

Civil Society Contributions on Forced Disappearances in Brazil to the United Nations Committee against Enforced Disappearances (CED)

Brazil, December 5, 2022.

1. Forced disappearance in Brazil: background and present

The practice of forced disappearance in Brazil inevitably goes back to the colonization process that was sustained by the persecution and forced removal of Romani people in their native territories, the domination of native indigenous peoples, and, for more than 350 years, the transatlantic trafficking of African people to the Americas, serious violations that aimed at enslaving these peoples and communities.

However, the practice of forced disappearance has historically stood out for being widespread under authoritarian regimes, including in Brazil, especially during the military dictatorship (1964-1985), when 243 people were forcibly disappeared by the regime.¹

¹ This is the official number according to the National Truth Commission report on the victims of the practice of forced disappearances in the same period (1964-1985), available at: [Chapter 12.pdf \(memoriasreveladas.gov.br\)](https://memoriasreveladas.gov.br). Accessed on 5 Dec. 2022.

It happens that even 37 years after the re-democratization of the Brazilian State, the practice of forced disappearance continues to be a systematic policy, but not against political opponents, but especially against black, impoverished, and peripheral young people, that is, the same victims of police lethality and also of mass incarceration in the country² and, contrary to what happens in cases of lethality or arrests - even if illegal - there is not even official information about forced disappearances, which makes it difficult to act, especially, in the investigation of each case.

This and other points will be better presented below so that they can be analyzed by the UN Committee against enforced disappearances and incorporated in its report on Brazil in the 24th period of hearings, according to the information note.

1.1. Condemnation of the Brazilian State by the Inter-American Court of Human Rights in the case of Gomes Lund and others vs Brazil (Guerrilha do Araguaia)

In March 2009, the Inter-American Commission on Human Rights submitted to the Court a claim against the Brazilian State, originating from a petition presented on August 7, 1995 by the Center for Justice and International Law (CEJIL) and Human Rights Watch/Americas, on behalf of persons who disappeared in the context of the Araguaia Guerrilla and their families.

The denunciation sought the accountability of the Brazilian State for the arbitrary detention, torture and forced disappearance of 70 people, including

² In the year 2021 alone, more than 6,145 people were killed by police forces in Brazilian states, which corresponds to 12.7% of all intentional violent deaths in the country. Of these victims, 84% were black, 99.2% were male, and 74% of the victims were up to 29 years old. The same profile crosses if we consider the people deprived of freedom in the country, which is composed mostly of young black men in the same age group (equivalent to approximately 67.5% of the incarcerated population). Data from the Anuário Brasileiro de Segurança Pública, year 16: "*Police mortality drops, but mortality of blacks increases in 2021*"; "*the 820 thousand lives under the guardianship of the State*" Available at: <https://forumseguranca.org.br/wp-content/uploads/2022/06/anuario-2022.pdf?v=5> . Accessed on October 20, 2022.

members of the Communist Party of Brazil and peasants from the Araguaia region, in Brazilian Army operations undertaken between 1972 and 1975 with the aim of eradicating what they considered a "guerrilla" group, in the context of Brazil's military dictatorship (1964-1985).

One of the biggest obstacles today for the criminal accountability of the public agents involved, if not the biggest, and the one that also motivated the submission of the case to the Court, is Law 6683/1979, called the Amnesty Law. It prevented - and still prevents - the State from carrying out criminal investigations and holding criminally responsible people who participated in forced disappearances and extrajudicial executions in the context of the Military Dictatorship.

When deciding on the case of Gomes Lund and others vs Brazil ("Guerrilha do Araguaia"), the Inter-American Court of Human Rights was explicit in its ruling and reinforced article 63.1 of the American Convention on Human Rights, which deals with the duty of reparation of a state that has violated rights and freedoms protected by it. In this sense:

every violation of an international obligation that has caused damage entails the duty to repair it adequately, and this provision "reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on the responsibility of a State.

On that occasion, the Inter-American Court also determined that the Brazilian State should investigate the narrated facts, judge and punish those intellectually and materially responsible, and determine the whereabouts of the victims within a reasonable time, taking into consideration criteria determined³ for the investigation in this type of case:

(a) to initiate the pertinent investigations with respect to the facts of the present case, taking into account the pattern of human rights

³ Case of Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil. Judgment of November 24, 2010. Paragraph 256 "a", "b" and "c".

violations existing at the time, so that the process and relevant investigations are conducted in accordance with the complexity of these facts and the context in which they occurred, avoiding omissions in the gathering of evidence and in following logical lines of investigation;

b) determine the material and intellectual authors of the enforced disappearance of the victims and of the extrajudicial execution. Furthermore, because these are serious violations of human rights, and considering the nature of the facts and the continuous or permanent nature of the forced disappearance, the State may not apply the Amnesty Law in favor of the perpetrators, as well as any other analogous provisions, prescription, irretroactivity of the criminal law, *res judicata*, *ne bis in idem* or any similar exclusion of liability to avoid this obligation, in accordance with paragraphs 171 to 179 of this Judgment, and

(c) ensure that: (i) the competent authorities carry out, *ex officio*, the corresponding investigations, and that, to that end, they have at their disposal and use all the logistical and scientific resources necessary to collect and process the evidence and, in particular, are provided with access to the relevant documentation and information, to investigate the facts reported and to conduct, with promptness, the actions and investigations essential to clarify what occurred to the dead person and the disappeared persons in the present case; (ii) the persons participating in the investigation, including the relatives of the victims, the witnesses and the justice operators, are provided with the necessary security guarantees; and (iii) the authorities refrain from carrying out acts that could obstruct the progress of the investigative process.

The Court was also emphatic in stating that the state should ensure that the criminal proceedings related to the case were examined in the ordinary jurisdiction and not in the military forum, whatever the occupation of those involved, as well as determined that the state should ensure the full access and capacity of action of the

relatives of the victims at all stages of the investigation and trial of those responsible, according to the rules in force.⁴

Regarding the determination of the whereabouts of the victims, the Court emphasized the need for the state to make every effort to find the remains of the victims, highlighting the waiting of family members for more than 40 years. However, Brazil never informed how many expeditions to the Araguaia region were carried out for this purpose.

