In Brazil, the legal framework that may lead to ‘short-term enforced disappearances’ is the criminal offence of kidnapping whose conduct is in the Penal Code under article 148 and is characterized by depriving someone of their liberty, through kidnapping or false imprisonment. It constitutes an aggravation of the crime if the victim is an ancestor, descendant, spouse or partner of the agent or older than 60 (sixty) years; if the crime is committed through hospitalization of the victim in a nursing home or hospital; if the deprivation of liberty lasts more than fifteen days; if the crime is committed against a minor under 18 (eighteen) years of age; if the crime is committed with libidinous purposes; or if the victim suffers serious physical or moral suffering due to mistreatment or the nature of the detention.

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance as: The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. As stated before, Brazil does not have a specific criminal offence that would meet these requirements. The conduct of kidnapping does not cover the definition of the Convention.

Which are the main procedural questions that may arise for domestic authorities, the Committee and the Working Group when dealing with ‘short-term enforced disappearances’?

By not having a specific crime of enforced disappearance or short-term enforced disappearance, the State losses its opportunity to comply with the Convention and treat the subject matter with the seriousness it deserves. According to the definition of enforced disappearance established by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance such conduct (arrest, detention, abduction or any other form of deprivation of liberty) is chiefly performed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. Investigations against agents of the State tend to be difficult since there is an inclination of the official apparatus to cover the crimes perpetrated by its agents even in cases of regime change.

In the Brazilian case, during the military dictatorship ^[5] different public bodies cooperated: forces of repression, coroners, cemetery administrations and often the Judiciary. ^[5] Nowadays, by treating enforced disappearance or short-term enforced disappearance as kidnapping, the investigation may lose the principal element of the conduct which is the involvement of agents of the State.

ÉRICO LIMA DE OLIVEIRA
DEFENSOR PÚBLICO FEDERAL

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

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

[3] [IACHR. Gomes Lund vs Brazil. Judgment of November 24, 2010. Available at \[https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf\]\(https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf\).](#)

[4] [BRASIL. Comissão Nacional da Verdade. Report. Brasília: CNV, 2014, p. 290](#)

[5] [5] [BRASIL. Comissão Nacional da Verdade. Report. Brasília: CNV, 2014, p. 502](#)



Documento assinado eletronicamente por **Érico Lima de Oliveira, Defensor(a) Público(a) Federal**, em 08/06/2023, às 19:05, conforme o §2º do art. 10 da Medida Provisória nº 2.200-2, de 24 de agosto de 2001.



A autenticidade do documento pode ser conferida no site http://www.dpu.def.br/sei/conferir_documento_dpu.html informando o código verificador **6225157** e o código CRC **D7AB2A79**.