

BRAZIL

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Brazil is the largest country in South America. In 2001, its population was estimated at 173 million inhabitants.¹

Brazil is a decentralized Federative Republic comprised of 26 states. The Federal Constitution, promulgated on 5 October 1988 (and amended several times), is the supreme law of the land. It provides that the nation will manage its international relations by, among others, human rights principles,² and recognises a range of civil, political and social rights.³ The Constitution also provides for a right of litigation,⁴ and recognises the right to petition the Government in defence of rights or against illegal acts or abuse of power.⁵

The majority of crimes, including human rights crimes, are dealt with at state level.⁶ The Federal police are accountable for maintaining public security at the national level, while the jurisdiction of the civil and military police is at the state level. "Each state is responsible for its own military and civil police forces, as well as the state public prosecutor's office and the state judiciary, with access to the federal courts as a final court of appeal. Furthermore each state has different institutions, so the legal process may vary from state to state".⁷

Article 22 (1) of the Constitution defines the jurisdictions of the Federation and of the states. The latter are primarily responsible for the lower courts of criminal, commercial and civil issues. Federal tribunals for labour, electoral and military cases are established pursuant to Articles 111 and 112 of the Constitution.⁸ The Federal

¹ See on overall characteristics of the country, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Initial reports of States parties due in 1990, Addendum: Brazil, UN Doc. CAT/C/9/Add.16, 18 August 2000, paras. 9-17.

² Article 4º, II of the Constitution. Brazil. *Constituição* (1988). *Constituição da República Federativa do Brasil*. Brasília, DF: Senado, 1988, p. 12.

³ The Constitution guarantees, *inter alia*, the following rights: dignity of the human person (art. 1, III); prevalence of human rights (art. 1, II); inviolability of the right to life and to liberty (art. 5); repudiation of torture or any other inhuman or degrading treatment (art. 5, III); punishment for any attempt to discriminate against fundamental rights and liberties (art. 5, XLI); punishment for torture shall be considered by law as not subject to bail, to grace or amnesty (art. 5, XLIII); prohibition of cruel punishment (art. 5, XLVII); prisoners have the right to physical and moral integrity (art. 5, XLIX); federal intervention to guarantee respect to the rights of the human person (art. 34, VII, b); and control over police activities by the Public Prosecution (art. 129, VII).

⁴ Article 5 LV of the Constitution: "Litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense with the means and resources inherent to it"

⁵ Article 5, XXXIV of the Constitution.

⁶ Amnesty International, *Torture and ill-treatment in Brazil: dehumanization and impunity in the criminal justice system*, October 2001, AI-Index: AMR 19/022/2001, p. 40.

⁷ *Ibid.*, pp. 40-41.

⁸ See Decree Law 1.001, 1969. See for jurisdiction of military courts over military crimes in times of peace: Article 9: "I – crimes included in this Code, if defined in a different mode or not provided by the ordinary criminal law, whoever is the agent, unless provided otherwise in a special provision; II – crimes provided in this Code, even the ones equally defined in the ordinary criminal law when committed by a) active or retired member of the military against

District (the capital) has its own courts for these matters, stemming from Article 92 VII of the Constitution, Law 8.185 of 1991. The Supreme Federal Tribunal is the highest court, whose jurisdiction is set out in articles 102 and 103 of the Constitution. It is comprised of 11 justices and has both original and appellate jurisdiction.

The Judicial branch is empowered with administrative and financial autonomy. Judges in the various courts enjoy the guarantees of life tenure, irremovability, and irreducibility of compensation, pursuant to Article 95 of the Constitution.⁹

1.2. Incorporation and Status of International Law in Domestic Law

Brazil has become a party to the following relevant treaties:

- Genocide Convention (15 April 1952)
- Geneva Conventions (29 June 1957) and Protocols I and II (5 May 1992)
- Convention relating to the Status of Refugees, (16 November 1960)
- International Convention on the Elimination of All Forms of Racial Discrimination (27 March 1968)
- Convention on the Elimination of All Forms of Discrimination against Women (1 February 1984)
- Inter-American Convention to Prevent and Punish Torture, (20 July 1989)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (28 September 1989)
- Convention on the Rights of the Child, (24 September 1990)
- International Covenant on Civil and Political Rights, (24 January 1992)
- International Covenant on Social, Economic and Cultural Rights (24 January 1992)
- American Convention on Human Rights (25 September 1992)
- Rome Statute of the International Criminal Court (20 June 2002)

According to Article 5(2) of the Constitution, the rights and guarantees articulated in it are not exclusive. International treaty rights have special constitutional status.¹⁰ Once ratified by the Federal Congress, they are immediately applicable.¹¹

an active or retired member b) active or retired member of the military in a place subject to military jurisdiction against a reserve or retired member or civil; c) members in service or in the course of his employment, of a military nature...even if outside of the place subject to military jurisdiction against a reserve member...or civil. d) by a military during manoeuvring against a reserve, retired military or civil."

⁹ The Brazilian judiciary is in theory, an independent body. Judges have life tenure, except for a two-year probationary period for first instance judges, though retirement is compulsory at age seventy (Article 101 of the Constitution). They are chosen by competitive examinations and promoted alternatively on the basis of seniority and merit. One-fifth of the judges of the Federal Regional Tribunals and the highest state courts must be selected from among the members of the Public Ministry with more than 10 years of service or from amongst the most reputable lawyers (Articles 94 and 107 of the Constitution). Justices of the Supreme Federal Tribunal, Brazil's highest court, are appointed by the President of the Republic with consent of the senate and are chosen from citizens with notable juridical knowledge and unblemished reputation (Article 101 of the Constitution).

¹⁰ See Brazil's 2000 Report to CAT, *supra*, para. 49.

¹¹ Article 49 (1) of the Constitution. See also Piovesan, Flávia. *A Constituição Brasileira de 1988 e os Tratados Internacionais de Proteção dos Direitos Humanos*, in: *Superior Tribunal de Justiça, A Proteção Internacional dos Direitos Humanos e o Brasil*, Brasília, 2000, pp. 87-104.

Brazil adopted Law 9.455/97 incorporating the Convention against Torture into Brazilian internal law. While it does criminalise torture, the definition does not correspond to Article 1 of the Convention.

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of Torture

Torture was widely understood to be state sponsored during the last military dictatorship (1964-1985) and a number of laws facilitated its use. During this period, and especially from 1968 until the middle of the 1970s, Brazilian security forces are said to have regularly tortured and disappeared individuals without regard to human rights norms. Citizens were apparently detained without warrants or legal authority and were sentenced by special military courts.¹²

Even after the end of the dictatorship, the use of torture and ill-treatment reportedly continues to be a common practice among security forces, particularly in their dealings with the most disadvantaged sectors of the population such as young people, the poor, ethnic minorities and indigenous people. The United Nations Special Rapporteur on Torture stated in 2000 that the practice of torture was systematic. In his report on his visit to Brazil, he concluded:

“...Torture and similar ill-treatment are meted out on a widespread and systematic basis in most of the parts of the country visited by the Special Rapporteur and, as far as indirect testimonies presented to the Special Rapporteur from reliable sources suggest, in most other parts of the country...”¹³

Reportedly, human rights defenders have also been threatened and attacked.¹⁴ Amnesty International has reported that torture and ill-treatment are routinely inflicted by both military police during arrests and by civil police in overcrowded police stations.¹⁵ Beatings, electro-shocks and other methods of torture as a means of extracting confessions, extortion or maintaining control are regularly reported.¹⁶

Prison conditions are a matter of serious concern. Detention centres for common crime prisoners and juvenile detainees have been characterised as severely

¹² Evidence shows that the Armed Forces controlled or were somehow related to at least 242 secret detention centres used for political investigation, in which prisoners were kept incommunicado, tortured and murdered. The description of torture under the military dictatorship can be found in Brazil's 2000 Report to CAT, paras. 33-36.

¹³ Report of the Special Rapporteur Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43; Addendum, Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para. 166. See also the report: Follow-up of Torture Allegations In the State of São Paulo 200/2002, a joint collaboration between the following NGOs: ACAT/Brazil; Pastoral on Detention Centers/SP; Center for Global Justice; AMAR; AFACE; Torture Never Again (Tortura Nunca Mais); Psychotherapist's Union/SP, 2002, according to which over 5,600 cases of torture were registered by NGOs between February 2000 and June 2002 in the State of São Paulo (the most populous State in Brazil having a population of about 36 million people) alone.

¹⁴ See e.g. Amnesty International. Urgent Action 176/02 Death Threats/Impunity 12 June 2002, Public AI Index: AMR 19/07/2002.

