

# The prevention of torture in Rio de Janeiro: A study on the role of public defenders

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## Abstract

*The attorneys of the Public Defender's Office of the State of Rio de Janeiro (PDORJ) are heavily present in the penitentiary system of Rio de Janeiro, individually meeting the vast majority of detainees and conducting monitoring visits. This article presents the work of the PDORJ in the prison system, focusing on its role in the prevention of torture. Based on semi-structured interviews with public defenders, the article explains the paradox between the extensive presence of the PDORJ in the prison system and the few instances of torture that are officially reported. It also presents recommendations aimed at better identifying and responding to accounts of torture.*

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## Introduction

Conditions of detention and treatment of detainees are a chronic human rights problem in Brazil. Every day, four detainees die in custody in the country.<sup>1</sup> The total prison population of the country is now the third-largest in the world, behind only the United States and China.<sup>2</sup> According to international human rights bodies, torture<sup>3</sup> remains a reality in Brazil's penitentiary system<sup>4</sup> and is underreported,<sup>5</sup> and impunity for the perpetrators is the rule.<sup>6</sup> The Brazilian Supreme Court has recognized the situation as one of systematic violation of the rights of detainees.<sup>7</sup>

In that context, over the course of the past decades Brazil has developed a complex web of institutions tasked with preventing and redressing human rights violations in the penitentiary system. The Public Defender's Office (PDO), tasked primarily with providing legal assistance to those unable to afford it, is one of these institutions.

- 1 Conselho Nacional do Ministerio Público, "Sistema Prisional em Números", available at: [www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros](http://www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros) (all internet references were accessed in June 2019 unless otherwise stated).
- 2 World Prison Brief, "Highest to Lowest – Prison Population Total", accessed 14 July 2018, available at: [www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All).
- 3 In order to circumscribe its scope, this study focuses solely on torture and does not include acts or situations that would qualify as cruel, inhuman or degrading treatment or punishment. The study adopts the definition of "torture" provided in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments. According to the Convention, "torture" refers to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in the official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Under the definition, torture constitutes the infliction of severe pain, or suffering, by public agents, for the specific purposes enumerated. However, it is contended that the purposive element of the definition is what distinguishes torture from other cruel, inhuman or degrading treatment or punishment. On that topic, see Manfred Nowak, "What Practices Constitute Torture? US and UN Standards", *Human Rights Quarterly*, Vol. 28, No. 4, 2006, p. 839; Malcolm D. Evans, "Getting to Grips with Torture", *International and Comparative Law Quarterly*, Vol. 51, No. 2, 2008, pp. 381–383.
- 4 Juan Mendez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Brazil*, UN Doc. A/HRC/31/57/Add.4, 29 January 2016, para. 50.
- 5 *Ibid.*, para. 58.
- 6 Interview with Amerigo Incalcaterra, Regional Representative for South America of the Office of the UN High Commissioner for Human Rights, 24 January 2017, available at: <https://nacoesunidas.org/onu-impunidade-por-tortura-nas-prisoese-regra-no-brasil/>.
- 7 Supremo Tribunal Federal, *Medida cautelar na arguição de descumprimento de preceito fundamental 347*, 9 September 2015, available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10300665>.

While access to legal aid for persons deprived of liberty in Brazil has often been described as “deficient”,<sup>8</sup> the Public Defender’s Office of the State of Rio de Janeiro (PDORJ) stands out as an exception. In the State of Rio de Janeiro, public defenders are present on a weekly basis in every detention centre, meet with an estimated 90% of persons deprived of liberty (50,219 persons as of June 2016)<sup>9</sup> two to three times per year, and conduct regular monitoring visits of detention centres. This article addresses the role of the PDORJ in the prevention of torture.

This study is based on semi-structured interviews with public defenders working in the penitentiary system, as well as observations of their interventions in detention centres. The interviews and observations sought to document how the public defenders implement the preventive measures for which the institution is responsible. In doing so, the interviews gave particular importance to the perception that public defenders hold of torture in Rio de Janeiro’s detention centres, as well as of their own role in preventing it. By highlighting how public defenders understand their roles and perform their duty in practice, this article explains the following paradox: despite the extensive presence of the PDORJ in detention centres, very few instances of torture are officially reported.

The emphasis on the practice of public defenders echoes the recent findings of Carver and Handley, who concluded that the primary factor determining the effectiveness of measures aimed at preventing torture is the way they are implemented.<sup>10</sup> Taking into account the public defenders’ point of view about their mandate helps us to understand how they implement the preventive measures vested in the PDORJ.

It is important to mention that while this article provides a better understanding of the relationship between the PDORJ’s work and the prevention of torture, it does not seek to determine whether the activities of the Office succeed, or not, in reducing the risk of torture. Instead, it offers suggestions on why the PDORJ might be successful, or not, in achieving the tasks with which it has been entrusted that are related to the prevention of torture. In short, the article does not explain *if* the preventive measures adopted by the public defender succeed or fail in reducing the risk of torture; rather, it explains *why* the practitioners might succeed or fail in undertaking the measures related to the prevention of torture.

The article starts by briefly presenting the issue of torture in detention centres in Brazil. It then describes the normative framework within which the work inside the penitentiary system of the PDO operates, and presents a brief history of the work of the PDORJ in detention centres. The author then presents his research findings, describing the work of the PDORJ in detention centres and

8 Human Rights Watch, “Brasil: Eventos de 2017”, available at: [www.hrw.org/pt/world-report/2018/country-chapters/313303](http://www.hrw.org/pt/world-report/2018/country-chapters/313303).

9 Departamento Penitenciário Nacional, *Levantamento Nacional de Informações Penitenciárias: Atualização – Junho de 2016*, Brasília, June 2016, p. 10 (InfoPen 2016), available at: [http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/relatorio\\_2016\\_2211.pdf](http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/relatorio_2016_2211.pdf).

10 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, Liverpool, 2016, p. 83.

revealing the views of public defenders in that regard. Finally, based on these findings, the author addresses the paradox of the intensive presence of public defenders and the low number of denunciations, and presents recommendations aimed at better identifying and responding to denunciations of torture by public defenders working in the penitentiary system.

## Torture in Brazil's penitentiary system

Brazil's penitentiary system is often described as being in a state of collapse: detainees are held in overcrowded facilities, they lack access to health care, and they are exposed to violence. This section provides a brief account of the current situation relating to torture in the penitentiary system in Brazil and presents the institutional framework in place to respond to it. The PDO will then be discussed separately below.

### Overview

Civil society, non-governmental, governmental and international organizations have documented that torture is practiced in Brazil, including in detention centres.<sup>11</sup> Violence by co-detainees is also a recurring peril in Brazil's penitentiary system. Brazil's Supreme Court recently recognized the systematic violation of the rights of people deprived of liberty in the country.<sup>12</sup> The UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations (UN) Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have reported that they have received repeated and consistent accounts of torture and other forms of ill-treatment by penitentiary personnel.<sup>13</sup> Additionally, according to the Brazilian government, most of the 2,100 communications received monthly by the national ombudsman of the penitentiary system referred to "negligence, ill-treatment, torture and degrading treatment".<sup>14</sup> The government recognized the need to improve the conditions of

11 See, e.g., Mecanismo Nacional de Prevenção e Combate à Tortura, *Relatório Anual: 2016–2017*, 2017, pp. 18, 21, 22, 25; Mecanismo Nacional de Prevenção e Combate à Tortura, *Relatório Anual: 2015–2016*, 2016, para. 56; Pastoral Carcerária, *Tortura em tempos de encarceramento em massa*, 2016, p. 56, available at: [http://carceraria.org.br/wp-content/uploads/2016/10/Relat%C3%B3rio\\_Tortura\\_em\\_Tempos\\_de\\_Encarceramento\\_em\\_Massa-1.pdf](http://carceraria.org.br/wp-content/uploads/2016/10/Relat%C3%B3rio_Tortura_em_Tempos_de_Encarceramento_em_Massa-1.pdf).

