

General allegation

127th session (9-13 May 2022)

Brazil

The Working Group received information from sources concerning alleged violations and obstacles encountered in the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance (hereafter, 'the Declaration') in Brazil.

1. According to the sources, in 2017, the Brazilian Parliament adopted Law No. 13.491/17,¹ which modified Article 9 of the Military Criminal Code, expanding the definition of military crimes in peacetime and the jurisdiction of military courts. The Law expressly expands the jurisdiction of the Military Justice of the Union to investigate and prosecute acts committed by military personnel under certain circumstances, namely, (i) in the fulfilment of duties prescribed by the President of the Republic or by the Ministry of State for Defence; (ii) in actions involving security of military institutions or military mission and (iii) in activities of military nature, including peace operations.
2. Pursuant to information received, notwithstanding the fact that the Law 13.491/17 excludes intentional killings committed by State-level military personnel, from military jurisdiction, a few months after the Law was enacted, more than a thousand proceedings were transferred from ordinary courts to military courts in the country. In connection to this, the Working Group learned of research conducted in the state of Paraná which revealed that 71% of criminal inquiries into intentional killing of civilians by State-level military personnel was followed by military police procedures.
3. It is further indicated that, in 2018, the Bahia State Court of Justice ruled on the basis of Law No. 13.491/17 that the alleged enforced disappearance of Mr. Davi Fiúza fell under military jurisdiction, transferring the case to the military justice system. Initial investigations into the alleged enforced disappearance of Mr. Davi Fiúza led to the indictment of 17 military police officers for abduction/kidnapping, murder and hiding of the body before ordinary courts of the State of Bahia. The case is reportedly currently stalled in the military justice system.
4. According to the information received, Brazil is yet to adopt legislation recognizing enforced disappearance as an autonomous crime. The Bill 6240/2013, which addresses this gap is currently pending, still awaiting the approval by National Congress.
5. The Working Group was also informed that there are currently several proceedings under Direct Unconstitutionality Action (Ação Directa de Inconstitucionalidade) - including actions No. 5901, 5032, 4164 and 5804 - pending before the Federal Supreme Court of Brazil, which challenge the constitutionality of Law No. 13.491/17 and the competence of military jurisdiction to investigate and prosecute crimes committed by military personnel. Notwithstanding these proceedings, the Supreme Court has shied away from ruling on such issues and has systematically postponed court sessions concerning the constitutional review of the military jurisdiction in Brazil.

¹ BRAZIL. Law n. 13. 491/17. 13 October 2017. Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/113491.htm (in Portuguese).

The Working Group would like to bring to the Government's attention the following provisions of the Declaration, which are directly related to the present allegation:

Article 2

- 1. No State shall practice, permit or tolerate enforced disappearances.*
- 2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.*

Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 4

- 1. All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.*
- 2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance.*

Article 13

- 1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.*
- 2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.*
- 3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.*
- 4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.*
- 5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.*
- 6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified*

Article 14

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.

Article 16

- 1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above.*
- 2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.*
- 3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.*
- 4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.*

Article 18

- 1. Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.*
- 2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account.*

The Working Group would be grateful for your Excellency's Government's cooperation and observations on the following questions:

1. Please provide any additional information and/or any comment you may have on the above-mentioned allegations.
2. Please provide information on the applicable criminal legal framework to deal with allegations of enforced disappearance and clarify whether the latter is codified as a separate criminal offence. If not, please provide any updates on the progress of the adoption of Bill No. 6240/2013.
3. Please provide information on the measures taken to ensure that Law No. 13.491/17 is not used to hinder the access to an impartial and independent justice system.
4. Please provide information on how your Excellency's Government ensures that persons alleged to have committed an enforced disappearance are tried only by the competent ordinary courts, to the exclusion, in particular, of military courts.
5. How does your Excellency's Government ensure that enforced disappearances are investigated and prosecuted by an independent State authority? How does it ensure that enforced disappearances are promptly, thoroughly and impartially investigated by the said authority and that no measures are taken to curtail or impede such investigations?

6. How does your Excellency's Government ensure that persons who have or are alleged to have committed enforced disappearance do not benefit from any measures that might have the effect of exempting them from any criminal proceedings or sanction, including amnesty laws?
7. Please provide information on the current status of the proceedings pending before the Federal Supreme Court of Brazil that challenge the constitutionality of Law No. 13.491/17, in particular the Direct Unconstitutional Actions No. 5901, 5032, 4164, 5804. Please explain the reasons for the repeated and ongoing postponements of the Supreme Court's sessions concerning the constitutional review of military jurisdiction.
8. Please provide information on the status of the judicial proceedings on the alleged enforced disappearance of Mr. David Fiúza and, in particular, whether such proceedings abide by international human rights standards, including the State's duty to ensure that those accused are tried solely by ordinary courts.
9. Please provide information on the measures taken to tackle and reverse the reported trend in the state of Paraná, whereby criminal inquiries into intentional killing of civilians by State-level military personnel are followed by military police proceedings.

The Working Group requests your Excellency's Government to provide a response to the above questions within 60 days.