¹⁵ Cases of torture are more frequent among the state police than among the federal police who are considered more professional. Torture is practiced in every phase of detention: initial questioning, temporary detention, and long-term detention. See AI, Brazil, supra, pp. 11 et seq.

¹⁶ Ibid.

overcrowded in state facilities.¹⁷ The prison system cannot appear to cope with the huge numbers of prisoners in police stations or in public jails.¹⁸ The case of the physically and mentally impaired and HIV infected prisoners is even more severe, as these individuals may not receive proper medical care or/and are specially targeted for ill-treatment because of their condition.¹⁹ Prisoners who complain are often subjected to further abuse and reprisals.²⁰ The inhuman conditions to which prisoners are subjected²¹ generate regular protests and/or riots within the prisons which are usually suppressed by prison agents and/or police, resulting in further violations of human rights.²² Prisoners are also subject to abuse from their fellow inmates who exercise authority within the prison.²³

2.2. Domestic Responses

Brazil has adopted a series of policies and measures to combat acts of torture albeit with limited impact.²⁴ It has created a Human Rights Committee in the House of Representatives and established a National Secretariat of Human Rights in the Ministry of Justice with a brief to monitor and implement the National Program and to develop policies aimed at the defence and promotion of human rights. In 1999, it became the State Secretariat of Human Rights. The Federal Government has also launched two National Programs on Human Rights, the first in May 1996 and the second in 2002.²⁵

Moreover, in October 2001, the Federal Government launched a publicity campaign against torture.²⁶ Against this background, the Government has taken some measures to train law enforcement officials and staff in the prohibition of torture. By August 2000, courses on Human Rights intended for military or civil police officers were being held in several states such as São Paulo, Rio Grande do Sul, Santa

¹⁷ See Brazil's 2000 CAT Report, para. 17.

¹⁸ "In October 1998, there were 73,000 prisoners, 40,000 of whom were convicted and were awaiting vacancies in prisons. There were 33,379 prisoners in public jails and police stations, 15,000 of whom were convicted awaiting vacancies in penitentiaries". See Brazil's 2000 CAT report, para. 135.

¹⁹ "In March 1999, the Public Prosecutor of São Paulo presented a denunciation against 44 employees of the Secretariat for Prison Administration, accusing them of ill-treatment, neglecting to give help followed by bodily harm, criminal acquiescence, and crimes against the handicapped. Most of the employees who were denounced were civil servants of the health area: 21 physicians, 6 nurses and 12 nurse aids. Denunciation was made after two years of several occurrences of ill-treatment and neglect to give help in prison units of the State of São Paulo, mainly those intended for medical care, like the State Penitentiary and the Central Penitentiary Hospital". See Brazil's 2000 CAT report, para. 139.

²⁰ Amnesty International, Brazil: Annual Report 2000.

²¹ "In October AI delegates visited two police stations in Belo Horizonte, in Minas Gerais, which lacked medical and sanitation facilities and where extreme overcrowding of police cells was caused by the illegal detention of convicted prisoners. In the Drugs and Narcotics Police Station, overcrowding had reached 1,000 per cent, with 280 detainees - 80 per cent of them convicted prisoners - held in a space designed for 28. Detainees there were held in small, dark cells and allowed out for one hour every two weeks: some were forced to use disposable plates as toilet facilities". Amnesty International, Brazil: Annual Report 2002.

²² An account of the most notorious cases can be found in Brazil's 2000 CAT report, paras.123-28.

²³ See AI, Brazil, *supra*, pp. 17 and 18.

²⁴ See Brazil's 2000 CAT report, para. 62. See on a critical assessment of the steps taken by the Government to implement the National Program on Human Rights, Global Justice Center et. al., *Alternative Report on Compliance by the State of Brazil with the Obligations Imposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Geneva, 20 April 2001.

²⁵ See <http://www.mj.gov.br/sedh.htm>.

²⁶ Amnesty International, Brazil: Annual Report 2002.

Catarina, Espírito Santo, Alagoas, Amapá, Paraná, Pernambuco and in the Federal District. Similar courses were given to penitentiary security agents and other employees in the states of Paraná, Minas Gerais, São Paulo, Rio de Janeiro and Rio Grande do Sul.²⁷ The government has also encouraged investigating authorities to apply the Istanbul Protocol in investigating suspected incidents of torture, but apparently with limited success.²⁸ Finally, several measures have been taken to reduce the deficit of vacancies in the Brazilian penitentiary system and to improve prison conditions.²⁹

On the state level, Internal Affairs Divisions were created in the States of São Paulo (1995), Pará (1997), Minas Gerais (1998), and Rio de Janeiro (1999). According to the government of Brazil, "The Police Internal Affairs Division receives and investigates accusations of irregularities committed by civil and military police agents. These have evolved into playing an important part in the reduction of cases of torture once they are autonomous agencies and independent, run by representatives of civil society and directed towards complementing the control of State Police Action."³⁰ In São Paulo state, the government enacted decree 42.847/98 which established the Technical and Scientific Police Superintendent's Office, directly subordinate to the Cabinet of the Secretary for Public Security's Office in São Paulo, in an effort to ensure that exams and technical examination reports from the forensic service have maximum independence.

At present, several bills are pending in the National Congress that would amend the Torture Law No. 9.455 of 7 April 1997. Among these is bill No. 4129/2001, which seeks to modify the Law so that it accords with the terms of the Convention against Torture.

2.3. International Responses

In 2001, the UN Committee against Torture noted with approval the steps that Brazil has taken to combat torture. However, it expressed concern about, *inter alia*: "the persistence of a culture that accepts abuses by public officials, the numerous allegations of acts of torture and cruel, inhuman or degrading treatment - in police stations, prisons and facilities belonging to the armed forces - and the de facto impunity enjoyed by the perpetrators of those acts."³¹ Other matters of concern noted by the Committee included: "the absence of an institutionalized and accessible procedure to guarantee victims of acts of torture the right to obtain redress and to be fairly and adequately compensated, as provided for in article 14 of the Convention and the absence in Brazilian legislation of an explicit prohibition on any statement obtained through torture being accepted as evidence in judicial proceedings."³²

The Special Rapporteur on Torture who visited Brazil in 2000 noted that "the Torture Law is virtually ignored, prosecutors and judges preferring to use the traditional,

²⁷ See Brazil's 2000 CAT Report, para. 109.

²⁸ AI, Brazil, *supra*, pp.30-31.

²⁹ See Brazil's 2000 CAT report, *supra*, para. 118-19.

³⁰ See Brazil's 2000 CAT Report, para. 148.

³¹ Concluding observations of the Committee against Torture: Brazil, UN Doc. A/56/44, 16 May 2001, paras.115-120, 119 (a).

³² *Ibid.*, para. 119 (f) and (g).

inadequate, notions of abuse of authority and causing bodily harm.”³³ Moreover, he reported that “torture and similar ill-treatment are meted out on a widespread and systematic basis ...”³⁴ “In addition, conditions of detention in many places are, as candidly advertised by the authorities themselves, subhuman.”³⁵

The Inter-American Commission on Human Rights has found Brazil to be in violation of the right to physical integrity in several cases and recommended that Brazil carry out effective investigations, duly prosecute and punish those responsible and provide reparation to victims and their families for the consequences of the violations of their rights.³⁶

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The Constitution contains an express prohibition of torture and several provisions setting out the principles of dignity of the human person, respect for physical and moral integrity and prohibition of cruel punishment.³⁷ Article 5 reads: “All persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security, and property, on the following terms:

III. no one shall be submitted to torture or to inhuman or degrading treatment;

XLIII. the law shall consider the practice of torture, unlawful traffic of narcotics and similar drugs, terrorism and crimes defined as heinous crimes to be crimes not entitled to bail and to mercy or amnesty, and the principals, the accessories and those who, although able to avoid them, abstain from doing so, shall be held liable;

XLIX. convicts are assured of respect for their physical and moral integrity.”

The prohibition of torture is considered absolute and may not be derogated from.³⁸

Law No. 9.455/97, which came into force in April 1997, for the first time provided for a specific offence of torture. However, the definition of the offence: “1) coercing someone by the use of violence or serious threat, causing physical or mental suffering to obtain information or a confession from him or her or a third person; to cause an act or omission of criminal nature; or based on racial or religious discrimination. 2) To inflict physical and mental suffering upon someone held in custody through the use of violence or serious threat, as a means to apply personal

³³ Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Addendum, Visit to Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para. 161.

³⁴ *Ibid.*, para. 166.

³⁵ *Ibid.*, para. 167.