12 Supremo Tribunal Federal, above note 7.

13 J. Mendez, above note 4, para. 50; SPT, *Visit to Brazil Undertaken from 19 to 30 October 2015: Observations and Recommendations Addressed to the State Party*, UN Doc. CAT/OP/BRA/3, 16 February 2017, paras 16–17, 33–36.

14 Brazil, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, UN Doc. A/HRC/WG.6/27/BRA/1, 27 February 2017, para. 102.

detention in Brazil's detention centres during the last review of the country under the Universal Periodic Review of the UN Human Rights Council.<sup>15</sup>

According to the Brazilian Ministry of Justice, there were 726,712 persons deprived of liberty in Brazil in 2016.<sup>16</sup> Accordingly, considering that the official capacity of Brazil's penitentiary system is 368,049 individuals, the prison occupancy rate in Brazil was 197.4%.<sup>17</sup> In addition, the Ministry of Justice reported that there was an increase of 707% in the number of persons deprived of liberty since 1990.<sup>18</sup> For the first half of 2016, the average mortality rate for detainees in Brazil was 13.6 per 10,000.<sup>19</sup>

The prison population of the penitentiary system of Rio de Janeiro has evolved similarly. Over six years, the state's prison population almost doubled, reaching 50,482 persons in December 2016,<sup>20</sup> from 25,514 in December 2010.<sup>21</sup> Rio de Janeiro has the fourth-largest prison population in Brazil, behind the states of São Paulo, Minas Gerais and Paraná.<sup>22</sup> The prison occupancy rate in June 2016 in Rio de Janeiro was 176.6%.<sup>23</sup> In just three years, the number of deaths in the penitentiary system of the state also almost doubled, from 133 in 2013 to 254 in 2016.<sup>24</sup>

## Institutional framework to respond to torture

Brazil is a party to the relevant international instruments related to torture<sup>25</sup> and has criminalized torture under its domestic law. In particular, Article 5(III) of the Federal Constitution provides that “no one shall be submitted to torture or to inhuman or degrading treatment”. Article 5(XLIII) provides that torture is not

15 Brazil, *Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UN Doc. A/HRC/36/11/Add.1, 6 September 2017, para. 136.75 (a).

16 InfoPen 2016, above note 9, p. 8. On average, detainees are young (74% of the prison population is between 18 and 34 years old: InfoPen 2016, above note 9, p. 30), Afro-Brazilian (64% of the prison population: InfoPen 2016, above note 9, p. 32), male (Departamento Penitenciário Nacional, *Levantamento Nacional de Informações Penitenciárias Infopen Mulheres: 2ª edição*, Brasília, March 2018, p. 11, available at: [http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres\\_arte\\_07-03-18.pdf](http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres_arte_07-03-18.pdf)), and with little formal education (75% did not pursue education further than primary school: InfoPen 2016, above note 9, p. 33). 28% of the prison population is detained for drug trafficking offences (InfoPen 2016, above note 9, p. 43).

17 InfoPen 2016, above note 9, p. 8.

18 *Ibid.*, p. 9.

19 *Ibid.*, p. 52. Out of 10,000 detainees, 7.7 deaths were classified as “natural”, three as “criminal”, 0.8 as suicide, 0.4 as “accidental” and 1.6 as death with “unknown cause”.

20 *Ibid.*, p. 10.

21 Departamento Penitenciário Nacional, *Sistema Integrado de Informações Penitenciárias – InfoPen: Quadro Geral*, Brasília, December 2010, available at: <http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/populacaocarcerariasintetico2010.pdf>.

22 InfoPen 2016, above note 9, p. 10.

23 *Ibid.*, p. 8.

24 Data collected by the PDORJ for the purpose of a class action brought against the State of Rio de Janeiro, on file with author.

25 The International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, the American Convention on Human Rights, and the American Convention to Prevent and Punish Torture.

subject to bail, grace or amnesty. Article 5(XLIX) provides that “prisoners are ensured of respect to their physical and moral integrity”. Law 9455 of 1997 defines torture as a specific criminal act, and the Penal Code prohibits a number of acts that could also be considered to fall under Law 9455.<sup>26</sup> Victims and witnesses of crimes (including torture) at risk due to their collaboration with investigations or criminal proceedings can be admitted to the Federal Programme of Assistance to Victims and Witnesses in Danger and receive protection from the State. However, victims and witnesses deprived of liberty are explicitly excluded from the programme.<sup>27</sup> Therefore, persons deprived of liberty lodging a complaint for torture cannot benefit from it and are exposed to reprisals in the penitentiary system.

In addition to the PDO, a complex web of organizations is tasked with performing actions aimed at preventing torture in places of detention or seeking redress in cases of torture. These include institutions created under federal laws operating in all twenty-six states and the Federal District. State laws, as is the case in the State of Rio de Janeiro, also create institutions to prevent and combat torture.

First, to comply with its obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, Brazil created the National Mechanism on the Prevention and Combating of Torture, a national preventive mechanism that regularly conducts monitoring visits to places of detention.<sup>28</sup> The mechanism is part of the National System for the Prevention and Combating of Torture,<sup>29</sup> which also includes the National Committee for the Prevention and Combating of Torture.<sup>30</sup>

Additionally, the National Penitentiary Department, placed under the auspices of the Ministry of Justice, is tasked with overseeing the implementation of national penitentiary policies.<sup>31</sup> The National Council for Criminal and Penitentiary Policies is responsible for drafting guidelines relating to the

26 In particular, Articles 129 (bodily harm), 132 (“to expose the life or health of others to direct and imminent danger”), 135 (the omission to assist a person in danger) and 136 (ill-treatment). Torture is also considered to be an aggravating factor under the Penal Code: Código Penal, Decreto-Lei No. 2.848, 7 December 1940, Art. 61(II)(d).

27 Lei No. 9807, 1999, Art. 2(2). The law does not preclude public agencies from adopting protection measure for persons deprived of liberty on an *ad hoc* basis, but such measures would not be related to the programme. Also, Article 11 of Decreto No 3.518 of June 2000 provides that persons excluded from the federal protection programme can still count on the subsidiary protection of the Protection Service for Special Witnesses (Serviço de Proteção ao Depoente Especial). However, the admission to the programme was described as “very restrictive”: Lívia Tinóco, “O serviço de proteção ao depoente especial do departamento de polícia federal”, in *Cartilha sobre programas de proteção a vítimas e testemunhas ameaçadas*, 2013, p. 56, available at: [http://pfdc.pgr.mpf.br/atuacao-e-conteudos-de-apoio/publicacoes/protacao-a-testemunha/cartilha\\_protacao\\_vitimas\\_testemunhas\\_pfdc\\_2013](http://pfdc.pgr.mpf.br/atuacao-e-conteudos-de-apoio/publicacoes/protacao-a-testemunha/cartilha_protacao_vitimas_testemunhas_pfdc_2013).

28 Lei No. 12.847, 2013, Arts 8–11.

29 The National System for the Prevention and Combating of Torture seeks to strengthen the prevention and combating of torture through the coordination of its members (the MNCPT, the National Committee for the Prevention and Combating of Torture, the National Council for Criminal and Penitentiary Policies and the National Penitentiary Department). *Ibid.*, Arts 1–5.

30 The National Committee for the Prevention and Combat to Torture is tasked, among other things, with monitoring and presenting initiatives and processes (judicial, administrative or legislative) related to the prevention and combating of torture. *Ibid.*, Arts 6–7.

