

Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on extrajudicial, summary or arbitrary executions

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(Please use this reference in your reply)

27 April 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Working Group on Enforced or Involuntary Disappearances and Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolutions 45/10, 45/3 and 44/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the ruling of the Brazilian Federal Supreme Court of 11 May 2020, which denies the extradition of [REDACTED] to Argentina for the investigation of four interrelated judicial cases concerning crimes against humanity and grave human rights violations committed in the clandestine detention center 'ESMA' between 1976 and 1979.

According to the information received:

[REDACTED] was a Deputy Inspector of the General Directorate of Operations of the Argentine Federal Police between 1976 and 1979 during the Argentinian military dictatorship, and he worked at the Task Group 3.3.2 based at the clandestine detention center 'Escuela de Mecánica de la Armada', hereinafter 'ESMA'.

The National Federal Criminal and Correctional Court No. 12, Secretariat 23 of Buenos Aires, Argentina, summoned Mr. [REDACTED] to appear in court in connection with case No. 14,217/2003 and related cases No. 18,918/03, No. 18,967/03 and No. 17,534/08. The cases concern his alleged responsibility with regards to crimes of aggravated illegitimate deprivation of liberty committed with abuse of his functions, with the aggravating circumstances corresponding to the commission with violence or threats as a necessary participant, crimes of imposition of torture, imposition of torture followed by death, illegal deprivation of liberty aggravated for having been committed without the formalities established by law and with excess in his functions and illegal deprivation of liberty resulting in death, and crimes of aggravated illegal deprivation of liberty, for having been committed by a public official and without the formalities established by law, as a necessary participant.

Since Mr. [REDACTED] did not appear before the Court, he was declared rebellious on 28 October 2005, and his capture was ordered. Subsequently, the Argentinian security forces issued an international arrest warrant. In July 2015, agents of the Brazilian Federal Police found Mr. [REDACTED] in the Brazilian city of Viamão. He was arrested and put at the disposal of the Federal Supreme Court of the Federative Republic of Brazil in connection with his extradition request.

On 11 May 2020, the Federal Supreme Court unanimously resolved to reject the extradition request made by Argentina. The Court based its decision on the impossibility of Mr. González's prosecution for similar acts if they had occurred in Brazil, considering the general amnesty that applies in the country, enshrined in Law No. 6,683/1979. According to it, amnesty is granted to those who, between 2 September 1961 and 15 August 1979, committed political crimes or electoral crimes, to those who had their political rights suspended, and to the employees of the Direct and Indirect Administration, of institutions linked to the public power, to the servants of the Legislative and Judiciary Powers, to the Military and to the union leaders and representatives, punished on the basis of Institutional and Complementary Acts.

Moreover, regarding the crimes of illegal deprivation of liberty of people who remain disappeared, the Court introduced the presumption of death under the terms of Law No. 9,140 and recognized as deceased, for all legal purposes, persons who, due to their participation or accusation of participation in political activities from 2 September 1961 to 5 October 1988, were detained by public agents, and have since been disappeared. In doing so, the Court overlooked the permanent nature of the crime of enforced disappearance and its continuing character as a violation of multiple human rights. The Court concluded that since more than forty years had elapsed since the events, the extinction of the punishment due to the prescription of the crime should apply, considering the maximum term of twenty years foreseen in article 109 item I of the Brazilian Penal Code for the application of statute of limitations for this type of crime.

It is unknown whether Mr. [REDACTED] is still in Brazil or if any measures have been adopted to prevent his flight to ensure the implementation of the *aut dedere aut judicare* principle.

We express serious concern at the Federal Supreme Court's decision to deny the extradition of [REDACTED] to Argentina, which hampers the investigation, prosecution and adjudication of the four interrelated criminal cases held against him for crimes against humanity and grave human rights violations, at the National Federal Criminal and Correctional Court No. 12 of Argentina. Concern is expressed at the alleged violation of the rights to access to justice, to an effective remedy, to the truth, and to reparation of the victims of [REDACTED] and their relatives. We express further concern that the Court's decision seems to be incompatible with international human rights standards which impede the use of statutes of limitations and amnesties for crimes against humanity and serious human rights violations - including torture, killings, enforced disappearance and sexual violence. The applicability of Brazil's Amnesty Law No. 6,683/1979, which has been declared incompatible with international human rights law by the Inter-American Court of Human Rights, to Mr. Gonzalez's case is even more concerning as the law was issued in relation to acts committed during the dictatorship in Brazil, and therefore cannot be extrapolated to acts committed during the civil-military dictatorship in Argentina. Moreover, no equivalent law is in force in Argentina to grant amnesties to perpetrators of such crimes. In addition, the Court's decision to apply the presumption of death to victims of enforced disappearance, and concomitantly the statute of limitations, appears to contravene international standards on the subject according to which such crime continues while the fate and

whereabouts of the victim are not established with certainty. Additionally, we wish to raise our concern given the lack of information regarding any measure taken to prevent Mr. González's flight and to ensure that he is brought to justice.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

