



IBAHRI input to the WGEID study to mark the 30th anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance

1. The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.
2. The IBAHRI welcomes the opportunity to provide input to the United Nations Working Group on Enforced or Involuntary Disappearances' (WGEID) study to mark the 30th anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance (1992). This input focuses on the prohibition of military jurisdiction over the crime of enforced disappearance, as enshrined in Articles 14 and 16(2) of the Declaration.
3. As highlighted by the Working Group, impunity is a “distinctive trait” of enforced disappearances.¹ A factor that can contribute to States' unwillingness and/or inability to hold perpetrators to account is the jurisdiction of military authorities to investigate, prosecute and punish gross human rights violations. As highlighted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, “...historically, the human rights track record of military justice has been dismal...At its best, military justice has been a separate and inferior system of justice. At its worst, it has provided a pretext for impunity...”²

Prohibition of military jurisdiction over enforced disappearance under the Declaration

4. At the international level, no treaty-based international instrument contains specific provisions on military jurisdiction over gross human rights violations, such as enforced disappearances.³ However, Article 16(2) of the Declaration asserts that persons allegedly responsible for enforced disappearances “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”. Furthermore, Article 14 of the Declaration requires the prosecution and trial to be conducted by the “competent civil authorities of that State”.
5. In line with these provisions, the Working Group has recommended that civil prosecution services conduct prompt and serious investigations into allegations of human rights violations and that military prosecution services must be legally prevented from initiating or continuing investigations.⁴ The Working Group recently elaborated on this issue in its 2020 report on standards

¹ UN Working Group on Enforced or Involuntary Disappearances. *Report on standards and public policies for an effective investigation of enforced disappearances* (7 August 2020) UN Doc A/HRC/45/13/Add.3 [1, 93].

² UNGA. *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions* (20 August 2008) UN Doc A/63/313 [48].

³ At the regional level, see Articles 9(1) and 9(2) of the Inter-American Convention on Forced Disappearance of Persons (1994).

⁴ See, e.g., UN Working Group on Enforced or Involuntary Disappearances. *Report: Addendum: Mission to Mexico* (20 December 2011) UN Doc A/HRC/19/58/Add.2 [98]; UN Working Group on Enforced or Involuntary Disappearances. *Report: Addendum: Best practices on enforced disappearances in domestic criminal legislation* (28 December 2010) UN Doc

and public policies for an effective investigation, holding that “under certain circumstances, some States, such as those in post-conflict situations or States transitioning to democracy, should consider extending the prohibition of trial by any special tribunal, including a military tribunal, to include pretrial investigations, in order to restrict the participation of institutions and agencies that are suspected of committing or having committed enforced disappearances.”⁵ The report also notes that “any limitation of military jurisdiction should not serve as an excuse for the armed forces or other law enforcement or intelligence bodies to withhold full cooperation with the civilian authorities in charge of the investigation”.⁶

Contribution of the Declaration to the development of international law

6. The Declaration is referenced in international human rights standards and norms in the context of the prohibition of military jurisdiction to investigate, prosecute and try gross human rights violations, including enforced disappearances.

- **(Updated) Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997 and 2005)**

7. Principle 31 of the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997) reads “In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity owing to a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, that of an international criminal court.”⁷

8. Principle 29 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005) states that “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court”.⁸

9. The commentary to the Updated Set of Principles notes that the standard embodied in revised Principle 29 is reflected in Article 16(2) of the Declaration and has been “reaffirmed in resolutions of the Commission and Sub-Commission and in the practice of human rights treaty bodies”.⁹

- **Decaux Principles (2006)**

10. The Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) (2006), a “systematic survey of the implications of international law in this

A/HRC/16/48/Add.3 [57]. For further examples, see: Catherine Kent. Excluding enforced disappearances from military jurisdiction: A step forward in the fight against impunity, *Völkerrechtsblog*, 18.12.2020, doi: 10.17176/20210107-182429-0.

⁵ UN Working Group on Enforced or Involuntary Disappearances. *Report on standards and public policies for an effective investigation of enforced disappearances* (7 August 2020) UN Doc A/HRC/45/13/Add.3 [40].

⁶ UN Working Group on Enforced or Involuntary Disappearances. *Report on standards and public policies for an effective investigation of enforced disappearances* (7 August 2020) UN Doc A/HRC/45/13/Add.3 [42].