³⁶ See e.g. Report No. 34/00, Case 11.291, Carandiru, Brazil, 13 April 2000; Report No 55/01, Cases 11.286 (Aluisio Cavalcanti et al), 11.407 (Clarival Xavier Coutrim), 11.406 (Celso Bonfim de Lima), 11.416 (Marcos Almeida Ferreira), 11.413 (Delton Gomes da Mota), 11.417 (Marcos de Assis Ruben), 11.412 (Wanderlei Galati), and 11.415 (Carlos Eduardo Gomes Ribeiro) Brazil, 16 April 2001.

³⁷ See overview in Brazil’s 2000 CAT report, *supra*, para.51.

³⁸ See *ibid.* para. 69: “Even though the range of measures that restrict the rights of a citizen is broad, torture is forbidden in any case, even in the event of such exceptional circumstances.”

punishment or a preventive method” is not consistent with Article 1 of the Convention against Torture. While it has broadened the focus of the definition present in the Convention Against Torture by encompassing private citizens or non-state agents as possible perpetrators, it fails to take sufficient account of state responsibility and consequently may weaken the overall impact of the definition. Moreover, it restricts acts of torture to “violence or serious threat,” and does not cover those acts which are not violent *per se* yet which could cause “intense pain or suffering, whether physical or mental.”³⁹

The Code of Criminal Procedure prohibits the use of force against an arrested person, except in cases of resistance or attempt to escape.⁴⁰

Article 5 of Law 8.069 of 13 July 1990 (Statute of the Child and the Adolescent) guarantees that “no child or adolescent shall be the object of any form of neglect, discrimination, exploitation, violence, cruelty, or oppression, and any attempt, act or omission to their fundamental rights will be punished in accordance with the law.” According to Article 233 of this law, anyone who submits a child or adolescent under his/her authority or care to torture is subject to a term of imprisonment from 1 to 5 years.

Section II of the Law of Penal Discharge (Law 7210/84) “is dedicated to the rights of prisoners and states that sanctions may not jeopardize the physical and moral integrity of the convicted. It also determines the prohibition of dark cells and collective sanctions. Abuse of authority implies civil and criminal administrative sanctions.”⁴¹ Article 40 of this law determines that “the authorities must respect the physical and moral integrity of the convicted prisoners and of the provisional prisoners, such as the right to food, clothes, work, medical care, legal and social assistance, among others.”⁴²

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal offences and punishment

Article 1 of Law 9.455/97 defines the crime of torture both as an act and an omission. The law punishes an individual who commits torture and anyone who knew about the act and had the duty to prevent it.⁴³ Torture is punishable by a term of imprisonment which is determined in accordance with the circumstances.⁴⁴ For the direct application of torture: 2 to 8 years;⁴⁵ Serious physical injury resulting from torture: 4 to 10 years;⁴⁶ Death caused by torture: 8 to 16 years;⁴⁷ Absenting him or

³⁹ See Salla, Fernando, et. al., “*Primeiro Relatório Relativo à Implementação da Convenção contra a Tortura e outros Tratamentos ou Penas Cruéis, Desumanos ou Degradantes no Brasil (Draft)*”, 1999, p. 25 (Manuscript on file).

⁴⁰ Article 284, Decree-Law nº 3.689 of 3 October 1941.

⁴¹ Brazil’s 2000 CAT Report, para. 113.

⁴² Ibid., para. 112.

⁴³ Article 1 of Law 9.455/97.

⁴⁴ Ibid.

⁴⁵ Art. 1, II *ibid.*

⁴⁶ Art. 1, II (§ 3º) *ibid.*

⁴⁷ Art. 1, II (§ 3º) *ibid.*

herself before the practice of torture, when he/she was able to prevent it or ascertain it: 1 to 4 years.⁴⁸ If the torture is committed by a public official, the sentence is increased from 1/6 - 1/3.⁴⁹ If the torture is perpetrated against a child, adolescent, pregnant woman or impaired person, or the torture is committed in the context of kidnapping, the sentence is increased from 1/6 to 1/3.⁵⁰ In additional torture constitutes an aggravating factor in respect of other crimes.⁵¹ For example, homicide, subject to a punishment of 6 to 20 years, is increased to 12 to 30 years if committed with torture.⁵² However, rape in custody is not considered to be an aggravating circumstance for the crime of rape, which is punishable by 6 to 10 years.⁵³

Before Law No. 9.455/97 entered into force, perpetrators of torture were prosecuted under the Criminal Code⁵⁴ for illegal punishment (*apremios ilegales*),⁵⁵ ill-treatment,⁵⁶ and bodily harm.⁵⁷

The Criminal Code penalises those who arrest without the legal formalities or with *abuso de autoridade* (abuse of authority) or who submit someone under custody or surveillance to illegal coercion.⁵⁸ Attempts and participation in acts of torture are punishable according to rules applying to all offences.⁵⁹ There are no specific defences available to those charged with torture or ill-treatment under the Torture Law.⁶⁰

In the area of Federal administration, provision is made for the preventive suspension of any civil servant suspected of having 'practiced grave irregularities.' Article 147 of Law 8.112/90 (*Regime Jurídico Único dos Funcionários da União*) states: "As a cautionary measure and with the purpose that the civil servant shall not influence the investigation of the irregularity, the authorities in charge of the disciplinary process may decide for his suspension from the position for a period of up to 60 days without prejudicing pay." In addition, public officials who engage in torture are subject to disciplinary sanctions under Law 9.455/97. If the perpetrator is

⁴⁸ Art. 1, II (§ 2º) *ibid.*

⁴⁹ Art. 1, II (§ 4º) *ibid.*

⁵⁰ Art. 1, II (§ 4º) *ibid.*

⁵¹ Article 61 II Criminal Code.

⁵² See Article 121 (2) (III) Criminal Code.

⁵³ Article 213 Criminal Code.

⁵⁴ General Part introduced by Act n. 7209, 11 July 1984; Special Part established by Decree-Law n. 2848, 7 December 1940- Criminal Code.

⁵⁵ Article 146 of the Criminal Code.

⁵⁶ Article 136 of the Criminal Code: "the act of exposing to danger the life and health of a person under his authority, protection or surveillance for purposes of education, teaching, treatment or custody, whether by depriving him/her of food or indispensable care, or by submitting him/her to excessive or improper work, or abusing of means correction or discipline, carries a sentence of 2 months to one year, or a fine. If the act results in corporal injuries of a grave nature, the sentence is imprisonment of one to four years and, if it results in death, four to twelve years imprisonment. The sentence shall be increased by a third if the crime is committed against a person younger than fourteen years old."

⁵⁷ Article 129 of the Criminal Code. The offence carries a punishment of imprisonment of three months to one year.

⁵⁸ Article 350 Criminal Code.

⁵⁹ Articles 14 II and 29 of the Criminal Code.

⁶⁰ Article 5 (XLIII) of the Constitution.

convicted, the individual loses his employment and is barred from holding that position for twice the length of time of the sentence received.⁶¹ Criminal sanctions are not exclusive of disciplinary sanctions. On the contrary, they must be applied jointly.

As Brazil is a Federal Republic, each of its 26 states and the Federal District has its own administrative structure and each has the autonomy to establish its own mechanisms for disciplinary punishment. Article 37(6) of the Federal Constitution sets out the responsibility of the public entity to which the agent or perpetrator of the torture belongs. The Federal government has noted that the "Police forces are internally regulated by organic laws, prepared at state level, where duties and functions of police forces (civil or military) are specified. An example of this is the Organic Law of the State of São Paulo 207/79 which defines physical or moral ill-treatment and abuse of power as disciplinary infringements."⁶²

2. The procedural law

2.1. Immunities

According to article 5, XLIII of the Constitution, perpetrators of torture cannot avail themselves of bail, amnesty laws or pardons.⁶³ This provision, however, is qualified by the Amnesty Law No. 6683/79 approved by Congress in 1979, which declared an amnesty for "all crimes of political nature or carried out for political reasons." It has been applied to acts of torture perpetrated during the military regime.⁶⁴

2.2. Statutes of Limitations

Prescription depends on the maximum term of imprisonment applicable to the crime, which in the case of torture is 16 years or more if there are aggravating circumstances. The statute of limitations for any sentence of more than 12 years imprisonment is 20 years.⁶⁵

2.3. Investigations into torture

Any aggrieved individual may file a complaint with the:

- Ombudsman's Office [*ouvidoria*];⁶⁶
- Public Prosecutor's Office [*promotoria*];
- Police Station;⁶⁷

⁶¹ Art. 1, II (§ 5º) Law 9455/97.

⁶² See Brazil's 2000 CAT Report, supra, para.107.

⁶³ See Article 5 XLIII of the Constitution and Article 1, II § (6º) Law 9.455/97.

