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PRÉSENTATION DU 3ÈME RAPPORT DU PORTUGAL CONCERNANT LA CONVENTION DES NATIONS UNIES CONTRE LA TORTURE ET RÉPONSES DU PORTUGAL AU COMITÉ CONTRE LA TORTURE

*

PRESENTATION OF THE 3RD REPORT BY PORTUGAL ON THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ANSWERS BY THE PORTUGUESE DELEGATION TO THE COMMITTEE AGAINST TORTURE

Présentation du 3ème rapport du Portugal concernant la Convention des Nations Unies contre la torture [1]

Monsieur le Président
Madame et Messieurs les Membres du Comité contre la Torture

1. Introduction

1.1. Permettez-moi, tout d'abord, Monsieur le Président, Madame et Messieurs les Membres du Comité contre la torture, de vous présenter les sincères hommages du Gouvernement portugais, et de cette délégation très en particulier, pour le travail que vous accomplissez.

Votre souci, de lutte permanente contre la torture ou toute autre pratique semblable, permettez-moi de le souligner, est également celui des autorités portugaises. Vous pouvez vous en rendre aisément compte non seulement par la lecture du troisième rapport du Portugal concernant l'application de la

[1] La Déclaration initiale a été préparée par le chef de la délégation, Dr. Santos Pais, fondée sur les diverses contributions apportées, préalablement, par les autres membres de la délégation. Monsieur l'Ambassadeur Álvaro Mendonça e Moura a lu les points 1 et 2 de la Déclaration initiale, ce qui a fait que des rajustements de style se soient avérés nécessaires. Le reste de l'intervention orale, devant le Comité, compte tenu du temps disponible, a été faite seulement par Dr. Santos Pais. Au total, la lecture de la Déclaration initiale s'est étendue par 45 minutes environ. Le document a été, par la suite, délivré au Comité.

Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, que nous avons l'honneur de vous présenter à cette occasion, mais également, à travers cette Déclaration initiale et, par la suite, du moins je l'espère, à travers les éclaircissements et réponses aux éventuelles questions, que vous voudriez, plus tard, poser à notre délégation.

1.2. Notre sincère désir et notre préoccupation, dans ce domaine, à l'égal de la position toujours prise par les différentes délégations portugaises non seulement devant ce digne Comité, mais devant tous les autres organismes de contrôle, des Nations Unies, et aussi d'autres organisations internationales, tels que le Conseil de l'Europe, sera de vous assurer, tout au long de la discussion de ce 3.ème rapport du Portugal, de notre collaboration en vue de vous fournir tout renseignement nécessaire pour vous permettre d'évaluer les efforts entrepris, par le gouvernement portugais, dans ce domaine.

2. Constitution de la délégation portugaise

2.1. L'attention que le Gouvernement portugais porte aux travaux de votre Comité est également révélée par les soins qu'il a pris pour la préparation du présent rapport et la composition de cette délégation.

Permettez-moi, donc, de vous en esquisser les origines et de vous présenter brièvement, les membres respectifs.

2.2. Le présent rapport a été préparé par les soins du Bureau de Documentation et de Droit Comparé de l'Office du Procureur-Général de la République, comme les rapports précédents.

Le fait que ce soit un Bureau intégré dans un organe non directement dépendant du Gouvernement – le Ministère Public est, au Portugal, comme vous le savez, une magistrature indépendante de l'exécutif – aura permis, du moins nous osons l'espérer, l'exemption et l'éventuelle richesse de ce rapport. Vous voyez, donc, que le Gouvernement a essayé, dès le début, que vos travaux reposent sur le travail d'une entité extérieure à sa propre activité *stricto sensu*.

2.3. En ce qui concerne les Membres de la délégation portugaise permettez-moi, tout d'abord de vous présenter le chef de la délégation, M. Santos Pais, Procureur-Général Adjoint. Il est actuellement le Directeur du Bureau de Documentation et de Droit Comparé et travaille, à l'Office du Procureur-Général

de la République, dans le domaine des relations internationales de cet Office, particulièrement sur la protection des droits de l'homme.

M. Gomes Dias, Procureur-Général Adjoint, est Conseiller Juridique, depuis plusieurs années, auprès du Ministre de l'Administration Interne. Il accompagne, donc, depuis longtemps, toutes les réformes législatives préparées au sein de ce Ministère et leur ultérieure exécution.

Mme. Fátima Carvalho, de son côté, est magistrat du parquet et actuellement Sous-Inspecteur à l'Inspection Générale de l'Administration Interne, organe spécialement chargé de surveiller et d'enquêter les pratiques abusives d'autorité les plus graves de la part des différents corps policiers (Police de Sécurité Publique, Garde Nationale Républicaine).

Mme. Maria José Mattos travaille à la Direction Générale des Services Pénitenciers, en tant que Directeur des Services d'Exécution des Mesures Privatives de Liberté. Elle accompagne, d'ailleurs, comme M. Gomes Dias, la discussion, depuis le début, des problèmes concernant l'application de la Convention des Nations Unies contre la torture et celle du Conseil de l'Europe dans le même domaine.

Mme. Catarina Albuquerque et *M. Paulo Marrecas Ferreira*, finalement, travaillent dans le Bureau de Documentation et de Droit Comparé, dans le secteur des droits de l'homme. Ils sont, donc, chargés d'accompagner l'application interne des différentes Conventions internationales dans ce domaine et d'en assurer la diffusion non seulement auprès des magistrats (du siège et du parquet) et des autres opérateurs judiciaires, mais également auprès du public en général.

Permettez-moi, donc, M. le Président, Madame et Messieurs les Membres du Comité, de vous remercier de votre attention et de vous demander l'autorisation pour que M. Santos Pais continue la présentation de cette Déclaration.

3. Thèmes à aborder au long de cette Déclaration initiale

3.1. Le rapport que nous sommes chargés de vous présenter, couvre la période comprise entre le *31 mars 1996* et le *28 février 1998*.

Depuis février 1998, cependant, plusieurs changements sont survenus et dans la législation et dans la pratique portugaises. Je me permettrais, donc, de vous en esquisser les lignes générales, quitte à vous fournir de plus amples explications, le cas échéant, au cours de la discussion de ce rapport.

