



**PERMANENT MISSION OF BRAZIL TO THE UNITED NATIONS OFFICE
AND OTHER INTERNATIONAL ORGANIZATIONS IN GENEVA**
Ch. Camille Vidart, 15 – 1202 – Geneva / Switzerland

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The Permanent Mission of Brazil to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights – Special Procedures Branch and, in response to the call for inputs of the Chairs of the Committee on Enforced Disappearances and of the Working Group on Enforced or Involuntary Disappearances, dated 23 May 2023, has the honor to transmit herewith the contribution of the Brazilian Government.

The Permanent Mission of Brazil in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 2 August 2023



To: Office of the UN High Commissioner for Human Rights (OHCHR) –
Special Procedures Branch

E-mail: ohchr-ced@un.org and hrc-wg-eid@un.org

SUBMISSION OF THE GOVERNMENT OF BRAZIL

Brazil is a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance and regulates the issue through Decree No. 8767 of May 11, 2016. This Decree, in its article 2, understands as enforced disappearance the arrest, detention, abduction or any other form of deprivation of liberty that is perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, and the subsequent refusal to admit the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person, thus depriving them of the protection of the law.

Although it adopts the concept of "enforced disappearance", the current Brazilian legal system does not define it as a criminal offense. The legal framework that exists refers to penalties for State agents when individual rights and guarantees of citizens are not observed due to the actions of the former.

According to Article 5, item LXIII, of the Federal Constitution:

"Art. 5º. All are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms:

(...)

LXIII - the prisoner shall be informed of his rights, including the right to remain silent, and shall be assured of the assistance of his family and lawyer;"

In addition, article 148 of the Penal Code provides for the criminal type of kidnapping and private imprisonment, in the following terms:

"Art. 148 - Depriving someone of their liberty by kidnapping or private imprisonment:

Penalty - imprisonment from one to three years.

§ 1 - The penalty is imprisonment from two to five years:

I - if the victim is an ascendant, descendant, spouse or partner of the perpetrator or over 60 (sixty) years old;

II - if the crime is committed by admitting the victim to a care home or hospital;

III - if the deprivation of liberty lasts more than fifteen days.

IV - if the crime is committed against a minor under 18 (eighteen) years of age;

V - if the crime is committed for libidinous purposes.

§ Paragraph 2 - If the victim suffers serious physical or moral suffering as a result of ill-treatment or the nature of the detention:

Penalty - imprisonment from two to eight years."

In addition, Law No. 9455 of April 7, 1997, which defines the crimes of torture and makes other provisions, provides in its Article 1:

"Art. 1. It is a crime of torture:

I - embarrass someone with the use of violence or serious threat, causing physical or mental suffering:

a) in order to obtain information, a statement or a confession from the victim or a third person;

b) to cause an action or omission of a criminal nature;

c) on grounds of racial or religious discrimination;

II - to subject someone, under his custody, power or authority, with the use of violence or serious threat, to intense physical or mental suffering, as a way of applying personal punishment or preventive measure.

Penalty - imprisonment from two to eight years.

§ Paragraph 1. The same penalty shall apply to anyone who subjects a prisoner or person subject to a security measure to physical or mental suffering, through the practice of an act not provided for by law or not resulting from a legal measure.

(...)

§ Paragraph 4 The penalty shall be increased by one sixth to one third:

I - if the crime is committed by a public official;

(...)

III - if the crime is committed by kidnapping."

To date, the criminal types available in the Brazilian legal system that most closely resemble the crime of "enforced disappearance" are those presented above, which define kidnapping, private imprisonment and torture. In none of them is there a definition of a short-term period, so that the crimes are characterized by the conduct of the agent itself.

To use a short-term definition that exists in the Brazilian legal framework, we highlight the provisions of Law No. 13,869, of September 5, 2019, which provides for crimes of abuse of authority, in the articles below:

"Art. 12: Unjustifiably failing to report an arrest in flagrante to the judicial authority within the legal deadline:

Penalty - detention, from 6 (six) months to 2 (two) years, and fine.

Sole paragraph. The same penalty shall apply to anyone who:

(...)

II - fails to immediately notify the family or a person indicated by them of the arrest of any person and the place where he or she is being held;

III - fails to deliver to the prisoner, within 24 (twenty-four) hours, the note of guilt, signed by the authority, with the reason for the arrest and the names of the driver and witnesses; (emphasis added)

Art. 25 - Obtaining evidence, in an investigation or inspection procedure, by manifestly illicit means:

Penalty - detention, from 1 (one) to 4 (four) years, and fine.

(...)"

Establishing a parallel between the articles presented above, in order to maintain a relationship with the matter raised, it is verified that only in article 12 of Law 13.869, of 2019, there is expressly the defined period to be observed, of 24 hours, to be issued the note of guilt to the arrested person. Likewise, art. 148 of the Brazilian Penal Code.