⁶⁴ Law nº 6.683 of 28 August 1979. For the extension of this amnesty to *connected crimes*, a clause was inserted pardoning human rights violations carried out by the military and other agents of the repression, who remain unpunished. See, also Brazil's 2000 CAT Report, supra, para.38.

⁶⁵ Article 109 (I) Criminal Code.

⁶⁶ "The Ombudsman would pass these complaints on to the relevant authorities, normally the internal investigations unit, and is then able to follow the progress of cases until they are sent for prosecution or are archived. Ombudsmen cannot open their own investigation." AI, Brazil, supra, p. 24.

⁶⁷ See Article 41 CCP (Criminal Procedure Code).

- Internal affairs divisions (*corregedorias*).⁶⁸

Furthermore, aggrieved individuals may lodge claims with the competent court if their rights to physical and psychological integrity have been violated.⁶⁹ They may avail themselves of *habeas corpus*, court injunctions (individual and collective),⁷⁰ writs of injunction and *habeas data*.⁷¹ The Constitution provides, in Article 5, LXXIV, that "The State shall give full and free juridical assistance to those who can prove insufficient resources".⁷²

While there is no general right to private prosecution, Article 5, LIX of the Constitution stipulates that "private prosecution against public offenses shall be admitted if public prosecution is not filed within the period established by law." The crime of torture can, under Brazilian law, only be prosecuted by way of public action.

Both the civil police⁷³ and the *Ministerio Público* (Public Prosecution) have the authority to initiate a criminal investigation. The latter is responsible for the prosecution.⁷⁴ There are no special procedures for investigating and/or prosecuting criminal offences involving members of the police.⁷⁵ The public prosecution is authorized to exercise "external control" over "police activity,"⁷⁶ though it is the police that invariably carry out the investigation of a torture complaint, either through the internal affairs divisions (*corregedorias*) or through a police inquiry procedure (*inquérito policial*).⁷⁷

⁶⁸ These are units that exist within official bodies, such as the police, the prison service, the Public Prosecutor's Office or the judiciary, to investigate complaints and reports of institutional or criminal wrongdoing. They are staffed by members of the same body, which means for example that the civil police investigate civil police. Once an investigation is completed, the police's internal investigations unit will either: archive it, should they feel the allegations were unsubstantiated; recommend an administrative or disciplinary charge; or undertake both institutional and criminal proceedings against the suspected perpetrator. Should they decide to open criminal proceedings, the case will be passed to a judge with a recommendation as to how it should be prosecuted. See AI, Brazil, *supra*, p.24.

⁶⁹ Article 5 XXXV of the Constitution.

⁷⁰ Constitutional procedure intended to protect collective rights. It can be commenced by a political organization, a class entity or legally constituted association operational for at least one year, in the defence of the interest of their members' or associates' action, see Meirelles, Hely Lopes *Court Injunction, Class Action, Public Civil Action, Writ of Injunction, Habeas Data*, Sao Paulo, Malheiros Editores Ltda., 17th ed., 1996, p. 17.

⁷¹ This is a Constitutional procedure available to individuals or legal entities to ensure access to personal information. See Meirelles, Hely Lopes *supra*, p. 185.

⁷² The Public Defenders Office offers legal assistance to those with limited resources; these being the majority of people under arrest. According to the Report of the Special Rapporteur on Torture, *supra*, in many Brazilian states, these offices have not been set up and where they do exist, there is insufficient personnel. The majority of Brazil's current prison population today has insufficient access to defense counsel. Few have the financial means to hire their own lawyers and most states have not set up public defenders offices as required by the Constitution. In recognition of this, other organs, such as the Public Ministry for the State of Sao Paulo, have provided legal services to prisoners. In other cases, lawyers have worked on a rotating, *pro bono* basis. See AI, Brazil, *supra*, p.24.

⁷³ Article 4 CCP.

⁷⁴ Article 129 (I) of the Constitution and Article 24 CCP.

⁷⁵ Title V, Chapter III, art. 144, § 4° of the Federal Constitution.

⁷⁶ Articles 129, VII of the Constitution. See on public security also Article 144 of the Constitution. In the State of São Paulo, this jurisdiction was ratified through acts 9/96 and 119/97 of the General District Attorney's Office. Complementary Law 75, of 20 May 1993, gave a new statute to the Public Federal Ministry and attributed the defence of constitutional rights of the citizen to the District Attorney's Office of Citizen's Rights.

⁷⁷ Global Justice Center et. al., Alternative Report, *supra*. Since 1996, in the case of homicide committed by a member of the military police, an internal military investigation must decide if the homicide was intentional before forwarding the case to the civil courts. As a result, few prosecutions are brought. Rosenn, Keith S., "Judicial Review in Brazil: Developments under the 1988 Constitution", 7 South West. J.L. & T.A. 291 (2000), p. 316.

A police inquiry will be initiated on the request of a judicial authority or the Public Ministry, or at the request of the victim.⁷⁸ The opening of an investigation into allegations of torture is mandatory.⁷⁹ However, if the act is characterised as a lesser crime, such as “causing bodily harm,” the decision to open an investigation is discretionary.⁸⁰

The police employ a series of investigative methods.⁸¹ All complainants must undergo a medical examination at the *Instituto Médico Legal* (IML).⁸² The office of the Institute is attached to the office of the civil police (who are often the alleged torturers). Article 159 of the Code of Criminal Procedure states that “examinations of the body, and other expert exams shall be carried out by two official experts. ... If there are no official experts, the exam shall be carried out by two suitable people, graduates of upper schools, chosen preferably from those who are trained in an area technically related to the nature of the exam.” The only medical reports admitted at court proceedings are the ones drawn according to these procedures. Moreover, “with the objective of controlling the incidence of torture, the legislation relating to provisional arrest establishes that the judge may request a meeting with the prisoner and request that a medical examination be carried out (*corpus delicto* exam).”⁸³

The police present the results of the investigation, including the identification of the perpetrator, the nature of the offence and the evidence.⁸⁴ They have 30 days to submit an investigation to the competent judge, but may request a 30 day extension.⁸⁵ The case is then referred to the public prosecution which will assess the evidence and decide whether to recommend prosecution. If the evidence is sufficient to initiate criminal proceedings, the judge will indict the accused. In other cases, if the judge disagrees with the prosecutor’s decision to archive the case, or to prosecute it on lesser charges, the case can be sent back for re-evaluation to the Public Prosecution Office, which may send the case to another prosecutor. If the new prosecutor agrees with the decision of the first one, the judge will have to abide by the decision.⁸⁶ The decision to archive a case must be justified.⁸⁷ Often, police

⁷⁸ Article 5 (II) CCP.

⁷⁹ Article 24 CCP.

⁸⁰ The Public Prosecutor may decide not to bring charges if the suspected perpetrator of these crimes complies with certain requirements, such as compensating the victim or paying a fine, see Articles 72 and 76 of Federal Law No.9.099/95.

⁸¹ See for an overview Brazil’s 2000 CAT Report, para. 143.

⁸² Article 158 (6) (VII) CCP. The police station must supply a guide for the undertaking of the examination by the Medical Legal Institute. This may be requested by the judge or by the police officer, in some cases by the President of the Military Police Inquiry. A complementary exam may be solicited by the victim or by the Public Prosecutor. According to Article 6 CCP: “Once there is knowledge of the penal infraction, the police authority must: (...) IV – hear the complainant; (...) and VII- determine and examine the corpus delicti and any other evidence. Article 158 CCP provides: “When an infraction leaves traces, the direct or indirect examination of the body of evidence is indispensable, and the accused’s confession does not override this.” Finally, Article 184 CCP reads: “apart from the examination of evidence, the judge or police authority may refuse the required expert when it is not necessary for clarification of the truth.” Neither the judge nor the police authority may avoid an examination of the body of evidence. If there are lesions to the body, the victim is entitled to be examined by a doctor. Article 159 (1) CCP provides that two private doctors may produce a report, with equal effect.

⁸³ See Brazil’s 2000 CAT Report, supra, para.113.

⁸⁴ Article 4 CCP.

⁸⁵ Article 2 Federal law n. 8.072, of 25 July 1990.

⁸⁶ Article 28 CCP.

⁸⁷ Ibid..

inquiries are archived for lack of proof at the request of the Public Prosecutor. In accordance with the constitutionally protected right to petition in the defence of right, or against illegality or abuse of power,⁸⁸ the decision not to prosecute the accused can be the subject of an administrative challenge to the Secretary for Federal State Security or may be judicially reviewed. The decision of the judge not to lay charges can be appealed to the Appeal Court and the Superior Tribunal (Supreme Court), and in case of an issue concerning constitutional questions, to the Supreme Federal Tribunal (Brazil's Constitutional Court). The appeal may be made by the Public Prosecutor and their auxiliaries.