In the ruling of the "Guerrilha do Araguaia" case, the Inter-American Court of Human Rights recognized that the Brazilian State had not complied with its obligation to adapt its internal law according to the provisions of the American Convention on Human Rights, so that the Amnesty Law, for example, does not allow the violations of rights and freedoms committed by the State during the dictatorial period to be duly investigated and punished.

In the same sense, the Inter-American Court determined that the Brazilian State should ratify the Inter-American Convention on Forced Disappearance of Persons and proceed with the obligation of article 2 of the Pact of San José da Costa Rica and thus typify the crime of forced disappearance of persons, according to the inter-American parameters established in point 287 of the sentence:

the Court urges the State to proceed with the legislative process and to adopt, within a reasonable time, all necessary measures to ratify the Inter-American Convention on Forced Disappearance of Persons. On the other hand, in accordance with the obligation arising from article 2 of the American Convention, Brazil must adopt the measures necessary to typify the crime of forced disappearance of persons, in conformity with inter-American parameters. This obligation is binding on all state powers and organs as a whole. In this regard, as this Court has previously emphasized, the State should not limit itself to promoting the bill in question, but should ensure its prompt

⁴ Case of Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil. Judgment of November 24, 2010. Paragraph 257.

sanction and entry into force, in accordance with the procedures established in the domestic legal system. While complying with this measure, the State must adopt all those actions that guarantee the effective trial and, if appropriate, punishment of the facts constituting the forced disappearance, through the mechanisms existing in domestic law.

Only in April 2011, the Inter-American Convention on Forced Disappearance of Persons was ratified by the Brazilian State, being promulgated in May 2016. However, the crime of forced disappearance has not yet been typified in domestic law, limited to only one bill (PLS No. 245 of 2011, which received the number PL 6.240/2013 in the House of Representatives), which has been in progress since 2011 until today without an outcome of the legislative process. On the official website of the House of Representatives, the situation of this bill is: "awaiting designation of rapporteur in the Committee on Constitution and Justice and Citizenship", and the last order occurred on October 1, 2013.⁵

Despite a "different" political context, until today there is no observance by the Brazilian State of the most basic human rights, which in itself would allow the prosecution and accountability of public agents intellectually and/or materially involved in the practice of forced disappearance in Brazil.

1.2. Forced disappearance in Brazil today

- **Statistical information** - 13. The State Party shall take the necessary measures to promptly generate accurate and up-to-date statistical information on missing persons, disaggregated by sex, age, nationality, place of origin and racial or ethnic origin. Within this information should include the date of disappearance, the number of persons who have been located, alive and dead, and the number of cases in which the State may have had some kind of participation within the meaning of article 2 of the Convention. In this regard, the Committee recommends that the

⁵ Available at:

<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=589982>. Accessed on 5 Dec. 2022.

State Party expedite the launching of the National Registry of Missing Persons and ensure that it contains at least all the information indicated in this recommendation.⁶

In 2021, it will be a decade since the creation of the National Truth Commission: temporarily instituted in Brazil through Law No. 12,528 of 2011. It was a step by the Brazilian State to investigate the serious human rights violations committed by its agents between the years 1946 and 1988, when the current Federal Constitution was enacted.

The National Truth Commission released its Final Report⁷ in 2014, when it closed its activities. It is material of great democratic value, which refers to an important period in the history of Brazil, especially because it includes the military dictatorship that lasted from 1964 to 1985. However, it is not correct to say that state violence occurred only during the dictatorial period; it continues to occur and exposes the violence directed against certain segments of society, especially black people.

According to the Political Terror Scale (PTS) project⁸, which measures on a scale from 1 to 5 the degree of rights violations committed by states, all Latin American countries that went through the transitional justice process in the 1980s and 1990s have seen improvements in the human rights situation after redemocratization, except Brazil.⁹

⁶ Final remarks on the report presented by Brazil in virtue of article 29, paragraph 1, of the Convention.

⁷ Available at: <http://cnv.memoriasreveladas.gov.br/>. Accessed on 5 Dec. 2022.

⁸ The project, started in the 1980s by faculty and students at Purdue University in the USA, uses criteria according to the degree of these violations, among which are summary executions, torture, human rights violations, and human rights violations in the 12 Latin American countries that went through the process of transitional justice in the 1980s and 1990s, had improvements in the human rights situation after the re-democratization, except for Brazil

⁹ CAAF-UNIFESP - Center for Forensic Anthropology and Archaeology of the Federal University of São Paulo. State Violence in Brazil: an analysis of the Crimes of May 2006. Final Report. São Paulo: UNIFESP, 2019. Available at: https://www.unifesp.br/reitoria/caaf/images/novo_site/documentos/Relat%C3%B3rio_-_Crimes_de_Maio.pdf//. Accessed on 5 Dec. 2022.

The data collected by the PTS show that in the first years of redemocratization, the country, which by the same criteria had not yet reached the highest level of the scale during the dictatorial period, reached this position and remained there for three consecutive years. From 1993 to 1997 Brazil remained at high levels (level 4 of the scale), reducing only for one year and returning soon after to position 4, until the year 2019, when it again reached the highest level of the "political terror scale."¹⁰

With this brief analysis, we intend to demonstrate that the re-democratization, by itself, did not put an end to state violence committed against historically persecuted populations - black people, impoverished, peripheral, traditional peoples and communities, among others - and that, although important, the creation of an exclusive body to investigate the abuses committed during the most authoritarian period in Brazil's history did not consider that these abuses are still happening, but now in a different historical context.