31 Lei de Execução Penal, Lei No. 7210, 11 July 1984, Art. 72(I).

enforcement of sentences.<sup>32</sup> Both institutions are also tasked with conducting monitoring visits in all states of the federation.<sup>33</sup>

At the state level, the State Mechanism on the Prevention and Combating of Torture (Mecanismo Estadual de Prevenção e Combate à Tortura, MEPCT) of Rio de Janeiro<sup>34</sup> visits places of detention and conducts between fifty and sixty detention visits per year.<sup>35</sup> The State Committee on the Prevention and Combating of Torture is also tasked with ensuring the implementation of initiatives related to the prevention and combating of torture.<sup>36</sup>

The Lei de Execução Penal (Criminal Enforcement Law), the legislation detailing the enforcement of criminal sentences, also tasks various actors with visiting places of deprivation of liberty: judges,<sup>37</sup> prosecutors,<sup>38</sup> the Penitentiary Council,<sup>39</sup> the Community Council<sup>40</sup> and public defenders.<sup>41</sup>

The Brazilian government, in a submission to the SPT, summarized the expected outcome of the presence of these actors in places of detention:

[T]he continuous monitoring of institutions where there is deprivation of liberty is essential to prevent torture. It is necessary that a network of different actors such as judges, public defenders, prosecutors, policemen and federal and State managers, engage in a tireless work on the facilities where there is deprivation of liberty, in order to decrease and discourage violations, as well as in order to punish its perpetrators.<sup>42</sup>

## Legal framework and history of the PDORJ in the penitentiary system

This section exposes the evolving legal framework of the PDO in Brazil and presents a short history of the activities of the PDORJ in the penitentiary system. It shows that the attributions of the PDO are solidly grounded in the Federal Constitution

32 *Ibid.*, Art. 64(I).

33 *Ibid.*, Arts 64(VIII), 72(II).

34 State Law No. 5778, 30 June 2010, Art. 1.

35 In 2016, the State Mechanism conducted fifty visits. Mecanismo Estadual de Prevenção e Combate à Tortura, *Relatório Anual do Mecanismo Estadual de Prevenção e Combate à Tortura do Rio de Janeiro*, 2017, p. 8.

36 State Law No. 5778, Art. 4.

37 Lei de Execução Penal, Art. 66(VII).

38 Lei de Execução Penal, Art. 68, para. 1.

39 The Penitentiary Council is an institution made up of professors, legal professionals and members of the community tasked, among other things, with monitoring the way in which detainees are serving their sentences. See *ibid.*, Arts 69, 70(II).

40 The Community Council is an institution present in all judicial districts that is composed of one representative of a commercial or industrial association, one lawyer appointed by the bar association, one public defender and one social worker. It is tasked, among other things, with submitting reports to the Penitentiary Council and with providing support to persons deprived of liberty. See *ibid.*, Arts 80, 81(I).

41 *Ibid.*, Art. 81-B(V).

42 Brazil, *Replies of Brazil to the Recommendations and Request for Information made by the Subcommittee*, UN Doc. CAT/OP/BRA/1/Add.1, 18 February 2013, para. 194.

of 1988 and other federal laws. While the PDO was originally tasked with providing legal aid to those most in need, its mandate grew over the years. In particular, in 2009 the PDO was explicitly tasked with promoting human rights and was granted unfettered access to the penitentiary system.

## Legal framework

The first part of this section shows how the functions of the PDO were constitutionally recognized and were expanded over the years to put the protection of human rights at the core of its mandate. The second part focuses on the recognition of new prerogatives for public defenders working inside the penitentiary system.

### *The Constitution of 1988, its Amendment, and the general rules of the PDO*

Article 5(LXXIV) of the Federal Constitution of 1988 recognizes the right to an attorney for persons unable to pay for it:

Art. 5. Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: ...

LXXIV. the State shall provide full and free legal assistance to anyone who proves that he has insufficient funds; ...<sup>43</sup>

The Federal Constitution also establishes that the PDO is the institution tasked with the implementation of the right to free legal assistance. Article 134 provides that “[t]he Public Defender’s Office is an essential institution to the State’s jurisdictional function and it shall be responsible for the legal orientation and the defence, at all levels, of the needy, as set out in art. 5, LXXIV”.<sup>44</sup>

In 1994, Complementary Law No. 80 defined for the whole country the general rules governing the PDO. It focused on providing legal assistance and defence to the needy before the courts.<sup>45</sup> In 2009, the federal government adopted Complementary Law No. 132 to modernize the legal framework regulating the PDO.<sup>46</sup> The law substantially expanded the mandate of the institution and explicitly tasked it with the following objectives:

Art. 3-A. The objectives of the Public Defender are:

I - the primacy of the dignity of the human person and the reduction of social

43 Constitution of the Federative Republic of Brazil, 1988, Art. 5(LXXIV) (author’s translation).

44 *Ibid.*, Art. 134 (author’s translation). The autonomy of the institution was later guaranteed in 2004 through Constitutional Amendment No. 45, Art. 1.

45 Lei Complementar No. 80, 12 January 1994, Arts 1, 4.

46 Lei Complementar No. 132, 7 October 2009.

inequalities;

II - the affirmation of the Democratic State based on the Rule of Law;

III - the prevalence and effectiveness of human rights;

IV - the guarantee of the constitutional principles of full and complete defense and adversary system.<sup>47</sup>

The 2009 law also completely revisited and expanded the institutional functions of the PDO, putting human rights at its core. Of particular relevance for preventing and combating torture are the following functions: to act in the preservation and reparation of the rights of victims of torture providing for the follow-up and interdisciplinary care of victims;<sup>48</sup> to promote the dissemination and awareness of human rights;<sup>49</sup> to offer multidisciplinary assistance to its beneficiaries;<sup>50</sup> to promote all human rights and to use all mechanisms able to ensure their protection, including to make representation to international human rights mechanisms;<sup>51</sup> to present class actions;<sup>52</sup> and to work in places of detention to ensure that the rights of all persons are respected under all circumstances.<sup>53</sup>

Finally, in 2014, Constitutional Amendment No. 80 expanded the provisions relating to the PDO, drawing on the laws of 1994 and 2009 and seeking to expand the services of the PDO to the whole country.<sup>54</sup> Through Constitutional Amendment No. 80, the PDO is recognized as a “permanent institution” that represents “an expression and instrument of the democratic regime” and is explicitly tasked with promoting the human rights of those unable to afford legal representation.<sup>55</sup>

### *Overview of the roles of the PDO in the penitentiary system*

In addition to the expansion of its general mandate, the functions and prerogatives of the PDO in Brazil’s penitentiary system<sup>56</sup> grew after the adoption of the 1988

47 Lei Complementar No. 80, Art. 3 (modified by Lei Complementar No. 132) (author’s translation).

48 *Ibid.*, Art. 4(XVIII) (modified by Lei Complementar No. 132).

49 *Ibid.*, Art. 4(III).

50 *Ibid.*, Art. 4(IV).

51 *Ibid.*, Art. 4(X), 4(VI).

52 *Ibid.*, Art. 4(VII–VIII).

53 *Ibid.*, Art. 4(XVII).

54 For the objectives of the amendment, see Câmara dos Deputados, *Proposta de emenda à Constituição*, March 2013, p. 4, available at: [www.camara.gov.br/proposicoesWeb/prop\\_mostrarintegra?codteor=1064561&filename=Tramitacao-PEC+247/2013](http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1064561&filename=Tramitacao-PEC+247/2013). Before the adoption of the amendment, there were several public defenders’ offices throughout the country. However, the amendment made clear that the services of the public defenders must be available in all judicial districts within eight years.

55 Constitution of the Federative Republic of Brazil, Art. 134, as modified by Constitutional Amendment No. 80, 4 June 2014, Art. 1.