3.2. Je voudrais souligner, à cet effet, les domaines suivants:

- Les problèmes posés par Macau.
- La restructuration de la Police de Sécurité Publique.
- Les mécanismes actuellement existants dans le domaine de la prévention et répression de la torture et d'autres pratiques semblables.
- Les efforts entrepris dans le domaine des conditions de commissariats de police et des établissements pénitenciers en vue de les rendre plus en ligne avec les précédentes recommandations du Comité.
- Les efforts entrepris dans le domaine de la formation.
- Le travail déployé dans le domaine de l'information sur la Convention contre la torture, le travail de votre Comité et d'autres thèmes concernant la protection des droits de l'homme.
- Les nouveaux changements survenus en matière d'asile, de réfugiés et de protection d'étrangers.

Tout ce travail a eu comme inspiration directe une profonde réflexion, de la part des autorités portugaises, sur les recommandations de votre Comité, ainsi que d'autres organismes internationaux de contrôle, tel que le Comité européen pour la prévention de la torture.

4. Macau

Le Comité a précédemment souligné son souci de voir la Convention contre la torture appliquée à Macau, au cours de l'administration portugaise de ce territoire, dont le terme a eu lieu le 20 décembre dernier.

C'est, de ce fait, avec un grand plaisir, que je vous annonce que, après de longues négociations avec les autorités chinoises, le Portugal a réussi à assurer l'application à Macau de cette Convention, survenue le mois de juillet 1999, en plus d'une centaine d'autres Conventions internationales, dont spécifiquement plus d'une dizaine sur les droits de l'homme (les deux Pactes, la Convention sur les droits de l'enfant, Conventions sur l'élimination de toute forme de discrimination raciale et contre les femmes, etc.).

À la fin de son administration du Territoire, le Portugal laisse, donc, derrière lui, un éventail de dispositions nationales et internationales en matière de protection des droits de l'homme qui trouvera difficilement son pareil dans la région de l'Asie Pacifique.

5. Restructuration de la Police de Sécurité Publique

5.1. Les activités des corps de police restant, et pour le Comité, et pour les autorités portugaises, l'un des problèmes les plus délicats à résoudre dans le domaine de la Convention, nul doute que ce soit là l'un des thèmes qui suscita une plus ample préoccupation de la part du Gouvernement portugais.

Une profonde restructuration de la Police de Sécurité Publique a, donc, eu lieu dont je permettrais de vous esquisser, brièvement, les lignes maîtresses.

5.2. La loi 5/99, du 27 janvier, est venu remplacer le décret-loi 321/94, du 27 janvier. Elle porte la nouvelle règlementation concernant *l'organisation et fonctionnement de la Police de Sécurité Publique.*

Suite à la dernière révision constitutionnelle – article 164 *-u)* de la Constitution – les nouvelles dispositions ont été approuvées par l'Assemblée de la République et non pas, comme précédemment par le gouvernement, ce qui montre la préoccupation de l'État portugais envers les forces de sécurité.

5.3. Cette loi poursuit trois objectifs essentiels:

- Souligner la matrice civile dans la définition institutionnelle de la Police de Sécurité Publique, celle-ci ayant la mission fondamentale de défendre la légalité démocratique, de garantir la sécurité interne et d'assurer les droits et libertés des citoyens dans le respect de la Constitution et de la loi;
- inscrire, dans la loi statutaire de la PSP, les principes constitutionnels de la légalité, de la nécéssité et de la prohibition de l'excès en matière de mesures de police;
- perfectionner l'organisation interne du corps de la PSP à travers tout le territoire national, en vue d'assurer un plus profond encadrement des membres respectifs, ainsi que de leur rendre une plus ample proximité vis-à-vis la population qu'ils sont sensés défendre.

5.4. Plusieurs projets concernant cette recherche de proximité ont été, entretemps, mis en chantier, tels que les projets École sûre, Personnes agées en sécurité, Innover (appui à la victime).

5.5. Un autre texte est venu réglementer le Statut des membres de la PSP: le décret-loi 511/99, du 24 novembre.

6. Mécanismes de prévention et répression de la torture et autres pratiques semblables

6.1. L'une des préoccupations toujours exprimées par le digne Comité, exprimée à nouveau lors de la discussion du précédent rapport, concerne l'éventuel "fossé constaté entre la loi et son application". À cet effet, le Comité a recommandé au Portugal "d'apporter une plus grande attention au traitement des dossiers concernant les violences reprochées aux agents publics, afin d'initier des enquêtes et le cas avéré, d'appliquer des sanctions adéquates".

6.2. Un grand effort a, en conséquence, été entrepris en ce sens. Je me permettrais de vous indiquer, en complément des indications déjà fournies dans le rapport, les renseignements suivants.

En ce qui concerne la Police de Sécurité Publique et la Garde Nationale Républicaine, celles-ci disposent de Services d'Inspection spécifiques, chargés d'entamer des procédures disciplinaires, le cas échéant.

En dehors de ces Services, l'Inspection Générale de l'Administration Interne, au sommet, poursuit, comme indiqué dans le rapport, une fonction de contrôle de la légalité des activités des forces de police (§ 49 du rapport) et entame, également, des poursuites disciplinaires en cas de besoin. Même si elle appartient au Ministère de l'Administration Interne, cette Inspection Générale est actuellement présidée par un Procureur-Général Adjoint gardant, donc, toute son indépendance technique et fonctionnelle vis-à-vis du Ministre.

L'Inspection-Générale, vous voudriez bien le rappeler, effectue des visites régulières, aussi bien que des actions de surveillance sans pré-avis, où elle vérifie les conditions de fonctionnement général et, en particulier, les conditions de garde-à-vue dans les commissariats de police. 700 locaux ont, de ce fait, été visités et 117 fermés, faute de conditions adéquates de fonctionnement. En plus, il y une obligation de participation au Ministère Public, à des fins de poursuite criminelle, de toute action d'abus d'autorité, décelée par cette Inspection, configurant un crime.

6.3. En ce qui concerne la Police Judiciaire, celle-ci est placée sous la dependance organique du Ministre de la Justice et fonctionnelle du Ministère Public, qui coordonne son activité en matière de procédure pénale.

Du moins tous les trois ans, tous les services de cette Police font l'objet d'inspection par des Inspecteurs du Ministère Public, directement dépendants du Procureur-Général de la République. Celui-ci peut, aussi, déterminer des inspections extraordinaires, et il l'a déjà fait par le passé, chaque fois qu'il le juge nécessaire.

6.4. Les Services Pénitenciers, de leur côté, placés également sous la direction du Ministre de la Justice, disposent d'un Service propre d'Inspection. Divisés en trois équipes, de façon à couvrir tout le territoire national, chaque équipe est coordonné par un magistrat du parquet.