About the practice of forced disappearance in the context of the military dictatorship, the Final Report of the National Truth Commission pointed out that:

[In Brazil, forced disappearance was the result of the military regime's systematic policy against political opponents. [Forced disappearance was part of the dictatorship's strategy to conceal state crimes. Initially, torture and executions were covered up by false versions of suicides, confrontations, escapes, and hit-and-runs. The bodies were often handed over to the families in sealed coffins, to hide the marks of violence and to terrorize and disorient the political groups, as recounted in detail in Chapter 11...[Bodies were] buried under false names or as indigents in clandestine graves, or thrown into lakes, rivers, or the sea.¹¹

It is not wrong to say that the practice of forced disappearance has been and continues to be a growing practice even in so-called democratic times in Brazil and that it is still committed by agents linked to the public security forces. And the public

¹⁰ Available at: <http://www.politicalterroryscale.org/Data/>. Accessed on 5 Dec. 2022.

¹¹ Chapter 12, available at: Chapter [12.pdf\(memoriasreveladas.gov.br\)](12.pdf(memoriasreveladas.gov.br)). Accessed on 5 Dec. 2022.

security policy continues with the same militarized structure after the enactment of the 1988 Constitution.

The bodies responsible for political repression during the dictatorship were extinct and others aimed at the defense of human rights were created after the re-democratization, but the authoritarian structure continued to permeate the public security institutions with a militarized structure and without effective mechanisms of democratic control.¹² At this point, it should be noted that the Public Prosecutor's Office, although responsible for the external control of police activity, does not always perform this function adequately.

It is important to note that even before the process of re-democratization was concluded, extermination groups began to emerge composed of agents of the State that operated, above all, in the outskirts of the cities, using their functions as public security agents to cause deaths and forced disappearances, in addition to other human rights violations. The victims of these agents were mostly black, impoverished and peripheral young people.

The aforementioned National Truth Commission Report confirmed 434 (four hundred and thirty-four) deaths and disappearances during the military regime, divided as follows: 191 (one hundred and ninety-one) deaths, 210 (two hundred and ten) disappeared persons whose bodies have not been located to date, and 33 (thirty-three) disappeared persons whose bodies have been identified.¹³ However, these numbers do not correspond to the total number of deaths and disappearances, since they refer only to cases of fatal victims who were engaged in some political activity in opposition to the dictatorship and whose evidence of the involvement of state agents in the exercise of their functions was proven by the work carried out by

¹² CAAF-UNIFESP - Center for Forensic Anthropology and Archaeology of the Federal University of São Paulo. State Violence in Brazil: an analysis of the Crimes of May 2006. Final Report. São Paulo: UNIFESP, 2019. Available at: https://www.unifesp.br/reitoria/caaf/images/novo_site/documentos/Relat%C3%B3rio_-_Crimes_de_Maio.pdf. Accessed on 5 Dec. 2022.

¹³ Report of the National Truth Commission, v. III, p. 26. Available at: http://www.cnv.gov.br/images/pdf/relatorio/volume_3_digital.pdf. Accessed on 5 Dec. 2022.

the CNV, despite all the obstacles faced during the investigations, in particular the lack of access to documents produced by the Armed Forces.

This means that today it is impossible to have precise data on how many people were assassinated or forcibly disappeared by the Brazilian state during the dictatorial period. What we do have are estimates and complaints from movements and groups of family members of victims of the State and other persons and organizations from civil society, which, in some way, have contributed to shedding light on the practices that the State insists on hiding. In this sense, the text available on the Internet page "Memories of the Dictatorship" is opportune:

"The State that kills also makes people disappear. For those who kill, forced disappearance appears as a device capable of ruling out the hypothesis, even if remote, of punishment: if there is no body, there is no crime."¹⁴

Indeed, during Brazil's dictatorial period, clandestine graves were used as the destination for the bodies of victims of forced disappearance by the state. Today, even in the democratic period, clandestine cemeteries are still a common practice for the forced disappearance of people.

The news presented below, published in the Brazilian press, exemplify this practice: "Police locate clandestine cemetery in the North Zone of SP" (G1, 17/01/2010)¹⁵ ; "Bodies found in ditch are of missing youth" (Folha de São Paulo, 12/03/2019)¹⁶ ; "Clandestine cemetery with four bodies tied up is found in Jundiaí" (Estadão, 30/07/2019)¹⁷ ; "Guardas civis descobre cemitério clandestino na Zona Sul"

¹⁴ Vladimir Herzog Collection. Available at: <http://memoriasdaditadura.org.br/tag/desaparecimento-forcado/>. Accessed on 5 Dec. 2022.

¹⁵ Available at: [G1 > São Paulo Edition - NEWS - Police locate clandestine cemetery in the North Zone of SP \(globo.com\)](#). Accessed on 5 Dec. 2022.

¹⁶ Available at: [Bodies found in ditch are of missing youth - 12/03/2019 - Cotidiano - Folha \(uol.com.br\)](#). Accessed on 5 Dec. 2022.

¹⁷ Available at: <https://sao-paulo.estadao.com.br/noticias/geral,cemiterio-clandestino-com-quatro-corpos-amarrados-e-achado-em-jundiai,70002946920>. Accessed on 5 Dec. 2022.

(São Paulo, 07/07/2020)¹⁸ ; "Corpos encontrados em cemitério clandestino estavam com mãos amarradas e tinham sinais de tortura, diz GCM" (G1, 20/04/2021)¹⁹ .

Although some of the reports make reference to the alleged action of civilians in the disappearance of people, it is certain that only with the proper investigation of each fact individually considered will it be possible to state who are responsible for each victim of enforced disappearance found in each of the clandestine cemeteries.

In the year 2021, 65,225 cases of missing persons were reported to the police in Brazil, including forced, voluntary, and involuntary disappearances. According to the Anuário Brasileiro de Segurança Pública, "the variation in rates between states raises questions about the extent to which these cases are, in fact, registered and monitored by police authorities," leading one to believe that the statistics are underestimated.²⁰

Despite Federal Law No. 13,812, enacted in March 2019, instituting the National Policy for the Search for Missing Persons, creating, on paper, the National Registry of Missing Persons - a requirement compatible with the International Convention for the Protection of All Persons from Enforced Disappearance, approved in 2006 by the United Nations, and ratified by the Brazilian State in 2010 - **in practice there is not even an integrated database to access this information and act on it.**

In light of the Executive's omission, even before the enactment of the aforementioned law, in 2017, the National System for Locating and Identifying Persons (SINALID) was implemented through the National Council of the Public Prosecutor's Office. By September 2020, the platform had registered about 73

¹⁸ Available at: [Civil guards discover clandestine cemetery in the South Zone - Prefeitura \(capital.sp.gov.br\)](https://www.capital.sp.gov.br/) . Accessed on 5 Dec. 2022.