56 It is important to note that at the state level, in Rio de Janeiro, Lei Complementar No. 6 on the PDO already granted the task of providing legal aid in detention centres to the public defenders (Lei Complementar No. 6, 1977, Art. 22, para 4). While it does not task the PDO with conducting

Federal Constitution. The adoption of Complementary Law No. 132 of 2009 and Law No. 12.313 of 2010 considerably expanded and detailed the functions of the PDO in the penitentiary system. This section details how the PDO became a fundamental component of the State infrastructure in place to prevent torture in detention centres and to ensure that the rights of detainees are respected.

In its initial 1984 version, the *Lei de Execução Penal* made no mention of the PDO. It recognized that legal aid must be provided to detainees unable to pay for an attorney,<sup>57</sup> but it left open who would provide the assistance.<sup>58</sup> With the adoption of the Federal Constitution of 1988 and the designation of the PDO as the institution entrusted with providing legal assistance, it became necessary to specify that the PDO would be entrusted with the legal aid of detainees.

The first step in that regard was the adoption of Complementary Law No. 80, which mentioned that the PDO could “act jointly with police and penitentiary establishments, in order to ensure to the person, under any circumstances, the exercise of their individual rights and guarantees”.<sup>59</sup> It also recognized the right of the public defender to communicate with his or her beneficiaries in person and in private, even when they are detained.<sup>60</sup>

In 2009, with the adoption of Complementary Law No. 132, the PDO was specifically tasked with working in the penitentiary system, providing “permanent legal attention” to persons deprived of liberty.<sup>61</sup> The law also provided that

it is incumbent on the State administration to reserve safe and adequate facilities for [the PDO’s] work, to grant access to all dependencies of the establishment independently of previous scheduling, to provide administrative support, to provide all requested information and ensure access to the documentation of those assisted .... [The State administration] cannot, under any circumstances, deny the right to interview with members of the Public Defender’s Office.<sup>62</sup>

In 2010, Law No. 12.313 amended the *Lei de Execução Penal* to specify that the institution tasked with providing legal aid to detainees is the PDO.<sup>63</sup> It also provided that the states have to support the PDO in its work inside penitentiary units, that detention centres must provide a room for the interviews conducted by the public defender, and that the PDO should create a specialized unit to attend to released detainees and the family of detainees.<sup>64</sup> In addition to ensuring

inspections, this law provides that under no circumstance may the penitentiary administration impede the PDO from interviewing a detainee. Despite the normative framework in place, however, the PDO only started to provide legal aid to detainees permanently in 1999.

57 *Lei de Execução Penal*, Arts 10, 11, 15.

58 “The Federative Units must provide a service of legal assistance in penal establishments.” *Ibid.*, art. 16. This disposition allowed, as in the case of Rio de Janeiro up to 1999, that prison staff were in charge of providing legal aid and representation to detainees.

59 *Lei Complementar No. 80*, 12 January 1994, Art. 4(VIII).

60 *Ibid.*, Art. 128(VI).

61 *Ibid.*, Art. 108(IV), as modified by *Lei Complementar No. 132*, 2009.

62 *Ibid.*, Art. 108(IV), as modified by *Lei Complementar No. 132* (author’s translation).

63 *Lei de Execução Penal*, Art. 16, as modified by *Lei No. 12.313*, 2010.

64 *Ibid.*, Arts 16, 83(5), as modified by *Lei No. 12.313*.

access to justice to persons deprived of liberty, the law was justified by the premise that

the constant presence of public defenders within prison units is an effective measure to reduce the rates of violence, corruption, torture and non-compliance with the law. ... The work of public defenders in prisons is fundamental to ensure effective enforcement of the Lei de Execução Penal, directly contributing to the reduction of the level of urban violence and the risks of rebellion.<sup>65</sup>

Law No. 12.313 also modified the Lei de Execução Penal to recognize the PDO as a mechanism related to the enforcement of sentences and a formal part of the Brazilian penal system.<sup>66</sup> The Law specifically tasked the PDO with ensuring the legality of the manner in which the sentence is served,<sup>67</sup> and also drew a list of the functions of the PDO in relation to persons deprived of liberty. In particular, the institution is tasked with taking all necessary actions to ensure that the sentence is properly enforced. For instance, it can submit requests for the remission of sentence, request transfers of detainees to a different category of penitentiary establishment, apply for parole and pardon, ask for temporary absences from the detention centre, and request that the sentence should be served in a different district.<sup>68</sup> It can also appeal a judicial decision handed down during the sentence relating to a disciplinary offence<sup>69</sup> and make representations to the judge with the objective of initiating an administrative process in cases of violation of the rules relating to the enforcement of sentences.<sup>70</sup> Law No. 12.313 requires the PDO to regularly visit penitentiary units, to take adequate action to ensure their proper functioning, and to request that investigations about potential liability of State agents be undertaken;<sup>71</sup> it can also request the deactivation, total or partial, of a detention centre operating in violation of the law or whose conditions of detention are inadequate.<sup>72</sup>

As shown, the PDO's prerogatives related to access to justice for persons deprived of liberty and to the prevention of torture have been gradually expanded. In particular, ensuring that the human rights of detainees are respected, protected and fulfilled is at the core of the mandate of the PDO. To that end, it has been granted unfettered access to detention centres and can meet privately with all persons deprived of liberty. The Lei de Execução Penal now clearly states that the institution is competent to act on behalf of detainees for any matter relating to the enforcement of their sentence. It is also tasked with periodically visiting detention centres and taking action in case of irregularities.

65 Câmara dos Deputados, *Avulso: Projeto de Lei No 1.090-B de 2007*, 2008, para. 16, pp. 8–9 (author's translation), available at: <https://tinyurl.com/yxqlumca>.

66 Lei de Execução Penal, Art. 61(VIII), as modified by Lei No. 12.313.

67 *Ibid.*, Art. 81-A, 185, 186(IV), as modified by Lei No. 12.313.

68 *Ibid.*, Art. 81-B(I).

69 *Ibid.*, Art. 81-B(III).

70 *Ibid.*, Art. 81-B(IV).

71 *Ibid.*, Art. 81-B(V).

72 *Ibid.*, Art. 81-B(VI).

## History of the PDORJ in the penitentiary system

The Public Defender's Office of the State of Rio de Janeiro did not have a regular presence in the penitentiary system before 1999.<sup>73</sup> Between the first time the PDORJ provided legal assistance in detention centres in 1982 and 1999, it visited detention centres only sporadically to conduct large numbers of interviews in a limited amount of time.<sup>74</sup> Legal assistance in detention centres was, at that time, regularly provided by prison staff;<sup>75</sup> this raised issues relating to the quality of the legal representation provided, stemming from the staff's lack of specialized training and alleged corruption.<sup>76</sup>

In 1999, the State of Rio de Janeiro sought to ensure that police stations were not used to detain individuals for an extended period of time and started to transfer a large number of detainees to detention centres.<sup>77</sup> The PDORJ was asked by the state to provide legal assistance to the detainees inside the penitentiary system, a response to the growing overcrowding created by the transfer of detainees.<sup>78</sup> The state governor adopted Decree No. 25.685 of 8 November 1999, which sets out that public defenders will provide legal assistance to detainees in the penitentiary complexes Frei Caneca, Bangu and Niterói.<sup>79</sup> The PDORJ and the State Secretariat for Justice and Human Rights implemented the provisions of the decree through the adoption of Joint Resolution 01/1999. This resolution led to the creation of the Penitentiary System Unit (Núcleo do Sistema Penitenciário, NUSPEN) of the PDORJ, which was tasked with providing legal assistance to persons deprived of liberty in the state.

NUSPEN was initially composed of seven public defenders<sup>80</sup> but was expanded over the years, to thirty-six permanent public defenders at the time of this study. The State of Rio de Janeiro was the first to offer such services in detention centres and remains at the forefront in this regard today in Brazil.