Le Ministère de la Justice prépare, cependant, une restructuration de sa Loi Organique qui prévoit la prochaine création d'une Inspection Générale des Services la Justice, chargée de surveiller l'activité de plusieurs services du Ministère, dont la Direction-Générale des Services Pénitenciers.

6.5. En vue de permettre un suivi permanent de procédures criminelles engagées contre des agents d'autorité, le Procureur-Général de la République a déterminé, en 1993, suite à une lettre circulaire destinée à tous les magistrats du parquet déterminant la communication, à l'Office du Procureur-Général, de toute procédure entamée contre ces agents, la création d'une base de données permettant de faire le point sur la démarche de toutes ces procédures. Ceci permet, notamment d'avoir des statistiques sur l'amplitude de ce phénomène et sa variation au long des années.

En plus, depuis 1998, ces communications sont également transmises à la Direction-Générale des Services Pénitenciers et à l'Inspection Générale de l'Administration Interne, chaque fois qu'il s'agit d'agents soumis à leur surveillance et contrôle, pour leur permettre d'engager les nécessaires poursuites disciplinaires vis-à-vis des agents concernés.

6.6. En dehors de ces mesures, le Procureur-Général a préparé la création d'un Département Central d'Investigation et Action Pénale, dans le dernier Statut du Ministère Public (approuvé par la loi 60/98, du 27 août), intégré dans son Office, spécialement chargé de coordonner la direction de l'investigation des crimes contre la paix et l'humanité, dans lesquels sont inclus le crime de torture.

Cette coordination s'applique aux organes de police criminelle et aux départements du parquet, concernés par l'investigation criminelle, des sièges des districts judiciaires.

Toutes ces mesures rendent bien compte de la préoccupation, du moins des autorités judiciaires directement concernées par les poursuites criminelles, de poursuivre en justice toute communication concernant des actes pouvant tomber sous le champ d'application de la Convention de la torture. De ce fait, tous les actes pouvant tomber dans le domaine de la Convention sont toujours poursuivis, soit par le moyen de procédures disciplinaires, soit judiciaires, soit les deux.

7. Utilisation d'armes à feu par les différents corps policiers

7.1. L'utilisation d'armes à feu, du fait des problèmes soulevés lors de la discussion des précédents rapports du Portugal, a fait, tout récemment, l'objet de réglementation spécifique.

Le décret-loi 457/99, du 5 septembre, est venu, en effet, uniformiser les règles concernant cette utilisation par tous les corps policiers. Respectant les principes de la nécessité absolue et de la proportionnalité, l'usage d'armes à feu ne peut qu'avoir lieu en situation extrême et à défaut d'autres moyens plus efficaces.

7.2. L'on distingue l'utilisation d'armes contre des choses et contre les personnes. Vis-à-vis de celles-ci, l'utilisation ne peut avoir lieu que dans le seul but de protéger la vie humaine et dans les trois situations prévues dans les Principes des Nations Unies concernant l'utilisation de la force et des armes à feu, à savoir:

- Pour faire face à une agression actuelle et illicite dirigée contre l'agent ou des tiers, s'il y a un danger imminent de mort ou lésion grave;
- pour prévenir un crime particulièrement grave menaçant des vies humaines;
- pour détenir la personne à la base de cette menace lorsque celle-ci résiste à l'autorité ou afin d'empêcher sa fuite.

7.3. L'usage d'armes à feu est, en plus, assujetti au devoir d'avertissement préalable, au devoir de secours, à l'obligation de préparer un rapport et à la communication au Ministère Public.

Si la mort ou une blessure grave s'ensuit, l'Inspection Générale de l'Administration Interne doit être avertie et ouvrir immédiatement une enquête.

8. Conditions de détention dans des établissements de police

8.1. L'une des préoccupations du Comité étant, dans les précédentes discussions de rapports concernant le Portugal, les conditions de détention dans des établissements de police, notre délégation voudrait également vous faire part des dispositions prises dans ce domaine, par un Arrêt Ministériel: 8684/99, du 20 avril.

Il s'agit d'un Règlement sur les conditions matérielles de détention dans des établissements de police, applicable à tous les lieus de détention des forces

de sécurité et à toute personne privée de liberté pour une période n'excédant pas les 48 heures, y inclues celles traduites dans ces établissements à des fins d'identification.

8.2. Ce règlement contient des dispositions spécifiques sur les cellules (aires minimales, localisation, matériaux de construction, illumination, installations sanitaires, hygiène et confort) et impose l'aménagement progressif des cellules existantes. D'ailleurs 140 locaux de détention avaient déjà été fermés pour manque de conditions adéquates.

8.3. En plus, le nouveau règlement établit les procédures à adopter lors d'une détention: utilisation d'un livre pour l'enregistrement de la détention, utilisation d'un bulletin du détenu, indication de l'heure et motif de la détention, identité du détenu et de l'agent policier ayant procédé à celle-ci, autres circonstances d'intérêt (contacts avec des personnes de la famille, avocat, médecin, etc.).

8.4. Le nouveau règlement prévoit le droit pour le détenu de contacter des personnes de sa famille et son avocat, pouvant utiliser le téléphone à cet effet.

Le contact avec son avocat est fait en privé.

Le détenu peut également demander d'être examiné par un médecin de sa confiance et, en cas de blessures, il doit être conduit à l'hôpital.

8.5. Tous les lieux de détention sont assujettis à des visites d'inspection, sans avis préalable, par des Inspecteurs de l'IGAI, toute circonstance de mort du détenu, de violence ou de traitements inhumains ou dégradants contre celui-ci devant être immédiatement communiquée à cette Inspection ainsi qu'au parquet.

9. Conditions de détention dans des établissements pénitenciers

9.1. L'un des sujets de préoccupation du Comité étant également, dans les précédentes discussions de rapports concernant le Portugal, les conditions de détention dans des établissements pénitenciers, notre délégation voudrait également vous faire part des dispositions prises dans ce domaine.

Je voudrais, cependant, vous faire part du fait que les services pénitenciers ont fait l'objet d'inspection, à deux reprises, par le Service du Médiateur (Ombudsman) (1996, 1999). Dans la première, près de 200 recommandations ont été transmises au Ministre de la Justice.

Dans la seconde, le Médiateur souligne l'avancement survenu en plusieurs domaines.

9.3. Le Comité européen pour la prévention de la torture a, lui, visité le Portugal à 4 reprises (1992, 1995, une visite ad hoc en 1996, 1999), comme vous le savez, la dernière ayant eu lieu du 19 au 30 avril 1999. Il a également constaté de nettes différences en plusieurs domaines.

