

Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolution 25/13.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **proposed Constitutional Amendment Bill No. 33, allowing for children between the ages of 16 and 18 to be tried as adults in certain cases.**

According to the information received:

Brazil's Senate Constitution and Justice Committee will be voting on Proposed Constitutional Amendment (PCA) 33/2012 to amend article 228 of the Brazilian Constitution, which would lower the minimum age of criminal liability from 18 to 16 for heinous crimes. PCA 33/2012 is similar to PCA 171/1993, which was passed by the Lower House of Congress in August 2015. However, unlike PCA 171/1993, PCA 33/2012 provides that the prosecutor bringing a case against a child aged 16 or 17 must request a judicial waiver – to be determined on a case by case basis – for the child to be tried and sentenced as an adult, and, if convicted, the child would serve his or her sentence separate from adults. If PCA 33/2012 passes, it would irrevocably lower the age of criminal majority in Brazil to 16.

It is alleged that these proposed Constitutional changes are in response to the public's perception that children aged 16 to 17 are immune from liability for their criminal offenses. However, children between the ages of 12 and 18 can be held responsible for criminal infractions and face sentences of up to 3 years in "socio-educative" facilities (or juvenile detention centres). According to the information received, over 20,000 children are currently being held in such centres. Additional proposed legislation (333/2015) seeks to increase the length of detention from 3 to 10 years.

While I do not wish to prejudge the accuracy of these allegations, serious concerns are expressed about the potential of the Constitutional amendment to give rise to torture or other ill-treatment of children deprived of their liberty.

I would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 1,2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and as reflective of international customary law, and of paragraph 1 of Human Rights Council Resolution 16/23 which condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

I would further like to remind Your Excellency's Government of the findings in my report on children deprived of liberty (A/HRC/28/68), recalling that with regard to deprivation of liberty within the context of the criminal justice system, children should be charged, tried and sentenced within a State's system of juvenile justice, affording them adequate forms of protection, and never within the adult criminal justice systems. In addition, laws, policies and practices that allow children to be subjected to adult sentences are inherently cruel, inhuman or degrading because they fail to consider any of the special measures of protection or safeguards that international law requires for children. Children should never be treated as if they were adults. Because children are less emotionally and psychologically developed, they are less culpable for their actions and their sentencing should reflect the principle of rehabilitation and reintegration. I would additionally like to draw Your Excellency's Government's attention to the fact that lowering the minimal age of criminal liability has the potential to further contribute to prison overcrowding, an issue which I addressed during my visit to Brazil last August, and that severe overcrowding generates tension and a violent atmosphere, which can be detrimental to children's psychological and physical well-being.

With regard to international standards on child offenders, I would like to draw Your Excellency's Government's attention to Article 14(4) of the International Covenant on Civil and Political Rights, which Brazil acceded to on 24 January 1992, and Article 37(a-d) of the Convention on the Rights of the Child, which Brazil ratified on 24 September 1990, as well as to Rule 26.2 of the United Nations Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules), and Rule 49 of the United Nations Rules for the Protection of Juveniles Deprived of Liberty.

With regard to lowering the age of at which a child may be tried and sentenced as an adult, I wish to draw the attention of your Excellency's Government to the authoritative interpretation of the Convention on the Rights of the Child in its Committee's General Comment No. 10 (CRC/C/GC/10), whereby those States parties

which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals are required to change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

It is my responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. I would therefore be grateful for your observations on the concerns iterated in this communication and on the following matters:

1. Please provide any additional information and comment you may have on the accuracy and the merit of the above-mentioned allegations;
2. Please articulate in detail how the proposed Constitutional Amendment Bill, as reported above, is consistent with international norms and standards on human rights, particularly as set forth in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, and what are the measures provided for therein to protect against abuse.

We would appreciate receiving a response as soon as possible.

While awaiting with interest the detailed responses to the above allegations I would like to inform your Excellency's Government of my intention to issue shortly a news release because of the implications of the proposed legislation. I am of the view that the information upon which this news release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention. This news release will indicate that I have been in contact with your Government to clarify the issue/s in question

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

Juan Ernesto Mendez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment