



Brazil

Joint Submission to the List of Issues to be taken up in connection with the consideration of Brazil's initial report by the Committee on Enforced Disappearances

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This submission was the result of the collective work of the following organisations - CEJIL, Terra de Direitos, Iniciativa Direito à Memória e Justiça Racial, Rede de Comunidades e Movimentos contra a Violência, Fórum de Juventudes do Rio de Janeiro, Grupo Tortura Nunca Mais/RJ, Comissão de Familiares de Mortos e Desaparecidos Políticos.

1. Summary

This Brazilian NGO's Joint Submission intends to provide suggestions of questions for consideration regarding CED List of Issues on Brazil. As a matter of great concern, the NGOs point out:

- Enforced disappearances continue to take place in current days and have become widespread and systematic practices in certain territories in the country and it is important the State commitment towards investigate acts committed by persons or groups of persons acting with or without direct authorization, support or acquiescence of the State. Documenting and monitoring of cases of enforced disappearances remains a challenge in Brazil, with aggravated difficulties for civil society due to a scenario of extreme violence and action by paramilitary groups.
- Brazilian State needs to provide precise information on: (i) which would be the measures to prevent and combat enforced disappearances; (ii) how it intends to comply with its obligation under Article 5 of the ICPPED; (iii) how it intends to hold accountable the perpetrators of crimes against humanity committed against political opponents during the military dictatorship; (iv) how many cases of enforced disappearances have been tried and how many perpetrators were brought to justice since the signing of ICPPED and (v) how it has been dealing with the investigation and prosecution of mercenaries, paramilitary groups and/or death squads involved in forced disappearance reports, ensuring to investigation and forensic bodies independence and autonomy of work.

2. Introduction

This submission is a contribution to the work of the Committee on Enforced Disappearances in the context of the initial review of Brazil. CEJIL and a pool of CSOs and social movements in Brazil would like to provide suggestions of questions aiming at the strengthening of the dialogue, which will take place during the review of the State Party. These suggestions are offered to the Committee for consideration previous to its adoption of the List of Issues for the review of Brazil, which will be decided on the upcoming CED 18th Session (march 30 to April 9). The submission is presented in accordance with the NGO Information Notice¹.

CEJIL and its partner organizations in Brazil have carefully reviewed Brazil's National Report (CED/C/BRA/1) and observe with concern, which Brazilian authorities seem to deny that enforced disappearances continue to take place in current days and have become widespread and systematic practices in certain territories in the country.

¹ CED 18 Session. Information Note for NGOs. Available at: <https://drive.google.com/file/d/16xMtCrFwPlkCvYkxUAKpArFhmTNfXYBU/view>

The existing context of institutionalized and structural racism² together with the control of territories by armed groups, especially paramilitary groups (militias) is of deep concern. These groups have been historically acting in territories where the inhabitants are African-descendent and impoverished. Many of these groups, although outlawed, have been perceived as acting with at least the support or acquiescence of the State. In this scenario of terror, it has become extremely difficult for human rights defenders, family members and civil society organizations to document cases of enforced disappearances.

3. Definition and criminalisation of enforced disappearance (Articles 1-5)

The report presented by Brazil informs “[t]here is no specific law on enforced disappearance in Brazil, nor are there circumstances that support or condone such practice.”³ In an effort to justify its failure in comply with conventional obligations, Brazil affirms the existence of a Bill (6240/2013) still pending before the National Congress to comply with its duty under article 4 of the ICPPED to define enforced disappearance as a criminal offense under Brazilian law.

In addition, the Brazilian State intends to justify its lack of compliance with article 4 of the ICPPED, through an alleged harmonization of the domestic legislation that could be “invoked to deal with cases of enforced disappearances in Brazil”⁴ and presents a list of articles provided for in the Brazilian Penal Code⁵. According to the report “Disappearance is a crime category that can be understood in the Brazilian Penal Code as kidnapping, voluntary manslaughter, and concealment of a corpse”⁶.

Questions:

² More information on structural, systematic and institutional racism in Brazil can be found in reports and press releases issued overtime by the IACHR, as examples “IACHR. Preliminary observations to the in loco visit to Brazil”, page 19. Available (in Portuguese) at: <https://www.conectas.org/wp-content/uploads/2018/11/CIDH-Observa%C3%A7%C3%B5es-preliminares.pdf> ; “IACHR Expresses Deep Concern over Growing Violence against Afro-descendants in Brazil”, Press release 209/18 (September 2018) available at: https://www.oas.org/en/iachr/media_center/PReleases/2018/209.asp ; “IACHR Repudiates Murder of Councilor and Defender of Human Rights in Brazil” Press Release 52/18 (March 2018) available at https://www.oas.org/en/iachr/media_center/PReleases/2018/052.asp ; CIDH Case of Simone André Diniz v. Brazil 12.001. October, 21 2006. Par. 84 onwards available (in Portuguese) at: <http://www.cidh.org/annualrep/2006port/BRASIL.12001port.htm>

See also, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil A/HRC/31/57/Add.4 para.29. Available at: <https://undocs.org/A/HRC/31/57/Add.4>

³ Report presented by the Brazilian State to the Committee on Enforced Disappearances in June 30, 2019. CED_C_BRA_1_7043_E. Paragraph 36. Available at (https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=BRA&Lang=EN)

⁴ Idem. paragraph 45

⁵ Idem. paragraph 45-47.