In parallel to the work of NUSPEN, in 2004 the PDORJ created the Human Rights Unit (Núcleo de Defesa dos Direitos Humanos, NUDEDH), which was specifically tasked with providing legal assistance to individuals and groups whose human rights were violated.<sup>81</sup> In 2011, NUDEDH was also tasked with conducting monitoring visits to places of detention.<sup>82</sup> At the time of this study, both units were working with persons deprived of liberty: the public defenders of NUSPEN were representing detainees in their legal proceedings, while the members of NUDEDH were mainly conducting monitoring visits to places of detention.

73 Renata Tavares da Costa, "A atuação da Defensoria Pública no Sistema Penitenciário", in PDORJ, *Ideias para uma a construção de uma Execução Penal democrática*, Rio de Janeiro, 2010, p. 23.

74 Marcelo de Menezes Bustamante, "Histórico", in PDORJ, above note 73, p. 11.

75 R. Tavares da Costa, above note 73, p. 23.

76 Interview with Americo Grilo, former Coordinator of NUSPEN, Rio de Janeiro, 14 July 2016.

77 According to the coordinator of NUSPEN, the process only concluded in 2012.

78 Decreto No. 25.685, 8 November 1999, Preamble, para. 2; interview with Americo Grilo, above note 76.

79 Decreto No. 25.685, Art. 1.

80 Interview with Americo Grilo, above note 76.

81 PDORJ, Resolução 260, 11 February 2004, Art. 2a.

82 PDORJ, Deliberação CS/DPGE 82, 14 December 2011.

While the prison population of the State of Rio de Janeiro almost doubled between 2010 and 2017, it is noteworthy that the number of public defenders did not increase over this period.<sup>83</sup> It is estimated that the PDORJ now represents 90% of the prison population of the State of Rio de Janeiro.<sup>84</sup>

## **Findings of the study: Practice and perception of the public defenders of the State of Rio de Janeiro**

As mentioned above, several powers vested in the PDO are aimed at preventing torture. This section presents how, in practice, the public defenders of the State of Rio de Janeiro carry out their tasks and understand their own role in relation to the prevention of torture.

In this regard, Carver and Handley highlighted in their recent study the importance of the implementation of preventive measures related to the prevention of torture. Indeed, they found that

the way in which preventive measures are implemented is the main factor determining their effectiveness. ... [W]hile practice is determined partly by law, it is also affected by other considerations, such as the political and social environment and the level of knowledge and skills that practitioners have acquired through training.<sup>85</sup>

The interviews and observations conducted for the present study were fundamental to understanding the way in which the public defenders can fulfil in practice the mandate vested in the PDORJ. In particular, the observations allow us to understand how the interviews between the public defenders and the detainees are conducted in practice, to witness the environment in which they take place, and to identify the constraints experienced by public defenders. The interviews also sought to highlight how the practitioners understand their own role in preventing torture, as well as their perceptions of the occurrence of torture in the penitentiary system of the State of Rio de Janeiro. The self-perception of the public defenders is a relevant element to understanding how they undertake their tasks in practice, as it helps to explain the choices and strategies they adopt.

## **Methodology**

The findings of the present study are based on semi-structured interviews conducted between March and September 2016 with twenty-seven of the thirty-two public

83 Interview with Marlon Barcellos, Coordinator of NUSPEN, Rio de Janeiro, 29 August 2016.

84 PDORJ, *Convênio garante ao Verde a disponibilização de dados da Seap*, 25 May 2018, available at: [www.defensoria.rj.def.br/noticia/detalhes/5943-Sistema-Verde-sera-implementado-no-Nuspen](http://www.defensoria.rj.def.br/noticia/detalhes/5943-Sistema-Verde-sera-implementado-no-Nuspen).

85 R. Carver and L. Handley, above note 10, p. 83.

defenders working for NUSPEN at the time,<sup>86</sup> as well as the public defender in charge of the monitoring visits conducted by NUDEDH, for a total of twenty-eight interviewees. All thirty-two public defenders of NUSPEN were contacted and invited to participate in the study. One public defender declined to take part in the interview, and four failed to respond. The three coordinators of NUSPEN were also interviewed, as were the public defender responsible for the area of criminal defence and a member of the Office of the Director of the PDORJ. Representatives of the National Penitentiary Department, the National Mechanism on the Prevention and Combating of Torture, the Public Ministry of the State of Rio de Janeiro, and civil society organizations (the Association for the Prevention of Torture and the Pastoral Carcerária Nacional) were also interviewed. The first coordinator of NUSPEN and the undersecretary of the Department of Justice of the State of Rio de Janeiro at the time of the creation of NUSPEN also accepted to be interviewed.

The interviews were conducted in Portuguese, without an interpreter; they were recorded and are on file with the author. All the persons interviewed consented, in writing, that the information provided would be used for an academic publication. The public defenders of NUSPEN were interviewed under the condition of anonymity. The other interviewees agreed to participate in the interview without having their anonymity preserved.<sup>87</sup>

The author also participated in monitoring visits with NUDEDH, observed interviews conducted by NUSPEN with detainees, and attended meetings between public defenders and family members of detainees.

## Practice and perception

The activities of the PDORJ can be divided into three parts: individual representation of detainees (under the responsibility of the public defenders of NUSPEN), monitoring visits to detention centres (under the responsibility of NUDEDH), and collective actions and public interventions (under the responsibility of the coordinators of NUSPEN).

### *Individual representation of detainees by public defenders of NUSPEN*

As mentioned, Brazilian law entrusts public defenders with representing detainees before courts for any legal matter arising from their criminal conviction. In the case of the PDORJ, an internal regulation specifies that the public defender is also responsible for representing detainees with any other legal matter they might face. For instance, public defenders may seek to secure medical treatment for the

86 Of the thirty-six public defenders working at NUSPEN, four temporarily tasked with administrative functions were not considered for data collection as they were not conducting interviews at the time of the study.

87 The public defender in charge of prison visits within NUDEDH, the coordinators of NUSPEN and of the criminal defence section of the PDORJ, and the deputy head of the PDORJ consented not to have their identity kept confidential.

detainee, or represent him or her in family law procedures.<sup>88</sup> On average, one public defender represents 1,077 detainees.<sup>89</sup>

Every week, the public defenders<sup>90</sup> conduct interviews in detention centres, meeting an average of sixty detainees per week.<sup>91</sup> The interviews between public defenders and detainees are short (an average of five minutes) and focus mainly on legal matters relating to the enforcement of the sentence. The public defenders share information about transfers to a different category of penitentiary establishment and other related requests (parole, temporary absence from the detention centre, etc.). They also discuss disciplinary actions taken against detainees, as these may have further negative consequences for the detainee – they may lead, for example, to the postponement of a transfer to a different category of penitentiary establishment and ultimately the release of the detainee. The interview is normally conducted in a way such that the public defender shares basic information with the detainee (i.e., date of release, date of transfer) and provides information about any legal actions they may take on the detainee's behalf. They may sometimes also collect information from the detainee in order to better inform their legal strategy.

Occasionally, public defenders receive special requests from detainees not strictly related to the enforcement of the sentence. In particular, detainees denounce the lack of medical care, which prompts the public defenders to take action on their behalf in that regard. Other requests could relate to facilitating family visits, transfers to other detention centres, family law matters, etc.

The public defenders entrusted with the legal representation of detainees generally do not visit the cells. In fact, only three public defenders shared that they regularly visit the cells where detainees are held. The main reasons for not visiting them were because NUDEDH carries out inspections, because there is not enough time to visit cells regularly, and to avoid generating conflict with the authorities.

The interviews between public defenders and detainees are usually not conducted in private, although the public defenders were emphatic in stressing

88 The list of functions of the public defenders of the State of Rio de Janeiro is established by Deliberação CS/DPGE No. 80, 11 November 2011, Art. 7.