¹⁹ Available at: [Bodies found in clandestine cemetery were with hands tied and had signs of torture, says GCM | Sorocaba and Jundiaí | G1 \(globo.com\)](https://g1.globo.com/sorocaba/jundiai/g1-2021-04-20-corpos-encontrados-em-cemiterio-clandestino-estavam-com-maos-amarradas-e-tinham-sinais-de-tortura-diz-gcm) . Accessed on 5 Dec. 2022.

²⁰ Anuário Brasileiro de Segurança Pública, available at: <https://forumseguranca.org.br/wp-content/uploads/2022/07/06-anuario-2022-uma-ausencia-permanente-desafios-para-compreensao-dos-registros-de-desaparecimentos-no-brasil.pdf> . Accessed on 5 Dec. 2022.

thousand occurrences, segmented by state, year of disappearance, sex, age and skin color of the missing persons.²¹

In light of all the history narrated, it can be observed that, unfortunately, the disappearance of people that existed in the dictatorial period is still present in the democratic period.

The May Crimes, which occurred in São Paulo between May 12 and 21, 2006, are an expression of the structural violence of the Brazilian State and the practice of the disappearance of bodies. Sixteen years later, there are still omissions in the investigations and the families continue to suffer with the absence of information about what happened to the victims and their current whereabouts. The same occurs in other Brazilian states.

1.2. Lack of definition of enforced disappearances in Brazilian law (criticism of PL 6.240/13: attempt to disconnect the crime from the State's responsibility)

- **Criminal classification of enforced disappearance:** 15 - The Committee recommends that the State party take the necessary measures to: a) Expedite the classification of enforced disappearance as an autonomous crime, ensuring that its definition is fully compatible with article 2 of the Convention and provide appropriate sanctions that take into account its extreme gravity; b) Ensure that, once established, its application to cases of enforced disappearance that began before its entry into force but were prolonged thereafter is not subject to any limitation, such as those that may derive from the Amnesty Law. Forced disappearance as a crime against humanity.²²

Brazil enacted the Inter-American Convention on the Forced Disappearance of Persons (1994) - through Decree No. 8,766, May 11, 2016 - as well as, enacted the

²¹ Vladimir Herzog Collection. Available at: <http://memoriasdaditadura.org.br/tag/desaparecimento-forcado/>. Accessed on 5 Dec. 2022.

²² Final remarks on the report presented by Brazil in virtue of article 29, paragraph 1, of the Convention.

International Convention for the Protection of All Persons from Enforced Disappearance (2006), through Decree No. 8,767, May 11, 2016.

In this way, Brazil has obliged itself to comply with the provisions of Article I of the Inter-American Convention on Forced Disappearance of Persons, in the sense of not allowing the crime of forced disappearance and to punish these crimes within the scope of its jurisdiction.

As has been said, the lack of punishment for the crimes against humanity committed during the Brazilian dictatorship period was for a long time justified by the supposed legal command stemming from the Amnesty Law, however, what makes the use of amnesty so problematic is not only the lack of accountability of those individuals who committed systematic human rights violations, but rather its increasing use and acceptance in a world that has globally embraced the idea that there are human rights that are universal, for which no derogation is allowed, in particular the absolute right against torture, enslavement, genocide and other gross human rights violations. It is not to say that the amnesty granted by Law 6.683/1979 has been used in areas previously unknown, or in new and distinct ways, but rather that an international consensus has emerged in the last 70 years that certain acts committed by state agents are no longer exempt from responsibility.

In addition to the incompatibility with international law, there was a problem of internal inconsistency between the decision in the Argument of Noncompliance with Fundamental Precept (ADPF) No. 153 and the case law of the Federal Supreme Court (STF) itself. In extradition requests made by the government of Argentina, the STF had already decided and continued to decide that forced disappearance, qualified as kidnapping in national legislation, is a permanent crime.²³ Therefore, its statute of limitations only begins to run with the end of the permanence of the crime, which

²³ Ext 974, Reporting Justice Marco Aurélio, Reporting Justice Ricardo Lewandowski, j. August 6, 2009, DJ December 3, 2009; Ext. 1150, Reporting Justice Cármen Lúcia, j. May 19, 2011, DJ June 16, 2011; Ext. 1299, Reporting Justice Cármen Lúcia, j. September 10, 2013, DJ September 24, 2013; Ext. 1278, Reporting Justice Gilmar Mendes, j. September 18, 2012, DJ October 3, 2012.

would occur when the whereabouts of the person or his remains are determined. Since the bodies have not been located, the statute of limitations does not apply.²⁴

Regardless of the understanding that Decrees n. 8,766/2016 and 8,767/2016 have immediate application in the national legal system - the enactments of both Conventions on Forced Disappearance are also joined by the efforts of the Legislative Branch in order to add to the Penal Code the art. 129-A, in order to typify the referred crime, as well as to insert it in the list of heinous crimes (Law n. 8,072/1990). It is Bill no. 6.240/2013, already mentioned, which proposes, among other points, that these crimes are imprescriptible (§ 8 of art. 129-A, PL 6240/2013), and that they have a permanent nature, being, therefore, consummated continuously as long as the person has not been released or his fate, condition and whereabouts are not clarified, even if he has already died (§ 10 of art. 129-A, PL 6240/2013).

Despite these efforts, **the crime of forced disappearance is still not typified in the Brazilian legislation, being barely subsumed by the conduct foreseen as kidnapping and qualifying factors.** This absence is still a barrier to the prosecution of the crime and its accountability, as well as to the reparation that should be carried out by the Brazilian State.