⁶ Idem. paragraph 43

1. The Bill 6240/2013 still pending approval before the National Congress provides for the definition of enforced disappearances as a criminal offense under domestic law. There is a limitation in this Bill, also justified in the national report under article 8, related to the retroactive application of laws. The former is respective to the Brazilian Amnesty Law (Lei 6.683/79). Could the State provide the Committee with information on how it intends to comply with its obligation under Article 5 of the ICPPED? Especially in views the limitation imposed by Bill 6240/13 reinforces the effectiveness of the Amnesty Law domestically?
2. The State informs the Committee that there was an unfavorable opinion to Bill 6240/13 issued by the Commission on Public security and Against Organized Crime to the legislative changes proposed by the Bill. Those were under the justification of “trivialization of heinous crimes requiring greater repressions by Government”⁷. Could the State provide the Committee with precise information regarding which would be the measures to prevent and combat enforced disappearances “must take place first in the administrative sphere, as public policies”?

The Inter-American Court on Human Rights (IACHR) has found in the case of *Gomes Lund and Other v. Brazil* that “the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights violations lack legal effect. As a consequence, they cannot continue to represent an obstacle in the investigation of the facts in the present case (...)”⁸. Similarly, the IACHR has found in the case *Vladimir Herzog v. Brasil*⁹ that during the dictatorship regime in Brazil (1964/1985) there were systematic and widespread attacks against the population that opposed to the regime and these practices constituted crimes against humanity¹⁰. The IACHR found that “[e]ven when certain conducts considered crimes against humanity are not formally described as an offense under domestic law, or which were even legal under domestic law, the person who committed the crime is not exempted of accountability under international law. This means, the inexistence of internal norms to establish and sanction international crimes, does not exempt, in any case, the authors of its international responsibility nor the State to sanction those crimes”¹¹.

Question:

1. Could the Brazilian State provide information to the Committee whether and how it intends to hold accountable the perpetrators of crimes against humanity committed against political opponents who were forcibly disappeared during the military ruling 1964-1985? Especially since the State itself recognizes in Paragraph 55 of its initial report the acceptance of the mandatory competence of the Inter-American Court of Human Rights?

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Report submitted by the Brazilian State to the Committee on Forced Disappearances on June 30, 2019. CED_C_BRA_1_7043_E. Paragraph 24.

⁸ IACHR. Case *Gomes Lund et al. “Guerrilha do Araguaia” v. Brazil*. Preliminary Objections, Merit, Reparations and Costs. Serie C 219. Judgment of November 24, 2010. Paragraph 174 .

⁹ IACHR. *Caso Herzog e Outros v. Brasil*. Preliminary Objections, Merit, Reparations and Costs. Serie C 353. Judgment of March, 15, 2018. Paragraph 292.

¹⁰ *Idem*. paragraph 214-242.

¹¹ *Idem*. paragraph 231-232

Enforced disappearances are part of Brazilian history. From the slavery process, colonization, through the dictatorships, totalitarian and military regimes up to current days in democracy. On the specific issue of enforced disappearances, Brazil has signed the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), in 2007, approved by the National Congress in 2010 and deposited the ratification instrument in November 29 2010. However, since 1994, the Brazilian State was already a signatory of other regional treaty on the same issue, the Inter-American Convention on Forced Disappearances of Persons. Both instruments were enacted under domestic law in May 11, 2016, through presidential Decrees 8.767/2016 and 8.766/2016.

Among the main existing challenges on the issue of enforced disappearances is the documenting and monitoring of cases of enforced disappearances. Brazil repeatedly mentions in its initial report that “[d]ue to the fact that there is still no specific classification on enforced disappearance in the Brazilian Penal Code and as this category is not included in the statistics of the official bodies, there are no systematic or sufficient formal data which tends to fall within the jurisprudence called “dark figures of crime of the Criminal Law”¹².

Questions:

3. Since there is no methodology to build these indicators, could the State inform the Committee how the cases of enforced disappearances have been systematized and monitored in Brazil? Is there a method? In case there are, could the State provide information on which method it has been applying?
4. Could the State provide the Committee with information on how it has been dealing with enforced disappearances on current days? Especially due to the explanation offered to the Committee on the report regarding the harmonization of the domestic legislation through the categories of “kidnapping, voluntary manslaughter and concealment of a corpse”¹³?

According to Brazil’s report, Bill 6240/13 is aimed at simply specify and improve the implementation of ICPPED in the domestic sphere, to include ‘disappearance of forced nature’¹⁴. The report seems to perceive that disappearances have already been addressed by current criminal law¹⁵.