89 The PDORJ also meets with remand prisoners. The public defenders meeting with remand prisoners dealt with more than the double the number of detainees than those working with sentenced detainees, as they were each responsible for approximately 2,400 people. The interviews conducted by those public defenders are slightly different from those of the public defenders working with sentenced detainees. The interviews with remand prisoners seek to inform them of scheduled court hearings and to inform them that there is a public defender responsible for their case and that any question relating to the case should be addressed to him or her. The discussion is considerably shorter than those with detainees already sentenced. Indeed, while public defenders representing sentenced detainees met with an average of sixty detainees per day, public defenders working with remand prisoners met anywhere between 150 and 270 detainees per day.

90 At the time the interviews were conducted, the interviewed public defenders had been practicing law, on average, for the past 14.8 years. On average, they had been working with people deprived of liberty for 9.5 years. Nineteen public defenders interviewed were female, while nine were male.

91 Out of the twenty-five public defenders interviewed who work with convicted detainees, only four reported being able to visit each detainee at least every three months. Twelve public defenders stated that it takes at least five months to see someone again. According to internal regulations, each detainee should be visited at least every three months.

that the interviews are not conducted in presence of penitentiary staff. Twenty-three public defenders reported that they do not conduct interviews in private, and only three respondents said that they do.<sup>92</sup> Indeed, other detainees are often attended to simultaneously by interns or support staff, under the supervision of public defenders. It is also common that detainees wait to be interviewed in the room where other interviews are already taking place, or not far from it, which allows them to eavesdrop on the conversations. Depending on the size of the room where public defenders meet with detainees, there can be anywhere from one to thirty detainees waiting in the room.

The authorities play a crucial role in facilitating the work of public defenders. In particular, public defenders have to share the list of the detainees with whom they want to meet one day in advance to allow smooth movement on the day of the interviews. The cooperation of staff is considered essential by public defenders because of the key role they play in facilitating the interviews by bringing the detainees to the public defenders' room. In that regard, nine public defenders spontaneously mentioned the importance of maintaining a good relationship with the penitentiary administration. These public defenders mentioned that the need for cooperation means they would refrain from personally confronting the authorities by being personally active in denouncing alleged acts of torture or by causing annoyance to the staff by visiting the cells.

It is not part of the routine of the public defender to actively inquire about occurrences of violence. As one public defender explained:

[If] we see signs of injuries or if we receive information about torture from a detainee, we ask questions. But if we do not have information, it is not part of our practice to act on that. That is because of the large number of interviews we have to complete.<sup>93</sup>

According to another public defender:

[D]etainees see the public defender as their “exit door”. They might speak about torture if they have long sentences. They are interested in three things: appeal, release, and transfer to a better penitentiary establishment. When someone else from NUDEDH comes, the relationship is different. They talk to them to make denunciations. It rarely happened to me; when it occurs, it must be a very serious situation. Even when I ask, they mention that they do not want to talk about that; they want to address the issue of liberty.<sup>94</sup>

One public defender stressed that “our focus is legal; it is not to identify torture”.<sup>95</sup>

Although inquiring about torture is not part of their routine, public defenders identified various means through which they receive allegations of

92 The public defender responsible for the monitoring visits was excluded from this section. Also, one public defender did not share information about the privacy of the interview.

93 Interview with Public Defender 6, Rio de Janeiro, 22 June 2016.

94 Interview with Public Defender 10, Rio de Janeiro, 6 April 2016.

95 Interview with Public Defender 15, Rio de Janeiro, 16 June 2016.

torture: interviews in detention centres, appointments with family members, letters sent to the PDORJ, and notes sent through other detainees during interviews.

In general, however, public defenders seldom receive denunciations of torture during individual interviews. When public defenders collect allegations of torture, they notify the coordinators of NUSPEN, who are responsible for the follow-up.<sup>96</sup> Between October 2015 and August 2016, only eight accounts were shared by public defenders with the coordinators of NUSPEN.<sup>97</sup> None resulted in a formal denunciation to the Public Ministry.<sup>98</sup>

### *Monitoring activities of NUDEDH*

The PDORJ also conducts monitoring visits to detention centres.<sup>99</sup> At the time of the data collection, the NUDEDH was responsible for the organization of these visits. It counted on one public defender and two interns to organize and take part in the visits. As per internal regulations, two inspections were organized every month.<sup>100</sup> One member of NUSPEN usually takes part in the visit, as well as a structural engineer.

The inspection is based on observations and discussions with detainees, and seeks to assess conditions of detention and identify overarching issues. It does not seek to address individual cases. The discussions with detainees are conducted collectively and in common spaces in order to avoid reprisals. During inspections, individual interviews in private are conducted only exceptionally. The public defender in charge of such inspections considers that detainees are more scared to share their stories in private than in a group. A report is prepared for each visit conducted. The reports are confidential, shared within the PDORJ and with the MEPCT. The PDORJ can, however, decide to use them in judicial proceedings against the state.<sup>101</sup>

According to the public defender in charge of the inspections, detainees share accounts of torture in the vast majority of inspections.<sup>102</sup> They are either shared spontaneously or after the public defender has asked questions about the occurrence of violence. However, according to this public defender, detainees usually do not want to officially lodge complaints because of fear of reprisals. When NUDEDH receives more substantiated denunciations, it shares them with

96 At the time the study was conducted, no protocol was in place to specify the steps that public defenders should take when they collect allegations of torture. However, in June 2018, the PDORJ adopted Resolução 932, which establishes a protocol detailing how public defenders should respond when they receive accounts of torture and other cruel, inhuman or degrading treatment or punishment. It establishes that NUDEDH is responsible for handling such cases.

97 Interview with Marlon Barcellos, above note 83.

98 *Ibid.*

99 At the time of data collection, only NUDEDH was conducting inspections. NUSPEN started to conduct monitoring visits in December 2016 and conducted six visits up until July 2018.

100 PDORJ, above note 82, Art. 12(2).

101 Interview with Marlon Barcellos, above note 83.

102 Interview with Robert Fraenkel, NUDEDH Public Defender, Rio de Janeiro, 11 August 2017.

NUSPEN for further internal consideration. NUDEDH shares an average of five to ten such allegations per month with NUSPEN.

Between 1 January 2015 and 11 August 2017, only three cases of torture involving four victims identified in the context of inspections were formally denounced to the competent authorities. The public defender responsible for monitoring visits also highlighted that NUDEDH received more denunciation of deaths considered “suspicious” (i.e., which might be the result of violence) than formal denunciations of torture.

### *Collective actions and political activities by NUSPEN*

While public defenders of NUSPEN are responsible for representing detainees before the courts for their individual cases, the coordinators of NUSPEN, together with NUDEDH, are responsible for collective actions taken on behalf of detainees. For instance, collective actions challenging rules concerning visits by relatives, seeking the recognition of reading as an activity leading to remission, or requesting the deactivation of a detention centre are presented by NUSPEN.

Additionally, both NUDEDH and NUSPEN collaborate with other organizations to tackle the issue of torture in the penitentiary system. In particular, the PDORJ is a member of the State Committee for the Prevention and Combating of Torture, a forum for discussing policies and initiatives related to torture prevention. Since 2015, the PDORJ is also part of a working group on torture that includes the Public Ministry and the MEPCT. The working group seeks to improve coordination amongst these institutions when accounts of torture arise.

The PDORJ also advocates for the protection of the rights of people deprived of liberty in international human rights fora. It has denounced several situations before the inter-American human rights system and the Special Procedures of the UN Human Rights Council, and has met with representatives of the SPT. The PDORJ also frequently intervenes in the media, drawing the attention of the public to problems in the penitentiary system.