An accused can be remanded to prison for 5 days, which can be renewed for another 5 days when there are indications that the individual has committed a crime and may obstruct justice.⁸⁹ After this period, the accused can only be remanded in custody if a judge makes a specific order to this effect, based on the risk of flight or re-offending, tampering with evidence or in cases of flagrant delict.⁹⁰ A request for pre-trial detention may be made by the Public Prosecutor or ordered directly by the presiding Judge.⁹¹ All civil service statutes provide for suspensions pending the outcome of the investigation, although without specific reference to torture. If the person charged is a public official, he or she can be suspended from that position pending the outcome of the criminal investigation. However, this measure is only ordered in compelling circumstances.⁹²

Some states offer a witness protection programme for witnesses and crime victims called PROVITA or *Programa Federal de Assistência a Vítimas e a Testemunhas Ameaçadas*. The program functions in 15 states. At first, the programme was highly praised but is now showing signs of inefficiency, partially due to insufficient resources.⁹³ It is not specific to cases of torture or other human rights violations as it is meant for all situations involving organised crime.⁹⁴ The practical implementation of protection measures is often the result of an agreement between a non-governmental organization and the State.⁹⁵

2.4 Investigations by other bodies

A Federal Human Rights Commission operates in the *Camara de Deputados*. There is also a Commission for the Defence of the Rights of People within the Justice Ministry,

⁸⁸ Art. 5, XXXIV of the Constitution.

⁸⁹ Law No. 7.960/89.

⁹⁰ See Articles 312 CCP and Article 5 of the Constitution as well as 302 CCP.

⁹¹ Article 312 CCP.

⁹² Article 147 of Law 8.112/90.

⁹³ Those excluded from protection include those individuals whose personality or conduct are incompatible with the behavioural restrictions demanded by the program, those serving a sentence or those accused who are on probation for whatever reason.

⁹⁴ See <http://www.mj.gov.br/sedh/dpdh>.

⁹⁵ "Other programmes with the same purpose were created in the State of Rio de Janeiro, through an agreement between the Ministry of Justice and the non-governmental organization *Viva Rio*. Bahia, Espírito Santo and Rio Grande do Norte are some of the States, among others, which have been taking initiatives to establish similar programmes. In the State of São Paulo the Reference Center for Victim Support (CRAVI) was created. In the State of Paraná, the Restructuring and Reorientation for the Crime Victim (PROVIC) was created and in the State of Santa Catarina the Center for Taking Care of Crime Victims (CEVIC) was created". See Brazil's 2000 CAT Report, supra, para. 149

and a Federal Office of Citizens' Rights in the office of the Attorney General. These organs do not investigate individual cases, except in exceptional cases related to grave violations of human rights. They have powers of recommendation only.

2.5 Trial stage

Law 9.299/96 ended the jurisdiction to try military personnel (officers and policemen) for premeditated offences against life committed by the military police, but preserved its jurisdiction for crimes against an individual's physical integrity. Thus, if the complaint included allegations of bodily harm that are sanctioned by the Military Criminal Code, the process can be subject to military justice. Torture, however, is not sanctioned under the Military Criminal Code. Police officers (civil and military) and ordinary citizens charged with torture are therefore tried in ordinary criminal courts. If torture resulted in death, the case is heard by a tribunal with a jury.

There are no special procedural rules for torture cases. The procedure is inquisitorial. Both the prosecution and the defence may produce up to eight witnesses. The burden of proof is on the victim.⁹⁶ Victims, family members and NGOs are allowed to participate in the trial as assistants to the prosecution, i.e. they have the right to request and present evidence against the suspect, offer final submissions, join the Public Ministry or initiate on their own an appeal of a decision absolving the accused.⁹⁷ As suspended sentences are only available for sentences of up to 2 years, sentences for torture may not be suspended. Those sentenced for the crime of torture may not benefit from pardons, commutations, probations or amnesties⁹⁸ (except those mentioned by Law 6683/79).

3. The Practice

3.1. Investigations

The federal government launched a national toll-free phone service, operated by the *Movimento Nacional de Direitos Humanos*, and NGO located in Brazilia, to receive anonymous reports of torture.⁹⁹ According to the statistics elaborated by the Federal Human Rights Office, the service received 1,345 complaints between October 2001 and October 2002. 300 of these were remitted to the Public Ministry for investigation.¹⁰⁰ Allegations of torture do not generally elicit a strong reaction from Brazilian society when they are made public. In fact, society displays a certain tolerance towards the practice of torture. There is perception that torture is not such a serious crime, perhaps because the victims of torture are almost exclusively from

⁹⁶ Article 156 CCP.

⁹⁷ Article 268 CCP. Moreover, in order to guarantee reliability in testimony, the defendant and the witness might be separated when the presence of the defendant is harmful to the truth of the statement, in this way protecting the witness from intimidation and from being intimidated or influenced by the defendant.

⁹⁸ Article 2 Law no. 8072 of 25 July 1990.

⁹⁹ Similar services are at work at a few municipal and State jurisdictions.

¹⁰⁰ Mesquita Neto, Paulo de e Affonso, Beatriz S. Azevedo, *Segundo Relatório Nacional sobre os Direitos Humanos no Brasil* [Second Human Rights National Report of Brazil], São Paulo: Comissão Teotônio Vilela de Direitos Humanos, 2002,, pp. 22-23.

among the least favoured classes of society.¹⁰¹ One of the only incidents in which allegations of torture triggered a strong social reaction related to the events in the Naval shantytown in the city of São Paulo,¹⁰² where local residents were regularly subject to extortion, ill-treatment and torture by military police during police searches. Public repudiation forced the Federal Government to introduce Law 9455/97.¹⁰³

However, torture survivors appear to have refrained from making allegations against their torturers since the victims were often unaware of their rights and feared reprisals in the light of inadequate protection.¹⁰⁴ There are further barriers for those who decide to come forward. Special investigation units are, on occasion, made up of members from the same body that is being investigated. Moreover, Public Ministries in almost all states do not use the jurisdiction conferred by the Constitution to investigate cases, "most frequently asserting that legislation implementing this power is required for them to begin exercising this function. Even in São Paulo state, where Acts 9/96 and 11/97...regulate this power of the Public prosecution, the Civil Police continue, in practice, to oversee investigations of abuses committed by other police. In a few cases, such as that of the Human Rights Division of the Public prosecution in Belo Horizonte, Minas Gerais state, courageous prosecutors have taken measures to oversee the police."¹⁰⁵ When prosecutors or those in charge of the agencies overseeing police conduct investigate abuses, they frequently encounter several difficulties, such as resistance from police officers, lack of good will and cooperation from the heads of police stations (delegados/ delegates) to carry out their investigation¹⁰⁶ and risk of harassment.¹⁰⁷ Consequently, investigations into allegations of torture suffer from undue delays, cover-ups, and are generally inadequate. Injuries are frequently attributed to "resisting arrest".¹⁰⁸ Investigations carried out by the police are often abandoned or filed away and do not even reach the judicial authorities, especially in cases of torture.¹⁰⁹ In 2001, the number of police investigations of torture allegations rose, but convictions under the 1997 Torture Law remained low.¹¹⁰ Many police officers suspected of perpetrating torture are transferred to other postings to avoid suspension, and very few are prosecuted under the anti-torture law. Prosecutors and judges often insist that a medical examination must indicate either aggravated or extremely aggravated physical injuries to initiate a prosecution for torture even though this is not required under the Torture Law. Consequently, in cases where no evident signs of torture took

¹⁰¹ Mariz Maia, Luciano and Cavallaro, James, "Informe Alternativo sobre o Cumprimento pelo Estado Brasileiro das Obrigações Impostas pela Convenção", April 20, 2001.

¹⁰² The actions of the police were recorded and broadcasted on Brazilian television.

¹⁰³ See Brazil's 2000 Report to CAT, para.63.

¹⁰⁴ AI, Brazil, supra, p.28.

¹⁰⁵ Global Justice Center et. al., Alternative Report, supra.

¹⁰⁶ Report of the Special Rapporteur on Torture, Sir Nigel Rodley, supra, para. 164. The Report continues: "(a)lso the split police system makes external monitoring of the military police, the body most frequently responsible for arrests in flagrante delicto, very difficult to monitor".

¹⁰⁷ "In Belem, Pará state, police Ombudswoman Rosa Marga Roth was taken to court by a police chief who was the main suspect in a torture case. The police chief accused her of crimes including libel and tampering with a witness. At the end of 2000 she faced two court cases". See Amnesty International, Brazil: Annual Report 2001.

¹⁰⁸ Ibid.