1.3. Military jurisdiction in cases of enforced disappearance

- **Military jurisdiction:** 19 - Recalling its statement on enforced disappearances and military jurisdiction, the Committee recommends that the State party adopt without delay the necessary measures to ensure that the investigation and trial of cases of enforced disappearance are expressly excluded from the jurisdiction of military tribunals.²⁵

²⁴ V. SILVA FILHO, José Carlos Moreira da. Justiça de *Transição e Poder Judiciário brasileiro* - a barreira da Lei de Anistia para a responsabilização dos crimes da ditadura civil-militar no Brasil. In: _____. Justiça de *transição*: da ditadura civil militar ao debate justransicional. Porto Alegre: Livraria do Advogado Editora, 2015, p. 237-260.

²⁵ Final remarks on the report presented by Brazil in virtue of article 29, paragraph 1, of the Convention.

As if the already problematic legislation bequeathed by the military dictatorship were not enough, the approval of Law No. 13,491 in October 2017 represented an unprecedented expansion of the scope of military crimes in Brazil. This occurred due to the **expansion of the concept of military crimes beyond the specific legislation, to the** extent that, by amending art. 9, II, of the Military Penal Code, Law No. 13,491/17 circumscribed in the concept of "military crimes in times of peace" not only the crimes provided in the CPM, but also those provided in the ordinary criminal legislation when practiced in the situations provided in lines "a", "b", "c", "d" and "e". Besides being extremely broad, these provisions include crimes committed by military personnel against civilians²⁶. In this way, depending on the situation in which the military is engaged, all common criminal legislation can be reconfigured and applied by Brazil's military courts, typifying conduct that has nothing to do with typical military activity and the need to safeguard the hierarchy and discipline of the troops.²⁷

The scope of this competence for the trial of civilians becomes even more worrying after the inclusion, in 2004, of § 7 to article 15 of Complementary Law no. 97/1999, which transferred to the Union's Military Justice the competence for the trial of crimes committed by military personnel in the exercise of subsidiary functions

²⁶ Art. 9 of the CPM: "Military crimes are considered crimes in peacetime: (...) II - the crimes provided for in this Code and those provided for in criminal law, when committed a) by active military personnel or the like against active military personnel or the like; b) by active military personnel or the like, in a place subject to military administration, against retired military personnel, reserve military personnel, or the like, or civilians; c) by a military person on duty or acting due to function, in a military commission, or in formation, even if outside the place subject to military administration, against a reserve, retired, or civilian military person; d) by a military person during the period of maneuvers or exercises, against a reserve, or retired, or similar, or civilian military person; e) by a military person on active duty, or similar, against property under military administration, or against the military administrative order".

²⁷ It is worth noting that it is practically impossible for a military committing a crime while on duty and not answering in Military Justice. In theory, the military only acts as military in the cases foreseen and described in the aforementioned Complementary Law. Therefore, if he is acting in a function provided by law, in principle, he will answer for the common crime in Military Justice. Only if the crime occurs during the operation would it be considered a military crime. Outside of it, in any context, the competence would be of the Common Justice.

attributed to the Armed Forces, which involve their actions in the area of public security, such as the known operations of guaranteeing law and order (GLO).

Based on this legal discipline, acts imputed to civilians, supposedly committed against military personnel, are treated as military crimes, even when these are acting with violence and outside military perimeters, or deployed to act in the preservation of public order, which occurs in operations to ensure law and order, which have been used mainly against residents of slums and suburbs throughout the country, especially young black men.

The consequence of this understanding is that residents of impoverished areas, with a majority black population, subjected to operations to guarantee law and order have often been arrested in flagrante delicto and criminally charged under the allegation of disrespect and disobedience, for insurging against typical public security actions, but occasionally carried out by the military of the Armed Forces, being processed and judged in the Military Justice. In many of these cases, the testimony of military personnel is even considered sufficient evidence to impose a conviction.

In October 2017, the Brazilian legislature passed Law No. 13,491/17, which amended Art. 9 (military crimes in times of peace) of the Military Criminal Code to establish that cases concerning intentional homicides of civilians committed by military personnel of the Armed Forces during GLOs and other circumstances fall under the jurisdiction of the Union Military Justice, namely:

- a) fulfillment of attributions established by the President of the Republic or by the Minister of Defense (art. 9, §2, I);
- b) action involving the security of a military institution or military mission, even if not belligerent (art. 9, §2, II); or
- c) activities of a military nature, of peacekeeping operations, of guaranteeing law and order or of subsidiary attributions, carried out in accordance with the provisions of art. 142 of the Federal Constitution and other legal provisions (art. 9, §2, III).

It should be noted that the ordinary justice system maintains jurisdiction over intentional homicides of civilians committed by state military personnel (Art. 9, §1º,

Military Penal Code), but even in these cases, the State Military Justice and the Military Police understand, as a rule, that the investigation should still be done through the Military Police Inquiry, and not through the civilian Police Inquiry, with the remittance of the records to the Common Justice system only after the investigation is completed. The thesis is based on article 82, §2 of the Code of Military Criminal Procedure. In practice, it is not uncommon for there to be parallel investigations, which can be detrimental to the investigations.

It is worth noting that the then President of the Republic vetoed Article 2 of Bill 44/2016, which limited the scope of its prescriptions to acts prior to December 31, 2016.²⁸ The Office for South America of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-American Commission on Human Rights (IACHR), among others, categorically rejected the bill in light of international human rights standards.²⁹

A few months after the law was passed, more than a thousand cases were transferred from ordinary justice to military justice³⁰ - a number that probably reached even higher numbers in the following months. **Contrary to the constitutional provision that intentional homicides committed by state military personnel should be processed in the common justice system and judged by the jury court**, data analyzed by the Public Defender's Office of the State

²⁸ Bill 44/2016, which resulted in Law 13.491, was originally a temporary criminal procedure law. Designed to be in force only during the 2016 Olympic Games, the scope of its provisions was limited to acts performed before December 31, 2016. However, the then president vetoed its article 2, which brought the temporal limitation, transforming the temporary law into a permanent expansion of the Military Justice jurisdiction.