Permettez-moi, donc, d'en donner un petit aperçu, à caractère général, quitte à vous donner, le cas échéant, des informations plus amples concernant la situation de quelques établissements ayant mérité une attention toute particulière de la part du CPT (notamment l'établissement de Porto).

9.4. Suite à l'approbation du Programme d'Action pour le Système pénitentiaire approuvé en 1996, mentionné dans le rapport et qui se poursuivra à l'avenir, l'on peut énumérer les changements suivants:

- Diminution du taux de surpeuplement de 57%, en 1996, à 14% aujourd'hui, du fait notamment de la création de nouveaux établissements et de l'aménagement d'établissements existants (et également d'un pardon survenu en 1999);
- amélioration des conditions matérielles de détention – installation de sanitaires dans les cellules, salles de gymnastique, amélioration de cuisines, parloirs et autres espaces communs;
- renforcement des services de santé – du fait de l'ampleur des problèmes liés à la toxicomanie, installation "d'unités sans drogues" (en 5 prisons); création, par la Résolution du Conseil des Ministres 46/99, du 26 mai, d'une "Stratégie nationale de lutte contre la drogue", laquelle considère comme prioritaire l'intervention en milieu carcéral (un "Programme spécial" a été conçu à cet effet); construction de nouvelles unités de santé; mise à la disposition des détenus de programmes de méthadonne, de vaccination et d'autres visant la réduction de risques; adoption, par la loi 170/99, du 18 septembre, des mesures visant à combattre la propagation des maladies infecto-contagieuses dans les prisons;
- amélioration du traitement pénitentiaire – renforcement de l'enseignement, de la formation professionnelle, des activités culturelles et sportives (plus d'une centaine de protocoles ont été signés avec plusieurs entités à cet effet, notamment en vue de favoriser le placement laboral et la formation professionnelle à l'extérieur des détenus en régime ouvert);

- renforcement des liens familiaux – création, en 1999, dans deux établissements pour peines de longue durée, de la possibilité de visites intimes.

9.5. Finalement, en matière d'évaluation et de contrôle des conditions de détention, les Services Pénitenciers font l'objet de contrôle par plusieurs entités extérieures, dont notamment:

- Le tribunal pour l'exécution des peines (visites mensuelles à chaque établissement, pour écouter, le cas échéant, des plaintes de détenus en toute confidentialité);
- le Médiateur;
- le Comité européen pour la prévention de la torture;
- la Cour européenne des droits de l'homme.

10. Formation des corps de police

10.1. Cette Déclaration initiale ne serait pas complète sans une référence, quoique brève, au problème de la formation des agents de police.

La Loi 5/99, du 27 janvier, concernant l'organisation et le fonctionnement de la Police de Sécurité Publique, a établi un nouveau cadre organique pour les établissements de formation de ses agents:

- L'Institut Supérieur de Sciences Policières et de Sécurité Interne (pour la formation des officiers de police);
- l'École Pratique de Police (agents de police et sous-chefs).

10.2. Un Conseil Consultatif pour la Formation des Forces et Services de Sécurité, entretemps créé par la Résolution du Conseil des Ministres 78/98, du 7 juin, s'est vu attribuer des fonctions d'étude, de coordination et de planification des cours et des actions de formation concernant les membres de ces forces.

L'on aimerait souligner la participation, dans ce Conseil, de personnalités de la société civile et surtout des milieux universitaires.

10.3. Un Programme de formation continue, initié en 1997, se poursuit toujours. Préparé en collaboration avec l'Université Ouverte et destiné à couvrir tous les éléments en fonctions de la Police de Sécurité Publique et de la Garde Nationale Républicaine, ce Programme couvre tous les domaines d'actuation

de ces forces (droits fondamentaux, éthique professionnelle, milieux sociaux environnants, action de police de proximité, etc.).

Ce Programme inclus également la formation de formateurs (200 de la PSP, 700 da GNR) – 21 séances ont été menées à ce jour.

10.4. Le Programme a permis d'achever 8 vidéos de formation et leurs manuels d'utilisation respectifs, couvrant des domaines tels que les droits fondamentaux, l'éthique professionnelle, la protection et l'appui à la victime, les immigrants et les minorités, la toxicomanie, etc. D'autres vidéos sont en préparation.

Tous ces vidéos ont déjà été distribués à travers tout le territoire national, permettant d'atteindre tous les éléments de ces forces (46.000). À la fin de chaque module, il y a lieu a une évaluation, moyennant une épreuve écrite.

11. Information sur la Convention contre la torture

11.1. En ce qui concerne la diffusion au Portugal d'informations sur la Convention contre la torture et sur le travail du Comité chargé de contrôler son application respective, il faut signaler que la Commission portugaise pour le Décennie des Nations Unies pour l'Education en matière de droits de l'homme a entrepris plusieurs activités et initiatives dans ce domaine.

11.2. Tout d'abord, le site du Bureau de Documentation et Droit Comparé, dans lequel est intégré le site officiel de la Commission nationale, contient une section sur la protection internationale des droits de l'homme, dont une sous-section est dédiée à la Convention contre la torture et au travail de ce Comité. Elle comprend notamment une explication des principales dispositions de la Convention (y compris du mécanisme de présentation de communications par des particuliers) et les compétences, fonctionnement et composition du Comité.

On peut également y trouver le texte des trois rapports présentés par le Portugal sur l'application de la CCT, les procès verbaux des réunions au cours desquelles les rapports ont été discutés et finalement les Observations Finales que le Comité a émises sur le Portugal.

11.3. Deuxièmement, il faut mentionner l'importance de la publication juridique "Bulletin de Droit Comparé", publiée sur une base semestrielle également par le Bureau de Droit Comparé.

Cette revue de caractère juridique est distribuée gratuitement à tous les magistrats du pays et est abonnée par un très grand nombre d'avocats et d'autres

professionnels du droit. Ce Bulletin a publié, au début de 1999, le texte du troisième rapport du Portugal sur l'application de la CCT, les procès verbaux des réunions au cours desquelles le rapport a été discuté et finalement les Observations Finales que le Comité a émises sur le Portugal. Le Bulletin a également publié un article sur la Convention et sur le fonctionnement et les compétences du Comité.

11.4. Finalement, l'on aimerai faire référence à quelques projets pour l'avenir. En effet, la Commission Nationale pour le Décennie des Nations Unies pour l'Education en matière de droits de l'homme est en train de traduire, vers le portugais, la Série "Fiches d'Information" des Nations Unies (parmi laquelle se trouve une brochure sur le Comité), aussi bien que de la Série Professionnelle des Nations Unies, dont le nº 2 est dédié aux "Droits de l'Homme et application des lois. Manuel de formation à l'intention des services de police".