We would further like to recall that according to article 4 of General Comment 31 of the Human Rights Committee, the obligations contained in the Covenant are binding on every State as a whole and that all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of the relevant authorities of the State of Brazil, in particular the Federal Supreme Court, on the following matters:

1. Please indicate how the Federal Supreme Court's decision to reject the extradition of Mr. [REDACTED] to face criminal charges in Argentina for crimes against humanity and gross human rights violations committed in that country between 1976 and 1979 is in compliance with international human rights standards.
2. Please inform about the legality of the application of Brazil's Amnesty Law No. 6,683/1979 to the serious crimes that Mr. [REDACTED] is accused of having committed in Argentina, where there is not an equivalent law in force, and how this decision complies with international human rights standards on the application of amnesties to crimes against humanity and serious human rights violations, and Brazil's international undertakings in order to ensure the application of the principle of *aut dedere aut judicare*.
3. Please provide information on which measures have been undertaken to prevent Mr. González's flight and to ensure that he is brought to justice and held accountable.
4. Please indicate how the application of statute of limitations to the serious crimes allegedly committed by Mr. [REDACTED] is in compliance with international standards on the non-applicability of such statute to crimes against humanity and serious human rights violations, especially bearing in mind the permanent character of the crime of enforced disappearance.
5. Please indicate how the Court's decision to apply the presumption of death to victims of enforced disappearance, which constitute a continuous crime until the fate and whereabouts of the victim is established, is in compliance with international human rights standards, in particular the Declaration on the Protection of all Persons from

Enforced Disappearance International and the International Convention
for the Protection of All Persons from Enforced Disappearance.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to avoid the flight of Mr. [REDACTED] halt the alleged violations and prevent their re-occurrence; and in the event that the investigations support or suggest the allegations to be correct, to ensure that he is brought to justice, prosecuted and, if appropriate, sanctioned.

Please accept, Excellency, the assurances of our highest consideration.

Fabian Salvioli
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of
non-recurrence

Aua Balde
Vice-Chair of the Working Group on Enforced or Involuntary Disappearances

Morris Tidball-Binz
Special Rapporteur on extrajudicial, summary or arbitrary executions

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to recall that article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Brazil in 1992, guarantees the right of every individual to life and security and provides that these rights shall be protected by law and that no one shall be arbitrarily deprived of his or her life. In addition, article 7 guarantees the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Covenant also provides for the right to liberty and security of the person and for the prohibition of arbitrary detention in article 9 (1). It further requires that all persons deprived of their liberty shall be treated with humanity and respect for their dignity in article 10 (1), and to be recognized as a person before the law in article 16. Moreover, article 2 sets out the duty of States to ensure that any person whose rights were violated has an effective remedy, and that the competent authorities enforce such remedies when granted.

As established by the Human Rights Committee in its General Comment No. 31, States have an **obligation to investigate and punish serious human rights violations**, such as torture, extrajudicial killings and enforced disappearances. Failure to investigate and prosecute such violations is in itself a breach of the norms of human rights treaties (paragraph 18). Impunity for such violations can be an important element contributing to the recurrence of violations. The Committee has observed in the case of *Bautista de Arellana v. Colombia* that the "State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified".

Furthermore, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, urges States to undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and to ensure that those responsible for serious crimes under international law are prosecuted, tried and duly punished (principle 19). We recall that the full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations (principle 5).

As noted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, from a human rights perspective, the obligation to investigate and prosecute arises from the right to an effective remedy. It is also part of the right of the victim, his or her immediate family members and, in certain cases, society as a whole to know the truth. The administration of justice in the face of serious human rights violations is a central element in preventing the recurrence of such violations. Promoting a culture of impunity contributes to vicious cycles of violence.