Question:

5. If this is the case, could the State provide the Committee information (including disaggregated data) regarding how many cases of enforced disappearances have been

¹² Report submitted by the Brazilian State to the Committee on Forced Disappearances on June 30, 2019. CED_C_BRA_1_7043_E. Paragraph 29

¹³ Idem. Paragraph 43

¹⁴ Idem. Paragraph 43

¹⁵ In its initial report, Brazilian State lists different articles of the Brazilian Penal Code, the Law against tortures (9.455 / 97) and the Heinous Crimes Law (Law 8.072 / 90) to deal with cases of enforced disappearance in Brazil. Report submitted by the Brazilian State to the Committee on Enforced Disappearances on June 30, 2019. CED_C_BRA_1_7043_E. Paragraphs 43-47

tried and how many perpetrators were brought to justice since the signing of ICPPED? As Brazil is a Federal State, the information could be presented as a matter of example of best practices of any of the states within Brazil.

In informing the Committee on the classification and definition proposed by Bill 6240/13, Brazil appears to believe that this classification could consist in an important advancement to include actions foreseen in the Convention¹⁶, as “seizing, incarcerating, kidnapping or any other form of depriving someone from his/her liberty, even legal means, on behalf of the State or of an armed or paramilitary group, or upon authorization, support or consent of the State (...)”. On paragraph 43, Brazil points out that these conducts would be subject to sanctions when committed by persons acting “as an agent of the Government, its institutions”. On paragraph 44 the State notes that these acts would constitute the crime of enforced disappearances when committed “on behalf of the State or of an armed or paramilitary group, or upon authorization, support or consent of the State (...)”.

Question:

6. Could the State clarify to the Committee how it intends, under the conceptual framework of the classification these acts as criminal offenses, to include situations in which perpetrators act with acquiescence of the State, instead of the consent, as framed in Paragraph 44 of the report, while decided to depart from the original text of the Convention?
7. Can the State clarify to the Committee whether it considers has been complying with its international obligation under Art. 3 of the Convention, since it states in paragraph 51 of its report that “[d]eprivation of liberty by a person or a group of persons acting with no authorization or consent of the State is already classified as a serious crime under the Constitution and the Brazilian Penal Code (...)”?

In relation to State’s obligations under Article 3 of the Convention, it is important to note that the duty of the State is to investigate acts committed by persons or groups of persons acting without the authorization, support or acquiescence of the State. In Brazil there is systematic omission of the State regarding investigation and prosecution of cases of enforced disappearance, especially when there is information on the participation of policemen or former policemen. There is a history of paramilitary groups (milícias) formed by former state agents or former policemen disappearing people in Brazil¹⁷.

Question:

¹⁶ Idem. paragraph 44
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Public Prosecutor Office of the State of Rio de Janeiro (MPRJ). Diagnose of the Program for Locating and Identifying Missing Persons “The disappearances in state bureaucracies”. April 2018. Page 56. Available at: https://www.mprj.mp.br/documents/20184/748003/relatorio_plid.pdf

8. Can the State clarify to the Committee how it has been dealing with the investigation of the paramilitary groups (milícias)¹⁸ or death squads, especially in relation to their actions regarding enforced disappearances?

Brazil continues to tolerate the occurrence of enforced disappearances. As it is stated in the Diagnose of the Program for Locating and Identifying Missing Persons (PLID), developed by the Prosecutor's Office of the State of Rio de Janeiro (MP/RJ) “cases of enforced disappearance were made visible in the latin american context of civil-military regimes, but continue to be a reality in Brazil. In the margins of the State [...], in a scenario supposedly democratic, this practices mark the lives of people, mainly impoverished, living in remote areas of the country and in the outskirts of big cities”¹⁹. Furthermore, perpetrators continue to not be held accountable for these crimes. During the military dictatorship period in Brazil 494 people were forcibly disappeared by the regime. To this date, perpetrators were not brought to justice and the circumstances of these crimes were never revealed. Currently, hundreds of people continue to be disappeared in Brazil, as part of this legacy from the military regime, the control of territories by armed groups and the impunity that persists in Brazil.

Question:

9. State agents and milícias (formed by current and former state agents) have been pointed as the main perpetrators (or suspects) of the cases of enforced disappearances. Brazil has a chronic history of impunity and the investigative bodies are on many times involved with the perpetrators. Could the State provide to the Committee information on what policies or efforts it has carried out to ensure that investigation bodies and responsible for forensic evidence gathering are independent and autonomous?

¹⁸ “Milícia” is a term commonly used to describe armed groups in Rio de Janeiro, made up of policemen, former policemen, firefighters, and correctional officers who, using coercion and an alternative discourse to drug trafficking, dominate territories and populations. Source: Rio de Janeiro State Prosecutor's Office. Diagnose of the Program for Locating and Identifying Missing Persons “The disappearances in state bureaucracies”. April 2018. Page 56. Footnote 26. Available at: https://www.mprj.mp.br/documents/20184/748003/relatorio_plid.pdf

¹⁹ Free translation from the Portuguese version. Public Prosecutor Office of the State of Rio de Janeiro (MPRJ) Idem. Page 56.