### *Public defenders’ perception of their role and of occurrences of torture in Rio de Janeiro*

This section focuses on public defenders’ perception of their own role in preventing torture. It also seeks to present their perception of occurrences of torture in Rio de Janeiro, with particular attention placed on their perception of the impact that their actions have on the prevention of torture. The relevance of the findings in this regard rests on the conclusion by Carver and Handley that “the way the torture prevention measures are implemented is the main factor determining their effectiveness”.<sup>103</sup> In turn, the way the practitioner will implement the preventive measures is influenced by how they understand their role, as well as the potential

103 R. Carver and L. Handley above note 10, p. 83.

impact of their work. Indeed, their perspective on the prevalence of torture in the penitentiary system and their role in preventing it will inform the way they will address this issue. Highlighting these subjective considerations helps to explain the choices made by the public defenders.

First, all twenty-eight public defenders interviewed considered that it is part of the role of the PDORJ to prevent torture and identified various ways in which the institution plays this role. Being present inside all detention centres, meeting regularly with detainees and conducting monitoring activities were relevant actions identified by the public defenders. According to them, this regular presence and providing detainees with a channel for denouncing torture would, in turn, result in prison staff refraining from torturing detainees because of the possibility of denunciations and being found responsible for these acts. The public defenders also mentioned that their work helps to reduce tensions and risk of violence inside the detention centre by providing detainees with regular updates on the date of their release and transfer to other categories of penitentiary establishment.

It is important to mention that twenty-two out of the twenty-eight public defenders spontaneously shared their belief that the presence of representatives of the institution has the *effect* of preventing torture. While public defenders provided a variety of reasons for this belief, it is striking to see that such a high number of public defenders spontaneously mentioned this fact. This is interesting because public defenders do not actively seek to ascertain whether detainees are victims of violence, and they rarely receive such allegations during the individual interviews conducted. Indeed, the interviews primarily focus on the procedural aspects of the enforcement of the sentence, such as the date of release and the transfer to other penitentiary establishments.

When asked whether they consider that torture is underreported in the State of Rio de Janeiro, twenty-four out of the twenty-eight public defenders answered in the affirmative.<sup>104</sup> One of the twenty-eight public defenders said that torture was maybe underreported, and two did not share an opinion on the matter. Only one public defender considered that torture was not underreported in Rio de Janeiro.

The public defenders who considered that torture was underreported were asked the reason for such underreporting. Of these twenty-four public defenders, fourteen identified detainees' fear of reprisal as a reason. Nine of those public defenders also mentioned explicitly that the lack of protective mechanisms for individuals denouncing torture in detention explained why public defenders

104 The prosecutor in charge of collective rights in the penitentiary system of the Public Ministry of the State of Rio de Janeiro, Tiago Joffily, also considered that the cases of torture officially denounced represent a "tiny fraction" of all instances of torture in the penitentiary system of the State of Rio de Janeiro. Interview with Tiago Joffily, Prosecutor of the Public Ministry of the State of Rio de Janeiro, Rio de Janeiro, 27 June 2016.

could not ensure their safety.<sup>105</sup> Five public defenders identified the lack of accountability and possibility of getting redress as a reason why detainees do not denounce torture. Four public defenders held that detainees have often come to believe that torture is simply to be expected when one is detained. Three public defenders stressed that detainees often do not make the distinction between the judge, the prosecutor and the public defender – given the role of the judge and the prosecutor in the conviction of the detainees, this confusion may inhibit the trust that detainees have in public defenders. Finally, one public defender mentioned generally a possible lack of trust in the public defender on the part of detainees.

The public defenders were asked to identify the strengths of the PDORJ in preventing torture. Half of the public defenders identified their regular presence in all detention centres of the state. Seven public defenders highlighted the legitimacy of the institution in the eyes of detainees and staff. Five respondents stressed the ability of the PDORJ to act strategically, including through actions seeking to safeguard collective rights. Three persons identified the PDORJ's capacity to use the judicial system, two identified the competence of the public defenders, and two referred to the institution's capacity to provide legal information. Tellingly, only one public defender mentioned the capacity to identify torture.

Finally, the public defenders were asked to identify the weaknesses of the institution when it came to the prevention of torture. Sixteen of the twenty-eight public defenders considered that lack of resources (support staff, psychologists, structural engineers, material resources, etc.) is a shortcoming of the PDORJ. Three respondents considered that there is a lack of strategic action in relation to torture. Three public defenders cited the lack of a protocol to respond to accounts of torture shared by detainees. Three respondents considered that more monitoring visits should take place. Finally, three public defenders complained that they are dependent on other institutions, such as the Public Ministry, when it comes to following up on denunciations of torture.

## Discussion

The activities undertaken by the PDORJ in detention centres, as reported by interviewees, are numerous and closely mirror the functions granted to it in the Lei de Execução Penal, Complementary Law No. 80 and the Federal Constitution of 1988. Most notably, the PDORJ regularly meets persons deprived of liberty unable to pay for an attorney, represents them before the courts, conducts regular monitoring visits, engages in public and international fora, and meets with their family members.

<sup>105</sup> The lack of a protective mechanism for detainees denouncing torture was also identified as a reason for underreporting of torture by Tiago Joffily, above note 104, and the Ombudsman of the National Penitentiary Department, Maria Gabriela Peixoto. Interview with Maria Gabriela Peixoto, Ombudsman of the National Penitentiary Department, Brasília, 26 July 2016.

In relation to torture, this study seeks to explain the paradox between the extensive presence of the PDORJ in detention centres and the very few instances of torture that are officially reported. In that regard, and as mentioned previously, it is important to note that while very few detainees lodge formal complaints of torture with the help of the PDORJ, public defenders do, in practice, receive accounts from detainees. In fact, the PDORJ received allegations of torture in the “vast majority of monitoring visits”. Public defenders also received eight accounts of torture over almost a year in the context of the individual interviews between the public defenders of NUSPEN and detainees. However, almost all public defenders still consider torture to be “underreported” in Rio de Janeiro.

This section will explain why the PDORJ might be more successful in receiving accounts of torture during monitoring visits than during individual interviews and why formal denunciations of torture are scarce. It will then present recommendations aimed at better identifying and responding to denunciations of torture.

## Monitoring visits and individual interviews

It is interesting to note that the PDORJ is more successful in receiving accounts of torture during monitoring visits than in individual interviews with detainees. The way the interviews are conducted might explain why few public defenders receive allegations of torture during the interviews. Public defenders, as a general practice, do not inquire about violence and torture during the interviews. Due to the large number of detainees interviewed per day (an average of sixty), interviews are short (the average length is five minutes) and focus almost exclusively on procedural matters related to the detainee’s sentence. Some public defenders shared their opinion that there was no time to inquire about torture. Further, the lack of knowledge of the role of the public defender by detainees and the fact that public defenders are regularly confused with other actors like judges and prosecutors might explain why detainees do not share information about torture during interviews. Moreover, detainees often prefer to focus on the “exit door” – i.e., they prefer to discuss their sentence and details about when they might be released. All these factors could explain why the full potential of the regular presence of the public defender through the weekly interviews as a mechanism to receive denunciations of torture is not fulfilled.

On the other hand, during monitoring visits, public defenders clearly specify that the purpose of their visit is not to discuss a detainee’s individual sentence, but to assess the conditions of detention. Public defenders participating in the visits proactively seek information relating to possible human rights violations taking place in the detention centre. The fact that the public defenders from this team clearly state that they are concerned about potential human rights violations may result in detainees taking the view that monitoring visits are a more appropriate opportunity to share their experience. All in all, for the reasons mentioned, and despite the regular presence in the detention centre of public defenders responsible for the legal representation of detainees, monitoring visits

appear to be the channel that is more likely to result in receiving complaints of torture from detainees.