We also refer to paragraph 27 of the General Comment 36, in which the Human Rights Committee recalls that investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol on the Investigation of a Potentially Unlawful Death (2016)), and must aim to bring those responsible to justice, promote accountability and prevent impunity (CCPR/C/GC/36).

The Convention on Enforced Disappearances, ratified by Brazil on 29 November 2010, stipulates that each State party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance (article 9); take a person suspected of having committed an offence of enforced disappearance, when circumstances so warrant, into custody and immediately carry out a preliminary inquiry or investigations to establish the facts (article 10); submit the case to its competent authorities for the purpose of prosecution should it not extradite that person (article 11); and take appropriate steps, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given (article 12).

We would also like to recall that international law **sets limits to the adoption of amnesties** insofar as they foster impunity and prevent States from complying with their international obligations to investigate and prosecute those responsible for gross human rights violations, as well as deny victims their right to truth, to access to justice and to request appropriate reparations. Amnesties are particularly incompatible with the obligation to prosecute crimes that represent serious human rights violations, such as torture, summary executions, enforced disappearances and genocide, among others. States have a due diligence responsibility to end impunity and hold accountable the perpetrators of such serious violations.

In this regard, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity reaffirms the obligation of States to take appropriate measures in respect of perpetrators of human rights violations (principle 1) and sets out restrictions on amnesties and clemency measures (principle 24). The Human Rights Committee ruled that all impediments to establishing the legal responsibility of persons who have committed serious human rights violations should be removed. In its General Comment No. 31, the Committee established that in cases where violations such as torture, summary and arbitrary deprivations of life and enforced disappearances have been committed by a public official or State agent, the States concerned may not exempt the perpetrators from their personal legal responsibility through amnesties and prior immunities (para. 18). In general comment 36, the Committee also held that “Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.” (para. 27).

Moreover, we would like to recall article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, which prohibits amnesties and other similar measures that could benefit the perpetrators or alleged perpetrators

of acts of enforced disappearance. The same article limits the right to pardons, considering the extreme seriousness of acts of enforced disappearance. In its general comment on article 18 of the Declaration, the Working Group on Enforced or Involuntary Disappearances urged States to refrain from making or enacting amnesty laws that would exempt the perpetrators of enforced disappearance from criminal proceedings and sanctions, and other similar measures that would prevent the proper implementation of other provisions of the Declaration.

In its 2021 Concluding Observations, the Committee on Enforced Disappearances recommended the State party to ensure that the application of the adopted offence in cases of enforced disappearance that commenced prior to its entry into force but continued thereafter is not subject to any limitations, including those that may be imposed on the basis of the Amnesty Law. It further recommended to remove any legal impediments to the investigations into enforced disappearances perpetrated during the military regime that have not yet ceased, in particular with respect to the application of the Amnesty Law.

We would like to recall that in the judgment on the case “Herzog et al. v. Brazil”¹ the Inter-American Court of Human Rights established that the Brazilian Amnesty Law No. 6683/79 constitutes an “exemption from liability prohibited by international law in cases of crimes against humanity”,² and States cannot invoke provisions of domestic law to avoid their compliance with international human rights law. In this sense, the Court ruled that: “[b]ecause it is a crime against humanity, the State must not apply the Amnesty Law for the benefit of the authors, as well as any other analogous provision, prescription, *res judicata*, *ne bis in idem* or any similar exclusion of liability to excuse itself from this obligation” (item 372 b) of the sentence).

In addition, we would like to bring to your Excellency’s attention that the **non-applicability of statutes of limitation to crimes against humanity** is a norm of *jus cogens*, i.e. a peremptory norm of international law that does not admit of any contrary provision. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, of November 26, 1968, establishes the non-applicability of prescription to crimes against humanity committed both in wartime and in peacetime, whenever they were committed. According to this instrument, States must adopt the necessary legislative or other measures so that the statute of limitations for criminal action or punishment, established by law or otherwise, does not apply to those crimes, and in the event of that they exist, be abolished.

Furthermore, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principle 23) establishes that “[p]rescription shall not apply to crimes under international law that are by their nature imprescriptible”. Similarly, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law determine that “statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.” (Principle 6).