Although the American Convention on Human Rights, ratified by Brazil in 1992, does not establish an exact period for the communication of arrest/detention (art. 7), the Brazilian Code of Criminal Procedure (Decree 3.689/1941) establishes the obligation of immediate notification of any arrest/detention to the Judiciary, within an interval of less than 24 hours (art. 3B, items I and XVIII, § 1; art. 306, § 1; art. 310).

For the forced disappearance of a person, the conduct of the State agent is of fundamental importance and, therefore, the act would be consummated by itself, regardless of the time elapsed. In analogy to the criminal type defined in article 148 of the Penal Code, the crime is consummated with the deprivation of liberty, being a permanent crime, whose consummation is prolonged in time.

In the deprivation of liberty, the conduct for the configuration of enforced disappearance is to deprive, in the sense of preventing/restricting the freedom of the person. Therefore, the perpetrator, by means of his conduct, accomplishing the core of the concept of enforced disappearance, achieves the result provided for in the law.

Brazil, in addition to being a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance, in its specific law on disappearance of persons (Law No. 13,812 of March 16, 2019), establishes the absence of any time frame for the definition of a disappearance, regardless of its motivating cause (art. 2, item I). At the same time, the same law establishes that the search for a missing person must take place on an urgent and priority basis, until the location (art. 3).

That said, the Ministry of Justice and Public Security understands that the crime is not characterized by the time lapse in which the victim is missing and in the possession of the state agent, but rather by the initial conduct of the agent in curtailing the freedom of the person regardless of time, if the note of guilt has not been delivered to the prisoner or the proper communication referred to in article 12, item II, of Law No. 13,869 of 2019. It should be noted that the crime of forced disappearance is permanent as long as the victim's whereabouts are unknown, being one of the characteristics for the classification of the offense, as contained in

Article III of the Inter-American Convention on Forced Disappearance of Persons.

In addition, Law 13.812, of March 16, 2019, which establishes the National Policy for the Search for Missing Persons and creates the National Register of Missing Persons, in its article 2, item I, considers a missing person "any human being whose whereabouts are unknown, regardless of the cause of his disappearance, until his recovery and identification have been confirmed by physical or scientific means", not defining a minimum or maximum period to be considered a missing person.

Therefore, we understand that the approach to the problem of short-term enforced disappearances, with regard to the intention of creating a typology - conceptual or criminal - should not be attached to the period of the disappearance, but rather to the conduct of the state agent who practices it.

In addition, it is worth noting that the Ministry of Human Rights and Citizenship (MDHC), through its Special Advisory Office for the Defense of Democracy, Memory and Truth, has among its competencies to provide support to the Special Commission on Political Deaths and Disappearances, as well as to act in search activities for politically motivated missing persons, as expressed in Decree No. 11.341/2023.

The functions of the Advisory Office are echoed in the previous provisions of Law No. 9.140/1995 - updated by Law No. 10.536/2002 -, which specifies that:

"Art. 1 - Persons who have participated, or have been accused of participation, in political activities in the period from September 2, 1961 to October 5, 1988, and who, for this reason, have been detained by public agents, are recognized as dead, for all legal purposes, and have since disappeared, without any news of them."

More recently, another official Brazilian document related to the subject has contributed to the understanding of enforced disappearance. This is the Final Report resulting from the work of the National Truth Commission, which stated:

"The practice of enforced disappearance, as a systematic and widespread phenomenon, has marked the recent history of Latin America. Implemented as a State policy during the military dictatorships that ravaged the Southern Cone, as well as during the armed conflicts in Central America, this practice consisted of the detention, followed by the execution and concealment of the bodies of thousands of people. In order to leave no

trace, states concealed the bodies of victims - by, among other things, creating clandestine cemeteries and graves; identifying people as indigent; and dumping bodies at the bottom of lakes, rivers or the sea (thrown from airplanes and helicopters). Thousands of political prisoners died in this way, and to this day, in most cases, there is no news of their whereabouts."

Although national documents recognize the possibility of enforced disappearance occurring on a temporary basis, for example by noting that such action places "the victim in a state of complete vulnerability and helplessness" as a disappeared person, and therefore excluded from the possibilities of defence in the context of justice - as expressed in the 2014 Report - there is no objective presentation of a specific understanding for cases of short-term disappearance.

Bill No. 6.240/2013 is in progress, which deals with the following: "Adds art. 149-A to Decree-Law No. 2.848, of December 7, 1940 (Penal Code), to typify the crime of forced disappearance of a person, and adds item VIII to art. 1 of Law No. 8.072, of July 25, 1990, to consider this crime heinous".

On the guiding questions referred to in the instructional annex: a) How is the notion of "short-term enforced disappearances" understood and in what contexts do they occur?

The notion of "enforced disappearance", especially in relation to disappearances promoted in the contemporary context, is under debate in Brazil.