²⁹ IACHR. UN Human Rights and IACHR strongly reject the bill that extends jurisdiction of military courts in Brazil (13 October 2017). Available at: <https://www.oas.org/en/iachr/media_center/PReleases/2017/160.asp>.

³⁰ O GLOBO. New forum for the military has already taken a thousand actions from common justice, from threat to torture. 2018. Available at: <<https://oglobo.globo.com/brasil/novo-foro-dos-militares-ja-tirou-mil-acoes-da-justica-comum-de-ameaca-tortura-22659068>>

of Paraná reveal that even cases of this kind were investigated through military inquiries in 71% of the homicides analyzed in the research³¹.

The competence of the Military Justice in Brazil is being discussed before the Supreme Court in different constitutional actions. So far, 6 (six) actions that discuss the theme in the Brazilian Supreme Court have been mapped out and will be summarized below.

The oldest of these is **Direct Unconstitutionality Action (ADI) No. 4.164**, filed by the Brazilian Association of Police Officers in 2008. This action challenges the wording conferred by Law No. 9.299/96 on item 'c' of item II and on the sole paragraph, both of article 9 of the Military Criminal Code, and on §2 and the head of article 82 of the Code of Military Criminal Procedure, since such provisions are contrary to arts. 5, inc. LIII and LIV; 144 §1, IV, and §4, all of the Federal Constitution of 1988, conferring on the Military Justice the task of investigating all military crimes, including the phase of opening a military police inquiry.

The **Direct Unconstitutionality Action (ADI) No. 5032** deals with the jurisdiction of the Military Justice System to judge crimes committed by members of the Armed Forces in the exercise of subsidiary attributions in operations to ensure law and order. The lawsuit, proposed by the Attorney General in 2013, questions the legislative changes made in 2004 and 2010 that expanded the jurisdiction of the military courts to include situations of employment of the armed forces in public security activities.

The **Argument of Noncompliance with a Fundamental Precept (ADPF) No. 289**, filed by the Attorney General of the Republic in 2013, claims the unconstitutionality of the trial of civilians by the Military Justice. The matter revolves around issues of procedural guarantees, such as: a) the principle of due legal process;

³¹ Inquiries were opened by the civil police in 27% of the cases and by the Public Ministry in only 1.2%. PARANÁ. Technical Note No 01/2021 - NUPEP/DPE-PR, 2021. Available at: <<https://docplayer.com.br/209312008-Nota-tecnica-no-01-2021-nu pep-dpe-pr.html>>

b) the principle of the natural judge, in addition to constitutionally protected principles, such as isonomy and human dignity.

The **Direct Action of Unconstitutionality nº 5804** was one of the first actions proposed to challenge Law nº 13.491, of 2017, already mentioned as one of the main unconstitutional milestones of the expansion of jurisdiction of the Military Justice. This action was also proposed by the Association of Police Delegates of Brazil that, besides challenging again under the terms of ADI 4.164 the expansion made already in 1996, now challenges the expansion made in 2017 that transferred to the jurisdiction of Military Justice the cases of felonious crimes committed by military personnel of the Armed Forces against civilians in contexts of operations of guarantee of law and order and of fulfillment of attributions established by the President of the Republic and the Minister of Defense, and of defense of military institutional security, even if not belligerent. In the same sense, a **Direct Action of Unconstitutionality No. 5901** was proposed by the Socialism and Liberty Party (PSOL) in 2018, which pleads for the declaration of unconstitutionality of the entire content of Law No. 13,491/2017.

The **Argument of Noncompliance with the Fundamental Precept no. 826**, proposed by the Brazilian Press Association, in 2021, aims at an interpretation in conformity with the 1988 Federal Constitution to declare unconstitutional several articles of the Military Criminal Code and several other codes, considering that they criminalize several conducts that can be considered military crimes and, therefore, under the current legal system be judged by the Military Courts, such as, for example, in the so-called crimes against honor and that can affect the freedom to manifest one's thoughts.

As for the provisions contained in the 1988 Constitution, although it has been delegated to the infra-constitutional legislator the task of defining military crimes and, with this, the scope of Military Justice, it is certainly not a blank check. The constitutional rules and principles, as well as the treaties on fundamental rights, establish a framework within which the competence of the Military Justice should be framed. Thus, the principles of due process of law, judicial impartiality, isonomy, and

the Democratic State of Law, among others, act as beacons, restricting the freedom of conformation in the definition of the competence of this specialized justice.

Furthermore, it is worth pointing out that the wording of the Federal Constitution authorizes the establishment of the Military Justice's competence to infra-constitutional norms, and there should be a restrictive interpretation of this authorization, and that recognizes the normative system of establishing civilian control over the armed forces, currently shaken by the inversion of values promoted by the current legislation.

2. Measures required to address enforced disappearance

Regarding the obligations of the Brazilian State in relation to investigations and accountability for forced disappearances, the Inter-American Court of Human Rights recalls that "**domestic law and the functioning of its institutions permit an adequate investigation of forced disappearances and, if these rules are insufficient, [the State] must conduct the necessary legislative reforms or adopt administrative, judicial or other measures to achieve this end**" (Medina, p. 91. §306), as well as the United Nations Committee on Enforced Disappearances was explicit in reinforcing in its Concluding Observations on the report submitted by Brazil³² based on the principles of international law that cases of enforced disappearances among other crimes such as murder should remain outside the jurisdiction of Military Justice.

In the same opportunity, the case of Davi Fiuza, a young black man who has been missing since 2014, whose case was referred to a military court in the State of Bahia by decision of the local Court of Justice based on law No. 13.491 of 2017 already explored here, was expressly mentioned.

³² Available at:

https://www.conectas.org/wp-content/uploads/2021/09/pt_CED_C_BRA_CO_1_46841_E-2.pdf. Accessed on 5 Dec. 2022.