Ces ouvrages seront publiées par la Commission en vue de la distribution respective parmi les groupes professionnels les plus directement concernés par ces matières, écoles, universités, autres établissements d'enseignement, bibliothèques publiques, parmi d'autres.

12. Etrangers, asile et réfugiés

12.1. Un nouveau texte est venu réglementer le régime d'entrée, séjour, sortie et expulsion d'étrangers au Portugal.

Ayant pour principal objectif celui de donner suite à tous les engagements internationaux de l'État portugais, soit de caractère universel, soit régional (Union Européenne), le nouveau texte a également pris en compte les décisions de la Cour Européenne des Droits de l'Homme, de Strasbourg, notamment en ce qui concerne les limites à respecter lors de la concrétisation de la mesure d'expulsion d'étrangers.

12.2. Comme lignes maîtresses du nouveau texte, l'on pourrait indiquer:

- Un régime différencié d'octroi de visas, en vue de garantir une plus grande équité, justice et transparence dans ce domaine;
- des règles claires sur le regroupement familial;
- un régime exceptionnel d'autorisation de résidence pour faire face à des situations graves, notamment pour des raisons humanitaires;
- un mécanisme d'appui au retour d'immigrants dans leurs pays d'origine;

– un régime de sanctions vis-à-vis les responsables de l'aide ou l'exploitation d'immigration clandestine [2].

(12.3. Pour ce qui a trait au nouveau régime d'asile, approuvé par la loi 15/98, du 26 mars, il faudrait faire mention de quelques détails pouvant présenter de l'intérêt pour ce Comité.

Lorsque la demande est présentée devant les postes de frontière, notamment ports ou aéroports, le requérant attend la décision dans la zone internationale ou en centre d'installation temporaire (un centre a été créé à l'aéroport de Lisboa à cet effet).

12.4. En matière d'expulsion d'étrangers, celle-ci peut avoir lieu en trois circonstances.

Lorsque la demande d'asile est manifestement infondée, l'étranger reste dans la zone internationale en attendant son renvoi. Si celui-ci ne peut avoir lieu dans les 48 heures, le requérant sera informé de ses droits et le tribunal compétent notifié de la situation afin de déterminer si celui--là restera en zone internationale ou dans un centre d'accueil.

En cas de procédure judiciaire d'expulsion, le juge peut déterminer, comme mesure de contrainte, le placement dans un centre d'accueil temporaire.

Finalement, le juge peut ordonner le même genre de placement vis-à--vis de l'étranger ayant désobéi ou résisté à l'ordre d'expulsion.

12.5. La loi 34/94, du 14 septembre, est venu créer les centres d'accueil temporaire. Un seul, du fait des frais encourus pour mettre en place ce genre de centres, a été créé à ce jour.)

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[2] Les points 12.3 à 12.5 inclus, qui se trouvent par la suite, n'ont pas été lus devant le Comité, par souci de ne pas trop allonger la Déclaration initiale de la délégation portugaise.

Monsieur le Président

Madame et Messieurs les Membres du Comité

Il est bien temps de conclure, même si d'autres changements sont entretemps survenus, tels qu'un profond remaniement de la loi-cadre de coopération en matière pénale, approuvée par la loi 144/99, du 31 août et la loi de santé mentale, approuvée par la loi 36/98, du 24 juillet.

Nous sommes bien conscients du chemin parcouru jusqu'ici, depuis 1989, notamment suite à vos conseils et recommandations.

Toutefois, devant cette voie de la protection des droits de l'homme où, nous tous, nous sommes engagés, devant cette tâche aussi difficile, aussi épineuse, où l'on connaît, parfois, le début mais pas forcément la fin, devant ce mystère inaltérable et insoluble de la personne humaine, avec ses désirs, ses émotions et, surtout, ses actions parfois tellement incompréhensibles, nous serons toujours loin du but.

Et nous continuerons, donc, à venir ici, devant ce Comité, demain, après-demain et, je l'espère, pour les années à venir, pour vous faire part de nos petites victoires et aussi de nos grandes défaites, pour vous faire partager de nos petites joies et probablement de nos grandes détresses quittes à un jour, si nous avons la chance, pouvoir dire: Mon Dieu, merci d'avoir pu y donner mon humble contribution.

Je vous remercie de votre attention.

Genève, le 3 mai 2000

Answers by the Portuguese delegation to the Committee Against Torture [1]

4th of May 2000, 3 p.m.

Mr. Chairman
Distinguished Members of the Committee

Introduction

At the outset of my intervention, let me thank you all, on behalf of our delegation, for the appreciation you made of the Portuguese report, as well as of our initial Statement, and for the 27 questions you have so kindly handed over to us. This reflects thoroughly, on our view, the care you, as a treaty monitoring body, put to the accomplishment of your work.

We have tried, to the most of our ability, to answer all these questions. If, however, by any chance, you feel that any of those questions remains

[1] Account being taken of the answers jointly prepared by the different members of the delegation, and of the scarcity of time available for their presentation (around an hour), the reading was done by the chief of the delegation instead of being entrusted to the members of the delegation as initially envisaged. On the other hand, there was no possibility, due to time restrictions, of reading the whole prepared text. The parts which were not read for those reasons are indicated in brackets and in italics. Reading the answers given by the Portuguese delegation lasted 1 hour and 15 minutes. The text was handed to the Committee in the end.

unanswered, I would kindly ask you, please, to bring this to our attention, so we could be able to inform you accurately on all the questions you have formulted.

Requests formulated by the distinguished Chairperson – Professor Burns (Canada)

1. Culture deficiencies of the police. The relationship between the police and citizens

1.1. You have mentioned, Mr. Chairman, at the outset of your appreciation of the Portuguese report, the general impression of the Committee *vis-à-vis* the deficiencies of culture inside the police forces, as opposed to the concerns of the Portuguese authorities in preparing new and more protective legislation.

I would like briefly to comment on your observation.

(*Needless to say, and this is clearly reflected by the evolution Portugal has gone through in these last 26 years after the democratic revolution of 1974, the general culture inside the police forces were, in not so distant times, generally based on the assumption of the use of force to fulfil their duties. This is precisely one of the reasons explaining the utmost care the Portuguese State has been granting all the issues concerning the restructuring of the Police forces and, of course, their continuous monitoring and training*).