### Absence of formal denunciation

It is also striking to note that while accounts of torture are not uncommon (taking into account the denunciations received during monitoring visits), very few detainees decide to lodge formal complaints and to seek redress with the help of the PDORJ. Rather, when detainees share their experience with the public defenders, they do it informally.

In this regard, many public defenders shared the belief that detainees' fear of reprisal, coupled with lack of trust in the justice system, explains why so few complaints are lodged for torture. One third of the respondents also considered that they are ill-equipped to adequately follow up on denunciations of torture. Indeed, because of the lack of effective protective measures for those who complain, they consider themselves unable to ensure the physical safety of detainees who may decide to go forward with a formal complaint.

In this context, it is possible that the public defenders prefer to focus on procedural matters related to the sentence of detainees because they consider this to be a more certain and efficient manner in which to concretely improve the situation of detainees. In particular, they believe they can secure tangible outcomes by focusing their efforts on the transfer of detainees to a better category of penitentiary establishment and on their release. This choice is understandable in light of the impact that overcrowding and lack of access to health care has on the well-being of detainees.

Additionally, public defenders pointed out that lack of resources is a weakness of the institution (the prison population of the State of Rio de Janeiro doubled between 2010 and 2017, while the number of public defenders remained stable). In other words, it is possible to suggest that focusing on procedural matters pertaining to the enforcement of the sentence is seen as a more efficient use of their limited time, resources and expertise, and does not present the risks related to formally denouncing acts of torture in the absence of an effective protection mechanism.

### Recommendations to better identify and respond to denunciations of torture by the PDORJ

This study on the practice and perception of public defenders has highlighted a paradox between the presence of the PDORJ in the penitentiary system of Rio de Janeiro and the low number of torture complaints that were lodged officially. This paradox is particularly interesting as it collides with the assumptions of public defenders about their work.

On the one hand, public defenders believe that their presence has the effect of preventing torture as it has a deterrent effect on prison staff, who are afraid of denunciations and of being found responsible for acts of torture. On the other

hand, public defenders consider that detainees refrain from denouncing acts of torture because of fear of reprisal, and they recognize that even in their capacity as public defenders, they are in fact powerless to effectively protect detainees who decide to lodge a complaint. This situation raises the obvious question of whether the public defender is indeed able to “decrease and discourage violations, as well as ... to punish [the] perpetrator”.<sup>106</sup>

As mentioned previously, this study does not seek to determine whether public defenders do, or do not, effectively prevent torture in the penitentiary system of Rio de Janeiro. However, it identifies certain elements that may hinder their capacity to do so, particularly relating to the effectiveness of individual interviews. In this regard, the PDORJ could take several steps to help strengthen the figure of the public defender in the individual interview as a channel for detainees to denounce torture.

First, the most straightforward (and costly) recommendation would be to reduce the ratio of detainees per public defender. By doing so, public defenders could spend more time with detainees, better explain their own role (including by differentiating themselves from prosecutors and judges), and address the issue of torture during the interview. Indeed, as provided for by the Criminal Enforcement Law, public defenders are not only responsible for issues related to procedural matters related to the sentence such as the progression of penitentiary regimes, but are also more broadly responsible for the regular enforcement of the sentence, including ensuring that detainees are not subject to torture. Sharing information about torture and the role of the public defender in preventing it and seeking redress are elements that could contribute to deconstructing torture as an unavoidable consequence of being detained.

Second, independently from any improvement in the ratio of detainees per public defender (which would likely be contingent on an increase in the budget allocated to NUSPEN), public defenders could seek to address the issue of torture strategically with detainees in the context of individual interviews. In fact, public defenders could discuss these issues with detainees when they meet for the first time, at the beginning of their detention. The issue of torture could also be addressed when detainees are transferred from one detention centre to another, during the first interview with a new public defender. Further, the PDORJ could decide to inquire more actively about such issues during individual interviews with detainees in detention centres that are considered more problematic, based on information shared by the Public Ministry, the MEPCT or NUDEDH.

These interventions should obviously avoid putting detainees at higher risk and creating expectations that cannot be met by the PDORJ. However, addressing the issue of torture in the context of individual interviews with detainees is necessary if the institution is to fulfil its role of holistically ensuring the regular enforcement of the sentence and protecting the human rights of the most marginalized.

106 Brazil, above note 42, para. 194.

Further, while the lack of capacity to ensure the protection of incarcerated victims of torture due to their exclusion by the relevant federal law from the protection mechanism severely limits the number of denunciations of torture, the PDORJ can take action and advocate for the adoption of a system that would take into account such victims. In this regard, more systematic collecting and compiling of accounts of torture received by the institution might allow the PDORJ to better advocate for legal reforms which could, in turn, contribute to ensuring that persons denouncing torture do not suffer reprisals. The information collected daily by public defenders relating to accounts of torture that cannot be used in legal procedures could nevertheless help provide a more accurate image of the reality inside Rio de Janeiro's penitentiary system. With this information readily available to the PDORJ, it could make use of its broad competence to advocate in public fora, both nationally and internationally, in favour of legal reforms related to the treatment and protection of detainees.

Additionally, public defenders could ensure that the information collected will be managed and used in a way that would avoid putting the detainees at risk of reprisals, by ensuring their confidentiality. Public defenders could also manage the expectations of the detainees, informing them that the information shared with the PDORJ will not be used to seek compensation or the punishment of the perpetrators.<sup>107</sup>

## Conclusion

This article sought to present the work of the Public Defender's Office of the State of Rio de Janeiro in the prevention of torture of persons deprived of liberty. It explained, based on the public defenders' practice and the perception they have of their role, why despite the significant presence of public defenders in detention facilities, few detainees reach out to them to formally denounce acts of torture. According to the interviews conducted for this study, public defenders believe that the limited resources allocated to the institution, in the context of a sustained increase in the population of the penitentiary system, severely hinder their capacity to inquire and follow up adequately on allegations of torture. Also, the lack of a protective mechanism for individuals denouncing torture while serving a sentence is seen as a significant obstacle to adequately handling denunciations of torture. Faced with these constraints, public defenders feel powerless and prefer to focus their attention and resources on issues over which they believe they can assert some influence – i.e., the transfer of detainees to better detention facilities, and the timely release of detainees. Taking into account overcrowding and lack of access to health care in the penitentiary system of the State of Rio de Janeiro, this appears to them to be a more efficient way of concretely improving the situation of persons deprived of liberty.

<sup>107</sup> The United Nations Subcommittee on the Prevention of Torture and the International Committee of the Red Cross use a similar mode of action.

The author identified suggestions for strengthening the position of the PDORJ as a reception channel for denunciations of torture. First, it could reduce the ratio of detainees per public defender. This would allow the practitioners to have more time to address issues like human rights violations in the penitentiary system. Second, the public defenders could inquire strategically about the incidence of torture, such as at certain specific moments of the sentence, or in specific detention centres where it is likely that higher number of victims of torture will be encountered. Finally, public defenders could systematically register all accounts of torture obtained during interviews, even those that cannot lead to formal complaints. With this information in hand, the PDORJ could better advocate for legal reforms leading to the adoption of a protective system for victims of torture who are incarcerated. It is argued that these steps would help the PDORJ to fulfil its mandate to protect the human rights of persons deprived of liberty.

This article did not seek to assess whether the presence of the PDORJ in the penitentiary system of Rio de Janeiro has had the impact of reducing torture. Throughout the interviews, several respondents shared the belief that the situation in the penitentiary system has gradually improved since 1999, in part due to their regular presence. In 2019, twenty years will have passed since the PDORJ assumed the responsibility of providing legal assistance in the state's detention centres. This will be an opportunity to fully assess the concrete impact of the PDORJ on the prevention of torture in the penitentiary system.