One of the essential elements of an adequate response to the practice of enforced disappearance is the integration between the search for the missing person and accountability procedures, especially criminal ones. International documents, such as the one proposed by the International Bar Association - Human Rights Institute (IBAHRI), also bring the importance of including and collaborating with victims' families and family associations, developing public search policies that do not revictimize them.

The search for forcibly disappeared persons, with a reasonable degree of suspicion falling on local security agents, requires special measures, such as the creation of properly equipped specialized agencies, and a legal framework that aggregates the entire chain of conduct responsible for the disappearance. Such measures are required at the administrative and legislative levels, but not only: the State is responsible in any dimension necessary to put an end to the practice. The UN Human Rights Committee includes, for example, by way of compensation, "investigation and accountability for any action that may have jeopardized the effectiveness of the search".

In this sense, the following are measures to confront the human rights violations mentioned above, which have not been complied with by the Brazilian State, configuring new rights violations and re-victimization of the family members:

2.1. Precautionary removal of officers involved in missing persons cases

In Brazil, the rule is the lack of accountability of public agents for violent actions. There is a series of "obstacles" that start with the concealment of evidence and forced disappearance of people, and go through the lack of proper investigation by the investigation bodies, such as the police and forensics, and culminate, in the few cases in which evidence is raised, in the absence of interest in bringing legal action against the agents by the Public Prosecutors. In the very rare cases in which public agents are denounced to the Judiciary, there is a naturalization of and connivance with the situation denounced.

Consequently, convictions of police officers for crimes they commit against the population they are supposed to protect are minimal. And even in cases where the police officers have been convicted by the courts, they remain in the force and continue to perform their duties normally.³³

For this reason, it is essential that Brazil be urged to adopt effective measures for the precautionary removal of police officers involved in crimes against life and personal integrity, as in the case of forced disappearances, and their subsequent dismissal when a final judicial sentence is handed down.

2.2. Implementation of an integrated database of missing persons

In May 2017, after four years of trying to reach an agreement, via a civil inquiry, of the Human Rights/Social Inclusion Prosecutor's Office with the PLID/Missing Persons Location and Identification Program, so that the Government of the State of São Paulo would start the implementation of an integrated database, through which the State Secretariats would minimally communicate about the people sheltered in public institutions, who would potentially be part of those sought as missing by their families, the Public Prosecutor's Office filed Public Civil Action no. 1019375-15.2017.8.26.0053, In the opportunity, it was highlighted that:

³³ A recent example - among several others that could be listed here - causes perplexity and demonstrates the need for the Brazilian State to explain itself, providing information about the number of public agents who have suffered criminal conviction and are still active. The example brought to light is the reinstatement to the military staff of Mr. EDSON RAIMUNDO DOS SANTOS, as published in the Official Gazette of the State of Rio de Janeiro published on January 29, 2021, who was held responsible by the Brazilian justice system for several crimes committed against Amarildo Dias de Souza, during a police operation carried out in the community of Rocinha (RJ) between July 13 and 14, 2013. On the occasion, it was verified that Amarildo was approached by police officers and taken to the headquarters of the UPP (Pacifying Police Unit) Rocinha, commanded by Mr. EDSON RAIMUNDO DOS SANTOS. According to the lawsuit, Amarildo was tortured to death by the police officers, who also hid his body, which was never found. The case reveals a very serious situation of institutional violence, with characteristics of forced disappearance and torture, conducts that the Brazilian State has committed itself, nationally and internationally, to prevent and repress.

"at the same time that there are thousands of missing persons throughout the State of São Paulo and while their relatives undertake a relentless search for their location, there are thousands of other individuals being buried as indigent or unclaimed, with no possibility of cross-referencing the data on disappearance with that on death. The identification of deaths in the state of São Paulo is carried out by two different bodies, namely, the Medico-Legal Institute (IML) and the Death Verification Service (SVO).

The IML, which is subordinated to the Superintendence of the Technical and Scientific Police, was created with the purpose of providing technical bases in legal medicine for the trial of criminal causes. Its function is to perform the autopsy of bodies with suspected violent and/or unqualified death. Operating by more than 70 (seventy) units all over the state, the IML does not have unified registers of bodies, so that relatives of missing persons are theoretically obliged to wander through all the units in order to check on the eventual passing of a missing person.

The Service of Death Verification, on the other hand, an organ linked to the Medical School of the University of São Paulo, is in charge of examining the bodies of people who die without medical assistance or from unknown natural causes, excluding those who were victims of violence. In the capital city, this service is provided by the Pathology Department of the University of São Paulo Medical School, while in the interior the service is the responsibility of the Pathology Department of the Ribeirão Preto Medical School of the University of São Paulo, under the terms of law nº5452/86.

Moreover, before the Civil Inquiry No. 14.0725.0000697/2014-2, which was processed in this Prosecutor's Office of Human Rights - Social Inclusion, the SVO did not even keep photographic records of the bodies, which hampered the search for relatives and could lead to possible mistakes or frauds regarding the identification of the bodies. Once the SVO is exempted from the obligation of contacting the deceased's relatives, there is a very high number of cases of identified

and unclaimed corpses - if they weren't, they wouldn't be at the SVO - of people reported missing, even with an occurrence report drawn up even before the death (...)

The Civil Police Digital Registry of Occurrences (RDO) database can be fed by the police stations or by electronic police report. Currently, it is a database restricted to use by the Civil Police of the State of São Paulo, but with access also by the Military Police. There is not, however, a unified database in the State of São Paulo that interlinks information among the several public entities involved in the missing persons issue, including, besides the Civil Police, the IML, the SVO, hospitals, shelters etc. (...)