¹⁰⁹ See e.g. Lemos-Nelson, Ana Teresa. Judiciary Police Accountability for Gross Human Rights Violations: The Case of Bahia, Brazil, Ph.D. diss., University of Notre Dame, April 2001.

¹¹⁰ Amnesty International, Brazil: Annual Report 2002.

place, such as in the case of mock executions or asphyxiation, no criminal case will be mounted against those responsible.¹¹¹ Further, the practice followed by the forensic service when preparing medical reports is inadequate and fails to ensure proper documentation of torture.¹¹² Difficulties in proving testimony or physical marks are also due to methods employed by the torturers (either no marks are left, or they are left long enough to heal or disappear before an exam is carried out at the Medical Legal Institute).¹¹³

Brazilian judges have not taken a rigorous stance to initiate investigations in torture cases. The Constitution of 1988 establishes that "evidence obtained through illicit means is unacceptable in the proceedings."¹¹⁴ A confession may be elicited before or after the interrogation process.¹¹⁵ If a defendant makes an allegation of torture, either the trial judge or the public prosecutor can demand an investigation.¹¹⁶ In such cases the judge should immediately halt the trial and launch an investigation into the allegations.¹¹⁷ However, as a general rule, the person alleging that a confession was untrue due to the interrogation process has the full burden of establishing the elements of his or her case. Brazilian courts have applied a rigorous burden of proof¹¹⁸ and complainants often fail to prove torture without corroborating evidence which in turn means that no investigations are carried out. Moreover, the doctrine which gives preference to police testimony over the consideration of allegations of torture has been affirmed by the country's highest tribunal, the *Supremo Tribunal Federal* (Federal Supreme Court) in several decisions.¹¹⁹ Brazilian

¹¹¹ AI, Brazil, *supra*, p. 32.

¹¹² *Ibid.*, p.31: "Amnesty International has received many reports of negligence or complicity on the part of doctors examining torture victims. Examinations regularly take place in the presence of the police officer or guard accused of having inflicted the injuries, making it impossible for the victims to provide a full account of the manner in which they received their injuries...Amnesty International has also received various complaints from members of the IML, public prosecutors, members of the judiciary as well as human rights defenders, that standardized forms for medical examinations of torture victims limit the examiner's ability to detail their findings and conclusions. Forms which offer direct and limiting questions and checklists to fill out tend to deter findings that might indicate the use of torture, deprive the doctors of the freedom to fully express professional opinions, and contravene the Manual on the Effective Investigation and Documentation of Torture (Istanbul Protocol) of August 1999."

¹¹³ See on the practice concerning medical examinations and evidence of torture, *ibid.*, pp.29 et seq.

¹¹⁴ Art. 5, LVI of the Constitution.

¹¹⁵ Article 199 CPP.

¹¹⁶ When torture leaves marks, Article 158 of the CPP applies, according to which "when an infraction leaves a mark, the examination of the body is indispensable, and the accused's confession does not cancel this."

¹¹⁷ Article 156 CPP.

¹¹⁸ See e.g. for the reasoning of the Santa Catarina Justice Tribunal: "The allegation of torture, not accompanied by proof and originating from a prisoner escaped from the penitentiary and considered as very dangerous, offers no credibility" (TJSC-HC 9.695-SC-1a C Crim. Rel. Des Nauro Colaço- DJSC 25.03.1991- p.9) (Unofficial Translation), in the 2002 joint NGO report on Follow-up of torture allegations, *supra*, which also quotes the recommendation by the Special Rapporteur following his visit to Brazil: "(i) Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture or similar ill-treatment." See report, *supra*, para.169.

¹¹⁹ See Supreme Court of Brazil, 9 September 1996, in Global Justice Center et. al., Alternative Report, *supra*. See also reasoning of the Rio de Janeiro Justice Tribunal: "The Judge freely evaluates the evidence of the acts, indicating the reasons which forged his conviction. The number of witnesses is not pertinent to the proof of a fact, but rather the aptitude and the credibility of the testimony ... Not to take into account the irreproachable past of an authority, even his remarkable professional profile, to give credibility to that which witnesses state regarding the allegation of torture which was supposedly carried out in a room apart, would be equivalent to inverting the burden of proof and a negation of the procedural law" (TJRJ 9.376/1999- (Ac. 04111 999 -2a C.Civ-Rel. Des.Sergion Cavalieri Filho-J 10.08.99 (Unofficial translation) and "Evidence produced by the testimony of police who have participated in the arrest of the accused is valid as the Judge cannot doubt, in principle, those who the State itself has charged with guaranteeing the security of the population" (TJRJ- Acr 180/99- Reg. 200.599) 1 a C. Crim. Rel. P/o Ac. Des. Ricardo

jurisprudence, therefore, unduly limits effective mechanisms to investigate allegations of torture.

3.2. Prosecutions and Trials

There are no known cases in which a perpetrator of torture committed during the reign of the military regime has been convicted. This period stands out as one of complete impunity because of the amnesty law. With regards to the implementation of Law 9.455/97, from 1997 to 2000, the public prosecution presented 258 cases of torture in Brazil. Out of these, 56 led to criminal proceedings, resulting in 11 convictions,¹²⁰ three convictions being appealed, one dismissal and 4 other cases. While there have been several convictions in the first instance, there has not been one single case which has become final.¹²¹

In November 2001, the National Council of Attorneys General (an organization which groups all the heads of the state ministries) identified more than 500 torture-related complaints. The data has not been updated, but it is reasonable to assume that at the end of 2002, there are more than 700 charges.¹²²

However, in many torture cases, charges are apparently brought for lesser crimes because prosecutors and judges prefer to use other criminal offences such as arbitrary violence, arbitrary exercise or abuse of power, ill-treatment, illegal coercion and abuse of authority, "despite the fact that the Law of Torture revokes the Statutory Law (Process Code and Law 4898/65) whenever they are in conflict".¹²³ One of the reasons for this judicial practice appears to stem from the fact that the provisions of the law on torture are more severe than those in statutory law.¹²⁴

Trials involving torture allegations (or any other human right violation) can take years to be resolved in Brazil, due to many factors: 1) Lack of access to the victim of torture who is often in a detention centre; 2) Undue delay during the investigation stage; 3) Improper outside interference in trials against alleged torturers is common.

Bustamante- J 23.03.1999 (Unofficial Translation), both in 2002 joint NGO report on Follow-up of torture allegations, *supra*.

¹²⁰ AI, Brazil, *supra*, p.61.

¹²¹ There have been some convictions, such as those in the Federal District's Justice Tribunal TJDF – APR 20000110349137 – DF – 2ª T.Crim. – Rel. Des. Silvânio Barbosa dos Santos – DJU 02.05.2002 – p. 125; TJDF – APR 19980410035163 – 1ª T.Crim. – Relª Desª Carmelita Brazil – DJU 06.03.2002 – p. 120 (in this case, the Court rejected the reclassification of the crime to "abuse of authority" and upheld the findings that the act amounted to "torture" in light of the gravity of the acts which had been proven through medical examinations. No information regarding sentence imposed was made available); Justice Tribunals of Minas Gerais and Rio de Janeiro– TJMG- ACR 000.229.238-1/00 – 1ª C.Crim. – Rel. Des. Gudesteu Biber – J. 28.08.2001 (the Court found that subjecting someone to intense physical suffering after he was illegally detained, as a means of punishment to satisfy the personal desire of the military police officer responsible for the arrest is sufficient to classify the offence as torture. No information regarding sentence imposed was made available); and TJRJ – ACR 3659/2000 – 3ª C.Crim. – Rel. Des. Gama Malcher – J. 04.09.2001.

¹²² According to information provided by Deputy Luciano Mariz Maia - former Professor of the Federal University of Paraíba and former Regional Public Prosecutor, currently Deputy of the House of Representatives and member of the Brazilian Network Against Torture.

¹²³ See Brazil's 2000 CAT Report, *supra*, para. 95.

¹²⁴ *Ibid*. "Despite the fact that the Law of Torture revokes the Statutory Law (Process Code and Law 4898/65) whenever they are in conflict, the competent authorities, even knowing the law, do not apply it for unusual reasons or even illegal reasons in clear cases of torture, maybe because the provisions of the law of torture are more severe than the Statutory Law, as it is in the case of crimes of torture." Report of the Special Rapporteur on Torture, Sir Nigel Rodley, *supra*, para. 161.