The concept of "enforced disappearance" is linked to that of "State violence" / "institutional violence", insofar as the phenomenon has been concretized as one of the developments of this violence.

Taking into account the brief conceptualization of the phenomenon made in the document with the instructions on the "inputs", which considers as "enforced disappearance of short duration" those that occur for brief periods of time, up to less than a day, after approach and apprehension by State agents. These illegal activities, by their nature, are more likely to be carried out today by security agents, who have, among their powers, the possibility to use force when they deem it necessary.

It should be noted that there is no unanimously accepted conceptualization of the terms "enforced disappearance", "State violence" and "institutional violence".

Social movements, mothers and relatives of victims of state violence and disappeared persons, after the official end of the civil-military dictatorship in 1985, have appropriated these nomenclatures, updating them and recognizing their occurrence also in the democratic context.

The National Truth Commission, together with the Amnesty Commission and the Commission on the Dead and Disappeared, has played a very important role in bringing to light a large number of issues that were not automatically fully resolved after the end of the civil-military dictatorship.

Currently, the bodies active in the measures of reparation, non-repetition and memory intend to resume reflections on these policies (reparation, non-repetition, memory), not limited to past periods, paying attention to the violence perpetrated in the contemporary context.

For this, it is essential to be able to identify the permanence of these past violent practices, as well as to investigate their updates, and enforced disappearance is one of these practices that has been perpetuated. The consequence of treating it as a phenomenon restricted to a single historical period involves the invisibilization of the frequent disappearances that occur for the most varied factors.

With regard to item "II", it is understood to be a widespread perception in the form of common sense. The effects of this understanding focus precisely on the delay in the search for missing persons.

This can be an obstacle to recognizing that detentions for investigation purposes, to determine the identity or background of the criminalized person, interrupted communication, informal questioning without the presence of third parties, defenders or not, constitute forms of disappearance.

b) What are the legal norms and practices that can lead to "short-term enforced disappearances" and what are the legal frameworks and practices that can prevent them?

The rules and practices that can lead to "short-term enforced disappearances":

- Absence/ non-compliance with human rights protocols in the course of investigative procedures (preliminary investigation; police inquiry; pre-procedural phase);

- Unjustified delay in the duration of the police inquiry, the main instrument of preliminary investigation in the country. When it comes to deadlines in the police investigation, it is in fact delimited the periods of time that the police authority has to conclude the investigations and refer the investigation to the Public Prosecutor's Office or to the judge.

The permanence of the investigated case under the tutelage of the police, besides not guaranteeing that new information is obtained, gives rise to human rights violations under the justification of obtaining information at any cost. On the contrary, research by the Sou da Paz Institute (available at: <https://soudapaz.org/o-que-fazemos/conhecer/pesquisas/politicas-de-seguranca-publica/controle-de-homicidios/?show=documentos#6651-1>) highlighted that the longer the investigative activity takes, the more difficult it is to identify the perpetrator(s), generating a greater possibility that the investigation will be closed;

- Adoption of precautionary practices without strict observance of the accusatory criminal procedural model.

In view of the competencies of the General Coordination of Public Security and Human Rights (CGSPDH), we understand that there are at least two ways to act in order to curb the practice of "short-term enforced disappearances":

- Strengthening external police ombudsmen, highlighting the role of civil society in the composition of these bodies. Social control of police activity can bring interesting gains, as it gives citizens who closely monitor daily actions the opportunity to monitor public security policies, submit complaints, suggestions and compliments.

- Strengthening investigations and effective accountability of officers, especially with regard to external control of police activity.

In addition, it is suggested that the creation of a single database of missing persons be implemented, as already determined by Law 13.812/19, which determined the creation of the National Register of Missing Persons.

Finally, it is suggested that actions be taken to prevent the occurrence of institutional violence, such as training of professionals, the use of body cameras as well as programs for the valorization of agents. c) What are the main procedural issues that may arise for national authorities, the Committee and the Working Group Committee and the Working Group when dealing with "enforced disappearances of short duration"?

One of the main issues that may arise as a challenge, both for national authorities and for the Committee and the Working Group, concerns the difficulty in formally recognizing, by the justice system, and by legislative and executive bodies, that "short-term enforced disappearance" is, in fact, a sub-category of disappearance, and not merely a time interval necessary for compliance with the procedures legally provided for in ordinary and extravagant criminal and procedural legislation.

It seems fundamental that the conceptualization of the phenomenon should make explicit the differentiating elements between "enforced disappearance of short duration" and seizure for the purpose of police investigation, precautionary measures, etc.

However, it is recognizable that the conceptual delimitation is not an easy job, requiring interlocution of the magnitude of this one in progress, requesting the collaboration of States and all institutions, popular social movements, organizations, people in the shared construction of this understanding so that it even works as a tool for recognition and awareness about the occurrence of short-term enforced disappearances.