1.2. This culture, as you may well understand, cannot been changed ovemight.

I would like, nevertheless, to elaborate a little more on the issues at hand. And I will begin with the concern to create new and more modem Organisations Acts of the Police forces, namely of:

- The Judicial Police, now acting in the criminal procedure under the supervision of the public prosecution service;
- the Public Security Police, strengthening its civil matrix and gradually abolishing its military connections, namely in the higher ranks of the hierarchy (the first Chief Commander of this Police, not belonging to the military, has just recently been appointed);
- the National Republican Guard.

1.3. I would like further to underline the care used in recruiting the new members of all these forces, increasing the requirements for admission (professional qualifications), making use of new techniques to this effect (psychological tests, for instance) and allowing for initial stages of adequate training and education, with the participation of members of the civil society (university professors, members of NGOs, etc.).

The training for all these forces includes, nowadays, extensive references to human rights issues and perspectives, monitoring procedures of all their activity, use of firearms, supervising agencies and, last but not the least, disciplinary and criminal responsibility in cases of abuse of authority.

As mentioned in the initial Statement of our delegation, the training programs currently in use have already covered all the members of the police forces mentioned before (over 46.000 persons in the whole), in the last 3 years alone, which clearly shows the concern of the Portuguese authorities on this subject.

(*1.4. In spite of all these efforts, however, there are still cases where inappropriate behavior by members of the police forces still occurs. In these cases, as we shall explain in more detail later on, there have to be disciplinary procedures, criminal charges and, whenever appropriate, criminal sanctions.*

We hope, nevertheless, as time goes by, with the entry of several new elements in the police forces (in the period 1996-9 alone, around 8.000), culture will inevitably change in the sense of the concerns expressed by this Committee).

1.5. As far as the relationship between police and citizens is concerned – citizens meaning, in this respect, not only Portuguese nationals but, of course, all people living in, or visiting Portugal – there has been a thorough concern in bringing police behavior under this main objective.

(*I have referred, in our initial Statement, to the concern for a proximity policy, underlining three specific projects: Safe school, Elderly people in security, Innovate.*

I would now like to make a specific reference to these programs and to the Integrated Program of Proximity Policing).

The idea behind the new Integrated Program of Proximity Policing has, as its main targets, to allow for a greater police visibility, greater insertion in the life

of the community, better knowledge and dialog with citizens and other entities, namely municipalities.

1.6. Several activities have been carried out in this respect, namely the Safe School Program, having as objective greater security inside and around schools, as well as along itineraries normally followed by children on their way to school.

This program involves more than 1.000 police agents, 350 vehicles and covers around 6.000 schools. Several specific actions of contact and information are carried out by the police agents involved vis-à-vis children and young people, namely on safety behaviors.

1.7. Another program, called Elderly People in Security, aims at providing security and tranquillity to elderly people, helping to prevent several risk situations. Several patrolling activities around public places, normally used by elderly people, are intensified, as well as created a network of direct and immediate contacts between these persons and the police. When necessary, free installation of a telephone in the residences of isolated elderly people is provided, with direct connection with the nearest police-station. Around 1.000 telephone sets are currently being installed under this program.

(*This program also comprises establishing co-operation protocols with several entities (institutions for social solidarity) carrying out supporting programs for the elderly*).

1.8. Finally, the Program "Innovate" is directly concerned with the contacts of the police with the general public, namely crime victims. Several new procedures have been implemented, towards specific categories of victims (victims of domestic violence, for instance), reception and further referral to the competent entities.

In this regard, a Protocol has been established by the Ministry for Internal Affairs with the Portuguese Association for the Support of Victims, as explained later on.

All these actions aim at greater vicinity between police and the general public in order to allow for better mutual understanding.

2. Definition of Torture – Mr. Burns

2.1. If one compares the text of the definition of torture set forth in article 243 of the Portuguese Penal Code, with article 1 of CAT, one concludes that in the transposition of the convention definitions into the Portuguese

legislation, only the expressions "for such purposes" and "or for any reason based on discrimination of any kind" were not included.

2.2. In relation to this aspect, however one must bear in mind the principles of legality and typification (that is, of strict adherence to the relevant elements contained in the pertinent provisions of the Penal Code), which are expressly consecrated in article 30 of the Portuguese Constitution and in article 1 of the Penal Code. According to such principles, there is no possibility for the inclusion of expressions with indeterminate or unascertainable meaning in the definition of the elements which constitute a criminal offence.

2.3. It is equally important to recall that the incriminatory dispositions of article 244 of the Penal Code for the acts of torture have frequently common elements with other incriminatory norms of the same Code. In these cases, the Court must determine which norms should prevail, normally the one imposing a more serious punishment, as we will explain in our answer to the next question.

We will address later the problem of the eventual complaint of the victim in order to institute proceedings for common assault.

3. Procès engagés en raison de la pratique d'actes de torture – Mr. Burns

3.1. Dans les trois dernières années, un seul cas a été autonomement qualifié comme de "torture". Il s'agit d'un cas concernant la PSP (Police de Sécurité Publique) de Sintra (mentionné dans des rapports d'Amnesty International) où l'agent a appliqué des électrochocs à un détenu. Cet agent a déjà été expulsé de la police suite à une procédure disciplinaire et le procès pénal suit, en ce moment, son cours.

3.2. Un autre cas est survenu dans lequel étaient aussi présents des éléments pouvant intégrer le crime de torture (en 1996 avec un élément de la GNR de Sacavém). Toutefois, du fait que, dans ce cas, le décès de la victime est survenu, l'agent a été accusée et puni pour homicide, crime de plus grande gravité et, donc, punie d'une peine plus grave (emprisonnement de 12 à 25 ans) que celle qui correspond au crime de torture (puni avec peine d'emprisonnement de 1 à 5 ans).

3.3. Le principe de la consomption, selon lequel, lorsque les mêmes faits intègrent simultanément deux types de crimes, la punition pour le crime le plus grave absorbe celle du crime le moins grave, principe fondamental du Droit Pénal portugais, s'applique, donc, ici.

4. Évolution des cas mentionnés au paragraphe 51 du rapport portugais – Mr. Burns

4.1. Les cas mentionnés au paragraphe 51 du 3ème rapport du Portugal concernent des offenses corporelles commises par des agents de la PSP, de la GNR, et qui, dans la période couverte des années 1996 à 1998, sont parvenues à la connaissance de l'IGAI.

4.2. En ce qui concerne l'évolution et le résultat de ces cas, il faut souligner que l'IGAI ne procède à une enquête que dans les cas de plus grande gravité (décès, torture, offenses corporelles graves, abus d'autorité). Les autres cas sont remis aux services internes respectifs des forces de police, qui engagent l'enquête, bien que l'IGAI maintienne un accompagnement de leur évolution et de leur résultat afin de garantir que tous les cas sont vérifiés et dûment punis.