The most common one is the intimidation of the victim, family members and witnesses.¹²⁵ Judges and public prosecutors have also received threats. The budget allocated to witness protection programmes is generally insufficient to cover the number who would require the service.¹²⁶ In addition, "victims and witnesses alike may often be transferred within the police or prison system, with no information of their whereabouts being passed to either family members or legal representatives, thus making it extremely difficult to contact them. Many victims retract statements or drop complaints, after returning to their detention centre, following threats or further torture or ill-treatment."¹²⁷

A 1998 Report from the Ombudsman of the Police of São Paulo (*Ouvidor da Polícia*) found that only 21.5 % of all denunciations result in administrative punishment or criminal indictment. The Report found that "the disciplinary regulations of Military Police are incompatible with the democratic rule of law and that the *corregedorias* are composed of police officers with no autonomy or independence, in relation to the Military Police command or to the Chief General of the Civil Police to carry out their work."¹²⁸

According to observers, the nature of Law 9455/97's definition of torture has led to the curious result that private citizens were convicted while as Brazilian authorities admitted, the courts convicted no police officers or other state agents in the period covered by its submission to CAT, i.e. April 1997 to November 1998.¹²⁹

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitution

The Constitution does not provide an express right to reparation for torture¹³⁰ but provides for state liability and recourse against the agent responsible pursuant to Article 37 (6): "Public entities and private entities rendering public services are liable for the damages caused to third parties, by their agents, in such capacity, ensuring the right of recourse against the liable agent in cases of intent or fault."

¹²⁵ One example is the case of Jessé Correia de Oliveira Filho "who was allegedly tortured in the Cordeiro Police Station in Recife, Pernambuco state, because he refused to confess to involvement in a homicide. He was left stripped naked for several hours. His hands were tied behind his back and four police officers repeatedly placed a plastic bag over his head and stood on him. Eventually he agreed to confess. He subsequently lodged an official complaint and was shot dead in the street near his home the evening before he was due to attend an identification parade to identify his torturers". Amnesty International, Brazil: Annual Report 2001.

¹²⁶ The Central Government endorsed these programs through Federal Law 9.087, of 13 July 1999, "which establishes 'principles for the organization and maintenance of special programmes for the protection of victims and witnesses that are being threatened', instituted by the Federal Program for Assistance to Victims and Threatened Witnesses and that makes protection available for the accused or the condemned who have voluntarily given effective collaboration to police investigation in a criminal process". See Brazil's 2000 CAT Report, supra, para. 151

¹²⁷ AI, Brazil, supra, p.29.

¹²⁸ Quoted in See Brazil's 2000 CAT Report, supra, para. 165.

¹²⁹ See Global Justice Center et. al., Alternative Report, supra.

¹³⁰ The only provisions providing for a right to reparation, Article 5 X and LXXV, do not cover torture. But see Brazil's 2000 CAT Report, supra, para.169 on this point.

The courts have interpreted the constitution in a way that recognizes this right. The Superior Justice Tribunal has recognised the right to moral damages for acts undertaken by the military regime.¹³¹

1.2. Civil Law

Reparation for torture under civil law encompasses moral, physical or patrimonial damages but not punitive damages.¹³² Brazilian law does not afford other forms of reparation besides pecuniary and non-pecuniary loss (such as rehabilitation, satisfaction and guarantees of non-repetition).¹³³ Civil action can be taken against the public official(s) responsible or the State (or both) as per Article 37 (6) of the Constitution which establishes the vicarious liability of the State. In case of an intentional offence such as torture, the State has the right to initiate judicial proceedings against the official to have recourse for any damages paid.

Reparation may be sought directly in a civil forum. The justice of each state is competent to recognize these suits against civil servants. Federal justices are competent when the agent was a functionary of a federal organ. A civil action in which the state is a party must be presented before the *varas de fazenda publica* (administrative trial court). Parties may apply for special recourse to the Superior Tribunal of Justice or the Federal Supreme Tribunal in case of constitutional questions. There is a statute of limitations of 20 years from the time of the act and 5 years for lawsuits against the State as per the Civil Code. The plaintiff does not have to wait for the end of the criminal trial to begin a civil claim.¹³⁴ The award of reparations is not necessarily linked to the outcome of the criminal procedure.¹³⁵ A sentence obtained in a criminal proceeding may be used in a civil action. In such an action, the only question in the civil matter will be the amount of damages.¹³⁶ Judges have discretion in awarding damages. The rules regarding the award of costs in are provided by article 159 of the Civil Code. Judicial orders create executory rights, and, like any judgment, may be enforced by an executory proceeding.¹³⁷ Attachment and seizure of assets cannot be ordered against the state. If judgment is entered against the state, the judge will order that the value of the damages awarded will be included in the government budget for the following year. Compensation is paid in chronological order.¹³⁸

1.3. Criminal Law

¹³¹ STJ – RESP 221076 – RN – 2ª T. – Rel. Min. Paulo Gallotti – DJU 18.12.2000 – p. 00179.

¹³² Article 159 Civil Code.

¹³³ After 26 years of discussion, the Brazilian Senate has approved a new Civil Code, Law no. 10.406, of 10 January 2002, (http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm). The new Civil Code came into force on 11 January 2003.

¹³⁴ STJ – RESP 293771 – PR – 2ª T. – Relª Minª Eliana Calmon – DJU 25.02.2002.

¹³⁵ See Article 66 CPP. See *Tribunal de Justiça do Paraná*, TJPR – Ag Instr 0109431-3 – (20647) – Goioerê – 3ª C.Cív. – Rel. Juiz Conv. Ronald Schulman – DJPR 12.11.2001.

¹³⁶ See Articles 63-65 CPP.

¹³⁷ Provisional Measure No. 2.102-27 of 26 January 2001, however, prohibits execution of any judgment requiring payment of government funds until the judgement has become final.

¹³⁸ Code of Civil Procedure (Law nº 5,869, of 11 January 1973) and 1988 Constitution.

It is not possible to claim compensation in the course of criminal proceedings by filing a complementary civil lawsuit. However, Article 91 (I) of the Criminal Code recognises the need to compensate the damage caused by a crime and a sentence has the nature of an executory title which allows the offended party to automatically claim civil compensation through civil proceedings without the convicted person being able to contest the existence of the crime or his responsibility for same.

2. Practice

There have been only a few compensation claims brought by torture survivors, the lack of convictions of perpetrators of torture being the single biggest obstacle to success. Even though a civil claim can be pursued independently from a criminal action, in practice Brazilian courts have linked the award of reparation to the outcome of related criminal cases, and therefore victims do not have an effective remedy, especially vis-à-vis the state. The most well known cases are those brought by victims of the last military dictatorship.¹³⁹ The Brazilian government has traditionally used the defence of expiry of the statute of limitations, though Federal Law 9.140/95 has barred such a defence. The Law has permitted the reopening of civil actions which would have been statute-barred. There have been several cases that have dealt with torture that has been perpetrated after the end of military rule which resulted in awards of reparations. One well known case is that of José Ivanildo Sampaio de Souza, a prisoner beaten to death by the Federal Police in a station in Fortaleza, in the State of Ceará. In 1996, the President of the Republic acknowledged the civil liability of the State and presented a bill to Congress. This bill, which became Law 9305/96, grants a pension to the family of José Ivanildo for life as compensation.¹⁴⁰

V. GOVERNMENT REPARATION MEASURES

The Brazilian government has officially acknowledged and condemned the past commission and continuing existence of human rights violations, including torture. The State Report submitted to the UN Committee against Torture in 2001 acknowledges the existence of torture.¹⁴¹

i) Reparation for past violations

At the Federal level, Law 9140 was adopted on 4 December 1995. Article 4 of the Law created a Special Committee, whose duty, among others, is to proceed to the recognition of those who died "from non-natural causes, on police premises or the like" for having participated or having been accused of participating in political activities during the military dictatorship.¹⁴² The Law provides compensation only to

¹³⁹ Examples are the case of Clarice Herzog (widow of Vladimir Herzog) and Thereza Fiel (widow of Manoel Fiel Filho) against the Federal government. The State acknowledged its responsibility in the death of their husbands and granted financial compensation in the case of Ms. Fiel; case of Irês Etienne Romeu who denounced the existence of a torture centre and demand presented by family members of Chael Charles Schreier.

¹⁴⁰ See Brazil's 2000 CAT Report, *supra*, para.171.

¹⁴¹ See *ibid.* paras. 42-46 and 81, stating that torture "is still an issue of concern" and that the number of confessions under torture "are still significant". See in contrast the assessment of the UN Special Rapporteur on Torture, *supra*, I, 2.3.