⁷ UN Commission on Human Rights. *Question of the impunity of perpetrators of human rights violations (civil and political): Annex II - Set of principles for the protection and promotion of human rights through action to combat impunity* (2 October 1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1, Principle 31.

⁸ UN Commission on Human Rights. *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher: Addendum* (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 29.

⁹ UN Commission on Human Rights. *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher* (18 February 2005) UN Doc E/CN.4/2005/102 [57].

area”,¹⁰ assert in Principle 9: “In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”.¹¹

11. The commentary to Principle 9 notes that “...there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating “guilty pleas” to victims’ detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings”.¹²

12. The commentary makes explicit reference to Article 16(2) of the Declaration, highlighting that “[t]his was the solution favoured by the General Assembly when it adopted the Declaration on the Protection of All Persons from Enforced Disappearances, which stipulates that persons presumed responsible for such crimes “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”. The constituent parts of the crime of enforced disappearance cannot be considered to have been committed in the performance of military duties...”.¹³

13. In the communication of *Kholodova v. Russian Federation*, the UN Human Rights Committee refers to Principle 9 in connection to its consideration that “in a democratic State where the rule of law must prevail, military criminal jurisdictions should have a restrictive and exceptional scope”.¹⁴ The Committee held that the “author’s right to reparation for herself as well as in the name of her son, was seriously compromised”, finding a violation of Article 2(3)(a) in conjunction with Article 6(1) of the International Covenant on Civil and Political Rights.¹⁵

- **Committee on Enforced Disappearances’ Statement on Enforced Disappearances and Military Jurisdiction (2015)**

14. In 2015, the UN Committee on Enforced Disappearances issued a statement on enforced disappearances and military jurisdiction “with a view to clarifying its guidance to States parties for its review of the measures taken to give effect to States parties’ obligations to implement the Convention”.¹⁶ The Committee, “[t]aking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the

¹⁰ UNGA. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (20 August 2008) UN Doc A/63/313 [51].

¹¹ UN Commission on Human Rights. *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)* (13 January 2006) UN Doc E/CN.4/2006/58, Principle 9. See also: *Decaux Principles Workshop: The Yale Draft (Yale Draft)* (June 2018) available at: <<https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>>, Principle 9.

¹² UN Commission on Human Rights. *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)* (13 January 2006) UN Doc E/CN.4/2006/58 [32]. See also: *Decaux Principles Workshop: The Yale Draft (Yale Draft)* (June 2018) available at: <<https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>> [45].

¹³ UN Commission on Human Rights. *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)* (13 January 2006) UN Doc E/CN.4/2006/58 [33]. See also: *Decaux Principles Workshop: The Yale Draft (Yale Draft)* (June 2018) available at: <<https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>> [46].

¹⁴ UN Human Rights Committee. *Kholodova v. Russian Federation* (11 December 2012) UN Doc CCPR/106/D/1548/2007 [10.5].

¹⁵ UN Human Rights Committee. *Kholodova v. Russian Federation* (11 December 2012) UN Doc CCPR/106/D/1548/2007 [10.5].

¹⁶ UNGA. *Report of the Committee on Enforced Disappearances: Annex III - Statement on enforced disappearances and military jurisdiction* (13 February 2015) UN Doc A/70/56 [2].

implementation of international standards”, reaffirmed that “military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance”.¹⁷

15. In doing so, the Committee noted that, *inter alia*, it “takes into account the Declaration on the Protection of All Persons from Enforced Disappearance, in particular its article 14, and bears in mind the approach of the Working Group on Enforced or Involuntary Disappearance of the Human Rights Council in this regard.”¹⁸

16. In many of its subsequent Concluding Observations, the Committee has recalled its statement when recommending that the State party in question take the necessary legislative and other measures to ensure that all cases of enforced disappearances are expressly excluded from military jurisdiction and can only be investigated and tried by ordinary courts.¹⁹

Obstacles to implementing the Declaration: Brazilian Context

17. In 2017, the Brazilian legislature adopted Law No. 13.491, which expanded military jurisdiction by amending the Military Penal Code definition of ‘military crimes in peacetime’. The Law expressly states that federal military institutions and courts now have jurisdiction to investigate, prosecute and try federal military personnel accused of intentionally killing civilians in certain contexts. This includes in responding to orders of the President and Guarantee of Law and Order Operations.²⁰ Additionally, the Law establishes all crimes under the Brazilian Penal Code as military crimes when committed by on-duty military personnel against civilians, even if the Military Penal Code does not classify such conduct as such.²¹