¹ http://www.corteidh.or.cr/docs/casos/articulos/seriec_353_esp.pdf

² http://www.corteidh.or.cr/docs/casos/articulos/seriec_353_esp.pdf

Moreover, we would like to recall that the Inter-American Court on Human Rights ruled that "amnesty provisions, statutes of limitation and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extra-legal or arbitrary executions and enforced disappearances, all of which are prohibited as contravening non-derogable rights recognized by international human rights law, are inadmissible" (Case of Barrios Altos v. Peru, Judgment of March 14, 2001, para. 41).

In this regard, article 17 of the Declaration on the Protection of all Persons from Enforced Disappearance provides that, where statutes of limitations exist relating to acts of enforced disappearance, they should be proportionate to the extreme seriousness of the crime. If applicable, the statute of limitation must only begin once the act of enforced disappearance has ceased. This is reiterated in article 8 of the International Convention on the Protection of All Persons from Enforced Disappearance, according to which the application of statute of limitations by the State party should be proportionate to the extreme seriousness of the offence, taking into account the continuous nature of enforced disappearance. Similarly, in its General Comment on Enforced Disappearance as a continuous crime, the Working Group on Enforced or Involuntary Disappearances established that the act of enforced disappearance begins at the time of the abduction and extends for the whole period of time until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.

Both the Declaration on the Protection of All Persons from Enforced Disappearance (art. 13 (6)) and the International Convention on the Protection of All Persons from Enforced Disappearance (art. 24 (6)) are forceful in affirming that investigations related to enforced disappearance must be carried out until the fate of the disappeared person has been clarified. The Working Group on Enforced or Involuntary Disappearances has interpreted that, as a rule, the investigation should also extend to the clarification of the whereabouts of the victim, and that these principles are based on the continuing nature of the crime of enforced disappearance.

Regarding the **presumption of death of victims of enforced disappearances** who remain missing and the continuous nature of the crime of enforced disappearances we would like to recall that in the judgment "González Medina and Family Members v. Dominican Republic" ⁶, the Inter-American Court held that the presumption of death cannot be equated with the determination of the whereabouts of the victim of enforced disappearance or the finding of his remains, since it would be inadmissible for the party who bears the burden of rebutting the presumption to use it to exclude or limit the responsibilities incumbent upon him under international law (I/A Court H.R., Case of González Medina and Family Members v. Dominican Republic. Case of González Medina and Family Members v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of 27 February 2012. Series "C" No. 240. Point 51, merits).

The Working Group on Enforced or Involuntary Disappearances has emphasized on multiple occasions that disappeared persons whose fate and whereabouts are not determined cannot be declared dead. In its General Comment on the right to recognition as a person before the law in the context of enforced disappearances, the Working Group stipulated that the act of enforced disappearance denies the disappeared person's legal existence and, as a consequence, prevent him or

her from enjoying all other human rights and freedoms, in a situation of total defenselessness. In addition, the Working Group has also established that placing a person outside the protection of the law means that all protections, including those intended to secure economic, social and cultural rights, cease to exist.

We would also like to refer to Principle 1 of the Guiding Principles for the search for disappeared persons, which stipulates that the search should be conducted under the presumption that the disappeared person is alive, regardless of the circumstances of the disappearance, the date on which the disappearance began and when the search is launched.

Finally, we would like to recall that under the *aut dedere aut judicare* (**extradite or prosecute**) rule, a state may not provide a safe haven for a person suspected of certain categories of crimes. Instead, it must either exercise jurisdiction over and prosecute the person suspected of committing serious crimes in full compliance with international standards, or extradite the person to a State able and willing to do so (or surrender the person to an international criminal court with jurisdiction over the suspect and the crime). The *aut dedere aut judicare* obligation is contained in numerous international instruments relating to crimes under international law including the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity; the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the International Convention on the protection of all Persons from Enforced Disappearances. The latter stipulates that States must submit cases of enforced disappearances to its competent authorities for the purpose of prosecution should it not extradite that person (article 11) and that States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings (article 14). In addition, principle 18 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, provides that Governments shall either bring persons found to have participated in any infringements on the right to life to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

To conclude, we would like to draw the attention of your Excellency's Government to States' obligations to **provide victims of human rights violations with effective remedies**. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in 2006, provide that victims of a gross violation of international human rights law or of a serious violation of international humanitarian law must be guaranteed of: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Similarly, according to principle 20 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable

period of time. The International Convention on the protection of all Persons from Enforced Disappearances further stipulates that each State Party shall take appropriate measures to ensure that each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person, and ensure that each victim has the right to obtain reparation and prompt, faire and adequate compensation (article 24).