4.3. En ce qui concerne les cas les plus graves, où l'IGAI a instauré et conduit les enquêtes, il faut mentionner 23 cas concernant l'année 1997 (dont 1 décès, 6 offenses corporelles, 3 cas d'abus d'autorité); 32 cas en 1998 (dont 4 décès, 4 suicides, 11 offenses corporelles, 2 blessures avec des armes à feu, 1 violation des droits fondamentaux); 34 cas en 1999 (dont 4 décès, 14 offenses corporelles, 5 blessures avec des armes à feu, 1 cas d'abus d'autorité, 1 cas de violation de droits fondamentaux).

4.4. Dans les enquêtes instaurées en 1997 (23) par l'IGAI, la responsabilité des agents a été prouvée dans 8 cas et des peines ont été proposées qui comprenaient la répréhension (1), la peine d'amende (3), la suspension de fonctions (3), la prison disciplinaire (3, pour des agents de la GNR), la démission (1).

4.5. Dans les enquêtes instaurées en 1998 (32) la responsabilité des agents a été prouvée dans 8 cas et les peines suivantes ont été proposées: répréhension (3); inactivité (1); suspension de fonctions (4).

4.6. Pour l'année 1999 (34) la responsabilité a été prouvée dans 13 cas, lesquels ont déjà donné lieu à des propositions de suspension de fonctions (4), répréhension (1), amende (5), prison disciplinaire (1);

5. Rapport d'Amnesty International – Mr. Burns

5.1. (Pages 5 à 9) – décès pendant ou après la détention par la police

5.1.1. Le rapport d'Amnesty International mentionne que, entre 1996 et 1999, il y a eu lieu à 14 cas de décès dans ces conditions.

Tous ces cas ont fait l'objet d'investigation. Néanmoins, la responsabilité des agents, en ce qui concerne la mort des victimes, n'a pas été retenue que dans quelques unes de ces affaires.

5.1.2. En effet, dans un seul des cas, on a pu constater que le décès de l'un des détenus a été volontairement causée par un agent (cas ayant eu lieu en 1996, à Sacavém). Cet agent, ainsi que deux autres qui ont collaboré à l'occultation du crime ont fait l'objet d'une mesure immédiate d'expulsion de la GNR. Ils ont été également condamnés à des peines effectives de prison.

5.1.3. En ce qui concerne les autres cas investigués – 13 – les résultats ont été les suivants: en deux d'entre eux, malgré les démarches entreprises, il n'a pas été démontré que le décès ait été déterminé par l'action des agents ayant procédé à la détention.

Il s'agit de l'affaire Olívio Almada, dans laquelle seule la détention illégale a été prouvée, les deux agents ayant été punis de ce fait, et de l'affaire Victor Santos où tout semble indiquer que celui-ci se soit suicidé et que les agents n'ont eu aucune responsabilité dans cette décision.

5.1.4. Les autres 11 cas ont eu lieu lors du déroulement d'opérations de police dans le cadre de la lutte contre le crime ou dans le cadre de la réalisation de détentions des auteurs des crimes. Les victimes ont été atteintes par des coups de feu.

Dans 6 de ces cas – Carlos Araújo, Paulo Jorge, Manuel Magalhães Silva et trois autres non mentionnés dans le rapport, l'on a conclu que l'usage de l'arme à feu par les agents a été excessif ou injustifié et des peines disciplinaires de suspension de fonctions ont été proposées. Dans les procédures criminelles engagées et ayant terminé par une condamnation, les agents ont été punis du chef d'homicide négligent, passible d'une peine de prison allant jusqu'à 5 ans.

Dans deux autres cas (Fernando Azevedo et un autre non mentionné dans le rapport) l'usage de l'arme a été considéré légitime et les agents n'ont pas été punis, ayant agi en légitime défense.

5.1.5. Des cas plus récents, qui ont eu lieu à Porto, déjà en 2000, se trouvent encore dans la phase d'accusation ou d'investigation. Dans le premier, les agents ont cependant été déjà détenus préventivement. Il s'est agi d'un cas d'intervention dans le cadre d'un désordre public.

5.2. (Pages 9-13) – mauvais traitements

5.2.1. Des investigations disciplinaires ou criminelles sont en cours en ce qui concerne les affaires Marco Fernandes, Juvenal Ova et Mário Rocha. Le

premier cas, du fait de sa gravité, est accompagné par l'IGAI, même si l'enquête est menée par le Commandement régional de la PSP de Madeira.

5.2.2. En ce qui concerne le cas des agents de la GNR d'Anadia, une enquête a été engagée par l'IGAI et on a recueilli des indices ayant justifié la proposition d'instaurer huit procès disciplinaires. Des communications ont eu, entretemps, lieu aux fins de l'instauration des correspondantes procédures criminelles.

5.2.3. Des autres cas mentionnés, l'un d'eux, l'affaire Zurita, n'a pas fait l'objet de recherches vu que l'éventuelle victime n'a pas voulu présenter plainte l'affaire ayant, donc, été considérée close.

5.2.4. Dans un autre cas – les 2 frères Mecha – investigué par l'IGAI, il n'a pas été possible de conclure par la responsabilité des agents. Il s'agit, en effet, d'un cas de désordre public, où l'usage de la force a été considéré légitime, six agents ayant été même blessés à cette occasion.

5.2.5. Dans le cas de la manifestation de Lisbonne – dont les victimes étaient Pedro Silva et Pedro Sousa – les deux situations dénoncées se sont confirmées mais, c'est seulement dans l'une de ces affaires – la première – qu'il a été possible d'identifier l'auteur, entretemps puni.

5.3. Pages 13-15 – Détentions illégales.

5.3.1. Cette délégation ne partage pas l'avis selon lequel les agents de police ne remplissent pas habituellement les formulaires de détention. Tout bien au contraire, toutes les actions de fiscalisation engagées, notamment à travers des visites sans avis préalable conduites par l'IGAI, permettent de conclure différemment.

5.3.2. Les cas mentionnés – Olívio Almada et l'affaire concernant les éléments d'Anadia – configurent, en fait, des cas de détention illégale, mais ils sont tout à fait exceptionnels.

5.3.3. Quant au cas Bruno Maurício, les enquêtes menées par les services inspectifs de la Police et par le tribunal n'ont pas permis de conclure par la véracité de la plainte présentée par la victime.