18. Under Law No. 13.491, intentional killings committed by state-level military personnel, such as military police officers, are excluded from state-level military jurisdiction. However, a few months after the Law was enacted, more than a thousand proceedings were transferred from ordinary courts to military courts in Brazil – a number that is now probably much higher.²²

19. The alleged enforced disappearance of David Fiuza in the state of Bahia is an example of this situation. In 2018, the charge against military police officers for kidnapping, but not involving a charge of intentional killing, was transferred to the state-level military court.²³ Furthermore, research in the state of Paraná reveals that 71% of criminal inquiries into intentional killing of civilians by state-level military personnel followed military police procedures.²⁴

¹⁷ UNGA. *Report of the Committee on Enforced Disappearances: Annex III - Statement on enforced disappearances and military jurisdiction* (13 February 2015) UN Doc A/70/56 [10].

¹⁸ UNGA. *Report of the Committee on Enforced Disappearances: Annex III - Statement on enforced disappearances and military jurisdiction* (13 February 2015) UN Doc A/70/56 [7].

¹⁹ See: UN Committee on Enforced Disappearances. *Concluding Observations: Tunisia* (25 May 2016) UN Doc CED/C/TUN/CO/1 [21]; UN Committee on Enforced Disappearances. *Concluding Observations: Burkina Faso* (24 May 2016) UN Doc CED/C/BFA/CO/1 [22]; UN Committee on Enforced Disappearances. *Concluding Observations: Gabon* (10 October 2017) UN Doc CED/C/GAB/CO1 [24]; UN Committee on Enforced Disappearances. *Concluding Observations: Cuba* (19 April 2017) UN Doc CED/C/CUB/CO/1 [20]; UN Committee on Enforced Disappearances. *Concluding Observations: Albania* (3 July 2018) UN Doc CED/C/ALB/CO/1 [27]; UN Committee on Enforced Disappearances. *Concluding Observations: Chile* (8 May 2019) UN Doc CED/C/CHL/CO/1 [15].

²⁰ Article 9(2), Law-Decree No. 1001/1969 (Military Penal Code).

²¹ Article 9(ii)(c), Law-Decree No. 1001/1969 (Military Penal Code).

²² O GLOBO. *Novo foro dos militares já tirou mil ações da Justiça comum, de ameaça a tortura* (2018) available at: <<https://oglobo.globo.com/brasil/novo-foro-dos-militares-ja-tirou-mil-aco-es-da-justica-comum-de-ameaca-tortura-22659068>>.

²³ G1. *TJ envia caso do desaparecimento de Davi Fiuza durante ação policial na BA para Justiça Militar* (2018) available at: <<https://g1.globo.com/ba/bahia/noticia/2018/09/18/tj-envia-caso-do-desaparecimento-de-davi-fiuza-durante-acao-policial-na-ba-para-justica-militar.ghtml>>.

²⁴ Inquiries were initially opened by the civil police in 27% of cases and by the Prosecutor’s Office in 1.2% of cases. PARANÁ. *Nota Técnica No 01/2021 – NUPEP/DPE-PR*, 2021. Available at: <<https://docplayer.com.br/209312008-Nota-tecnica-no-01-2021-nupeg-dpe-pr.html>>.

20. There are several proceedings before the Federal Supreme Court of Brazil that challenge the constitutionality of Law No. 13.491. For example, in February 2018, the Socialism and Freedom Party (Partido Socialismo e Liberdade - PSOL) filed Action for Unconstitutional Review (Ação Direta de Inconstitucionalidade - ADI) n° 5901. The Action presents a valuable opportunity for the Honourable Court to uphold Brazil's obligations under regional and international human rights law, standards and norms vis-à-vis the prohibition of military jurisdiction to investigate, prosecute and punish members of the armed forces accused of gross human rights violations in peacetime.²⁵

21. Based on the above, the IBAHRI encourages the Working Group to monitor the situation in Brazil and consider issuing an advice to the Government of Brazil calling on the State to revoke Law No. 13.491 and adopt a legal framework that explicitly excludes human rights violations, including allegations of enforced disappearances, from being investigated and tried by military jurisdiction.

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²⁵ See International Bar Association's Human Rights Institute. *IBAHRI submits amicus curiae brief on military jurisdiction to the Federal Supreme Court of Brazil* (9 March 2021) available at: <<https://www.ibanet.org/article/9647BA9F-2DD5-49C6-BB22-352C0136DA69>>.