The instances that, at a minimum, should integrate the unified database for missing and unidentified persons are: Public Security Secretariat (Civil Police of the State of São Paulo/ IIRGD and DIPOL; Superintendence of the Scientific Technical Police/IML; Military Police), Penitentiary Administration Secretariat, State Health Secretariat, Death Verification Service of the Capital; Death Verification Service of the interior of the State, Public Prosecution Service of the State of São Paulo/PLID, public (including municipal) or private hospitals, clinics and shelters, religious entities, alternative communities and other societies which, under any pretext, admit, admit or admit people, without due identification, in their facilities.

At that time, Law nº 15.292/2014, which defined the guidelines for the State Policy on Missing Persons and created the Missing Persons Database, was being flagrantly disregarded. The PLID/MPSP - Missing Persons Location and Identification Program had been faced with what it named "redesappearance" (the person disappeared, appeared and the State disappeared with him/her) and the numbers of missing persons already between 23,000/25,000 per year, occupying a good figure of the national 80,000.³⁴

³⁴ Reference available at: [anuario-14-2020-v1-interativo.pdf \(forumseguranca.org.br\)](https://forumseguranca.org.br/anoario-14-2020-v1-interativo.pdf) . Accessed on 5 Dec. 2022.

In 2019, Law 13,812 came into effect, which determined exactly the same content as the State Law, today generating the formation of working groups for its implementation.

This highlights the need for the Brazilian state to take steps to effectively implement an integrated missing persons database at the federal level, with regional information provided by the states, as well as a specific mechanism for collecting DNA from unclaimed missing persons.

2.3. Implementation of reparation measures for family members and for the memory of victims of state violence

The Brazilian State does not promote policies of reparation to the victims of forced disappearance and other crimes that encompass State violence, whose victims and families suffer from the violent action of agents of the Brazilian State and/or the inertia in the investigations.

Forced disappearances in Brazil are marked by invisibility. There are no investigations, identifications, accountability or reparation measures for the families of the disappeared bodies. Support, reparation, and memory measures are essential for a change in this scenario of grave violation of the human rights of missing persons and their families.

The Inter-American Court of Human Rights understands that special measures of reparation for the crime of forced disappearance must include the component of historical remembrance. Among the measures, the Court, in the 2012 judgment *Medina v. Dominican Republic*, obliged the State to promote a public international act, a plaque celebrating the life of Naciso González Medina, and even the production of a state-funded documentary recalling the life of the victim.

2.4. Implementation of a support policy for victims of state violence

The institutional violence of the Brazilian State is not only presented by direct action in situations in which public agents cause disappearances, as is known, but also by the State's omission to carry out effective investigations in search of the missing bodies and the proper identifications when located, which often does not even occur.

The causes of the disappearance are unknown to the family members, who dedicate their lives searching for answers about the whereabouts of the loved one. Thus, the hypothesis of forced disappearance can never be ruled out, even because it is a present and constant reality in the country, as already mentioned.

Although investigations are the responsibility of the state, in the face of state inertia, family members feel directly responsible for the search and start to carry it out on their own, even putting themselves at risk.

The Brazilian state does not respond to the needs of the families of missing persons in terms of investigations, identification, and accountability. There is still no support program in the country for family members who, in this context of rights violations, are victims of state violence. The pain, suffering and indefinite mourning of family members and the effects on their health are not considered in Brazil for the purpose of providing care and shelter to the families.

The Inter-American Court of Human Rights considers that in cases involving the forced disappearance of persons, the violation of the psychological and moral integrity of their families is a direct consequence of this phenomenon. The circumstances of the disappearance generate suffering and anguish, as well as a feeling of insecurity, frustration, and impotence when faced with the refusal of public authorities to provide information on the whereabouts of the victim or to conduct an effective investigation to clarify the facts.³⁵

In the search process, there are also socioeconomic consequences, as family members are often forced to quit their jobs or are fired for dedicating too much time

³⁵ In this sense, Case Blake v. Guatemala, judgment of January 24, 1998, p. 114 and Case González Medina y Familiares v. Dominican Republic, judgment of February 27, 2012, p. 270.

to the investigations. The re-victimization of family members throughout the long process of a search that persists for decades aggravates this situation. Therefore, an active stance by the State is required to establish policies to support the victims of disappearances.

It is urgent and necessary that the Brazilian State respond to the needs of the families of missing persons, with the adoption of an integral and multidisciplinary support program for the health of the relatives of missing persons, capable of providing them with a humanized care.

In fact, the whole context of systematic violation of human rights and vulnerabilities to which the relatives of missing persons are subjected in the scenario of institutional violence, often for long years without an effective response from the Brazilian State, imposes on the latter the obligation to have a program aimed at the integral health of the relatives who suffer from the absence of their loved ones, with repercussions on their physical, psychological, and psychosocial health.

3. Concluding remarks

For all the above reasons, the organizations signing this report highlight the importance of the United Nations Committee against Enforced Disappearances and other international mechanisms such as the United Nations International Mechanism of Independent Experts for the Advancement of Racial Justice and Equality in the Context of Law Enforcement - which met on December 1 and 2, 2006 in Santiago, Chile, in Santiago, Chile, with various civil society organizations, among them Conectas Direitos Humanos, Mães de Maio represented by the Rede de Mães e Familiares da Baixada Vítimas de Violência do Estado, Mães de Manguinhos, and others - to confront state violence, especially in relation to forced disappearances and extrajudicial executions in Brazil.

The undersigned also reinforce their commitment to produce narratives that give an account of the real context of human rights violations in the country, and **ASK** that, within the Committee's competence, that in loco visits be made to listen

to the movements of family members of victims with broad regional participation in Brazil.

Signed:

Conectas Direitos Humanos - São Paulo/SP

Fórum Memória, Verdade e Justiça - ES

Movimento Independente Mães de Maio - Baixada Santista/SP

Movimento Mães de Maio do Nordeste - Salvador/BA

Movimento Moleque - Rio de Janeiro, RJ

Movimento Parem de Nos Matar - Rio de Janeiro/SP

Rede de Mães e Familiares da Baixada Vítimas de Violência do Estado - Baixada Fluminense/RJ

Rede de Mães e Familiares da Baixada Fluminense - Baixada Fluminense/RJ