¹⁴² See Brazil's 2000 CAT Report, *supra*, paras. 44.

victims of torture who were subsequently disappeared or killed. The minimum amount of compensation is R\$100,000 (\$ 32,488).¹⁴³ Beneficiaries are spouses or companions, descendants, parents and other close relatives who can ask the civil registry officer for the notarised documentation required though the inclusion of a copy of the Law and its annexes.¹⁴⁴ "The compensation request may be made up to 120 days after the publication of this law. In the case of recognition by the Special Committee, the date will be counted from the recognition."¹⁴⁵ By August 2002, under Law 9.140, the government had acknowledged 136 members of the *Guerrilha Do Araguaia*, who "disappeared" after capture by the Army in the 1960's. The law provides only for compensation without requiring an investigation, prosecution or punishment of those responsible.¹⁴⁶

A claim for an indemnity from the State can also be made in those states which passed laws indemnifying victims of torture during the military dictatorship.¹⁴⁷ In the case of ex-political prisoners of the State of Parana, Law 11.255/95 allowed for payment of reparations, although with certain time limits. Torture was not expressly included as a ground for claiming reparation but was understood to be part of the prisoners' experience. Law 11.042 was passed in November 1997 in the Rio Grande do Sul State, which "acknowledges the accountability of the State of Rio Grande do Sul for physical and psychological injury caused to those under custody and establishes norms for them to receive [financial] compensation"; the establishment of the Special Committee to Award Compensation to Former Political Detainees in the States of Paraná and Santa Catarina.¹⁴⁸

Sao Paulo enacted Law 10.726/01 which established a Special Commission to investigate and provide financial compensation to victims of torture. The Law, however, provides financial compensation only for one period of the military dictatorship (between 31 March 1964 to 15 August 1979), excluding those tortured from August 1979 to the end of the military regime. The minimum amount of compensation is R\$ 3,900.00 (\$1,267) and the maximum amount R\$ 39,000.00 (\$12,670).¹⁴⁹ "The request for damages must be made within 180 days of the installation of the Special Commission...,"¹⁵⁰ and "benefits parents, children or spouses when the victim is deceased."¹⁵¹ Finally, Sao Paulo state enacted Law 10.177/98, establishing a Human Rights Program that provides for administrative compensation in exemplary cases, namely, cases which did not reach the court, in which there is clear state responsibility.¹⁵²

¹⁴³ Article 11(1) Law 9140/95.

¹⁴⁴ Article 3 *ibid.*

¹⁴⁵ Article 9 § 1 *ibid.*

¹⁴⁶ Global Justice Center et. al., *Alternative Report supra.*

¹⁴⁷ States which enacted legislation are Sao Paulo, Pernambuco, Rio Grande do Sul and Santa Catarina.

¹⁴⁸ The objective of this Committee is to analyse the requests for payment of compensation for physical and psychological suffering of the victims of torture and arbitrary detention during the military regime. See Brazifs 2000 CAT Report, *supra*, para. 62.

¹⁴⁹ Article 7 Law 10.726/01.

¹⁵⁰ Article 4 *ibid.*

¹⁵¹ Article 6 *ibid.*

¹⁵² See <http://www.pge.sp.gov.br/centrodeestudos/boletins/bolnovdez/doutrina.htm#SINOPSE>.

ii) Rehabilitation and Treatment of Torture Victims

There are no governmental reparation schemes or other mechanisms in place through which torture survivors can obtain reparation (truth commissions, national human rights commissions or compensation boards). PROVITA is one of the few programmes providing services for psychological aid for the victims of violence.¹⁵³

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Criminal prosecution of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

The Brazilian Criminal Code does not expressly provide for universal jurisdiction over torture, but Article 7 (Part II) (a) provides that national courts have custodial universal jurisdiction to try crimes committed abroad which Brazil is obliged to repress under a treaty.¹⁵⁴ This would appear to include the crime of torture.

Article 2 of Law 9.455/97 recognises the passive personality but not the active personality principle and applies to acts of torture committed against a Brazilian national outside of Brazilian national territory.¹⁵⁵ Brazil's Military Penal Code might also allow for the exercise of extraterritorial jurisdiction for war crimes.¹⁵⁶

Diplomatic immunity is granted according to the Vienna Convention on Diplomatic Relations, 1961, to which Brazil is a party.

1.1.2. Extradition laws

As a general principle, there must be an extradition treaty between Brazil and the State requesting extradition. Torture is considered to be an extraditable crime.¹⁵⁷ In the case of political crimes or crimes of opinion an extradition request may be rejected, according to article 5 LII of the Federal Constitution. Extradition shall not

¹⁵³ Program of Support and Protection for Witnesses, Victims and Relatives of the Victims of Violence (*Programa de Apoio e Proteção a Testemunhas, Vítimas e Familiares de Vítimas da Violência*, PROVITA). See supra, III, 2.3.

¹⁵⁴ Article 7 (Part II) (a) provides: "(t)he following shall be subject to Brazilian law, even though committed abroad: ...II - crimes (a) which through treaty or agreement Brazil is obliged to repress ... Section 2. In the circumstances in subsection II, the application of Brazilian law shall depend on the concurrent existence of the following conditions: (a) the agent is on national territory, (b) the act is also punishable in the country in which it was performed, (c) the crime is included among those for which Brazilian law authorizes extradition, (d) the agent has not been acquitted abroad or has not completed his sentence, (e) the agent has not been pardoned abroad or the penalty has not been extinguished, in accordance with the most favourable law, for any other reason." See AI, Universal Jurisdiction: The duty of states to enact and implement legislation, Chapter Ten, September 2001, AI-Index 53/006/2001.

¹⁵⁵ See also Brazil's 2000 CAT Report, supra, para. 100.

¹⁵⁶ See on this point Amnesty International, Universal Jurisdiction, The duty of States to enact and implement legislation, Chapter Four, Part A (Algeria to Hungary), September 2001, AI-Index 53/006/2001.

¹⁵⁷ See Brazil's 2000 Report to CAT, supra, para.105.

be granted when the extradited party would be subjected to a tribunal specifically set up to try him in the requesting State. A Brazilian national cannot be extradited. Extraditions might also be refused where the person whose extradition is requested might be subjected to human rights violations.¹⁵⁸ The Supreme Federal Tribunal is responsible for judging the requests for extradition solicited by foreign states.¹⁵⁹

1.2. The Practice

There are no recorded examples of criminal investigations being instituted against known persons suspected of having committed crimes subject to universal jurisdiction who are present in Brazil. However, the Brazilian courts refused to extradite Paraguay's ex-president General Lino Oviedo on the grounds that the alleged crimes were political and not criminal.¹⁶⁰

2. Claiming reparation for acts of torture committed in third countries

The Civil Code gives jurisdiction to Brazilian civil courts when: the domicile of the defendant, regardless of his or her nationality, is in Brazil or the lawsuit originates from an act that took place or was brought about in Brazil.¹⁶¹ As a general rule, an action *in persona* must be launched in the jurisdiction where the domicile of the defendant is.¹⁶² However, if the defendant has more than one domicile, the action can be initiated in any of the jurisdictions of these domiciles.¹⁶³ If the domicile of the defendant is unknown, an action may be initiated in the jurisdiction of the domicile of the plaintiff.¹⁶⁴ If the defendant does not have a domicile in Brazil, the plaintiff may launch the lawsuit in Brazil. If both of them reside outside of Brazil, the lawsuit may be launched in any forum.¹⁶⁵

No precedents are known in which Brazilian courts have ruled on the scope of state immunity applicable in compensation claims related to torture.

There are no known cases in which there have been any claims for reparation either individual perpetrators or foreign states with regard to torture committed outside of Brazil.

¹⁵⁸ *Ibid.*, paras. 70 and 71.

¹⁵⁹ Article 102 (1) (g) of the Constitution.

¹⁶⁰ On 23 March, 1999 Vice-President Argaña (a political rival of the then President Raúl Cubas Grau who was a supporter of Gral. Oviedo) and his bodyguard were shot and killed by gunmen in Asunción, Paraguay. "On 26 and 27 March supporters of Lino Oviedo, who were seeking to prevent the impeachment hearing of President Cubas, opened fire on people demonstrating in support of Congress and calling for the resignation of President Cubas. At least seven demonstrators were killed and more than 100 others injured", see AI, Annual Report 1999 (Paraguay). Oviedo, who was in Argentina was forced to leave this country and was arrested in Brazil in June 2000, see AI, Annual Report 2000 (Paraguay). Paraguay sentenced Oviedo in absentia for 10 years for a previous coup d'état attempt in 1996 and the murder of Argaña and the demonstrators in 1999, see <http://www.esmas.com/noticierostelevisa/internacionales/206442.html>.

¹⁶¹ Article 88 (I) and (III) Civil Code (1973).

¹⁶² Article 94 Civil Code.

¹⁶³ Article 94 (I) Civil Code.

¹⁶⁴ Article 94 (II) Civil Code.

¹⁶⁵ Article 94 (III) Civil Code.