5.4. Effective impunity

5.4.1. The report of Amnesty International, quoted by you, Mr. Chairman, speaks about a certain "malaise affecting the Portuguese justice system in general".

I would rather speak of my "malaise" in trying to address this quotation.

I understand that, as a general perspective, the elements referred to by Amnesty International seem, at least, awkward. Nevertheless, when you begin investigating each one of the cases referred to, you'll find that they all have been the object of criminal prosecution and charges.

Now, when you begin considering the sentences concretely imposed and discuss whether they are light or not I have a rather uneasy feeling. Belonging myself to the Public Prosecution, I have learned that punishment is imposed by the court on the basis of the facts, evidence and circumstances of the case.

What you normally see in the media, or the press, basis for the legitimate concern of this Committee, is normally a rather pale description of the facts that only the court can assess in face of the evidence produced. So, I would be rather prudent in concluding for the unrighteousness of the sentences imposed on the defendants.

(*5.4.2. Having said this, I don't want the distinguished members of this Committee to have the wrong impression that this delegation, or the Portuguese authorities, are insensitive to such data, or that the principles, we respect, of the independence of the judiciary or the presumption of innocence, is just a polite excuse to avoid the problem you have so justly invoked*).

The information we have given you on all cases cited by Amnesty International prove, rather on the contrary, the concern for the adequate prosecution of those justly accused of acts of torture or ill-treatment.

(*And although the punishments imposed in the end rely mainly on the consciences of the judges that have decided the cases, I would like to stress, once more, the concern of the Public Prosecution Service and other entities in instituting beforehand, the necessary disciplinary or criminal proceedings against the perpetrators of such unlawful acts, in order to allow the court to decide on them*).

5.4.3. As I have said in our initial Statement, a register of criminal proceedings against law enforcement officials has been established in the Office of the Attorney General to record information from all courts throughout the country and provide data enabling action for the prevention and punishment of

crimes related to the Convention against torture, thus bringing the general situation under tighter control.

Furthermore, the Public Prosecution Service institutes procedures for the automatic investigation of any case of torture or ill-treatment brought to their attention by any means whatsoever, even when the victims fail to lodge complaints through the prescribed legal channels. The only exception I can think of relates to the crime of minor common assault, where the Public Prosecution, due to the small gravity of the facts, has to request the victim whether he or she would like to lodge such complaint in order to start the criminal investigation.

In brief, both internal disciplinary measures against offending police officers and the external prosecutorial and judicial measures were significantly strengthened in recent years to ensure that all officers accused of ill-treatment are brought to justice and adequately punished.

6. Établissement pénitentiaire de Porto – Mr. Burns

6.1. Vous avez aussi demandé, M. le Président, des éclaircissements concernant la question de la violence entre les détenus dans la prison de Porto, adressée dans le rapport d'Amnesty International.

Dans le cadre des visites périodiques du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT), une délégation du Comité a effectué une visite au Portugal, du 19 au 30 avril 1999. L'on prépare, à ce stade, les observations du gouvernement portugais au sujet de cette visite.

6.2. Toutefois, lors des observations finales du Comité, celui-ci a demandé aux autorités portugaises un rapport spécifique concernant l'établissement pénitentiaire de Porto. Présenté le 30 juillet 1999, ce rapport rend compte des mesures immédiatement adoptées et des mesures programmées à moyen terme pour donner suite aux observations effectuées par le CPT.

6.3. La première mesure adoptée a été la préparation, par le service d'inspection de la Direction Générale des Services Pénitenciers d'une profonde *évaluation de la situation,* spécifiquement sur la violence entre les détenus, liée au surpeuplement et aux problèmes de la drogue.

6.4. Suite à cette évaluation, ont déjà été adoptées les mesures suivantes:

– *La diminution du nombre de détenus* jusqu'à 1000 (pendant ces dernières années le nombre de détenus a été de 1250 a 1350). Jusqu'à

la fin du 1er semestre de cette année seront mis en fonctionnement deux autres pavillons dans une prison située à 25 Km. de Porto, ce qui permettra de diminuer le nombre de détenus jusqu'à la capacité normale de cette prison;

- on a procédé à *l'installation d'un circuit interne de caméras – CCTV* – orientables sur les corridors, les cours de promenade et autres espaces communs, comme moyen complémentaire de surveillance;
- de même a été *mis en exécution un nouveau système obligatoire de rondes* à l'intérieur enregistrées auprès du surveillant chef;
- *le nombre de surveillants-chefs adjoints a augmenté* de 5 à 13 – l'on aimerait souligner, à ce propos, que ce sont ces membres du personnel les responsables pour chaque aile, contrôlant, donc, tous les mouvements des détenus dans les ailes, et non pas des détenus – faxinas – comme indiqué dans le rapport d'Amnesty International (demande 25 posée par Mme. Gaer);
- du fait que le phénomène de la violence entre détenus est surtout originé par des questions liées à la drogue, on a également renforcé, comme souligné dans la Déclaration initiale de notre délégation, les conditions *d'accès à la santé,* soit en augmentant le nombre du personnel de santé, soit en élargissant les possibilités de traitement moyennant des programmes de méthadone et/ou substances antagonistes et les programmes d'appui aux détenus séropositifs.

6.5. Toujours *dans le cadre de la lutte contre le trafic de stupéfiants,* dans l'établissement de Porto, on a augmenté les fouilles et renforcé les moyens techniques à cette effet. Au cours de 1999, par exemple, les services pénitentiaires en collaboration avec la Police Judiciaire ont saisi 146 gr. de héroïne, 551 gr. de cocaïne et 679 gr. de haxixe. Pendant la même période, ont été faites 98 communications au Ministère Public par possession ou trafic de stupéfiants.

6.6. Finalement, le 21 janvier de cette année a *été arrêté un surveillant* de l'établissement pénitentiaire de Porto, lequel est maintenant en détention préventive. Une procédure disciplinaire est aussi en cours contre ce surveillant.

Au mois d'avril *un autre surveillant a été aussi arrêté* et contre lui sont simultanément en cours une procédure disciplinaire et une procédure pénale.

En résumé, on peut dire que la diminution du nombre de détenus, l'intervention systématique des membres du personnel de surveillance à l'intérieur des ailes, le contrôle vidéo ont rendu possible une certaine

décompression dans le climat intérieur de la prison et la conséquente amélioration des rapports entre les détenus et entre ceux-ci et le personnel pénitentiaire.

7. Juridiction universelle – Mr. Burns

7.1. D'après l'article 5 nº 2 du Code Pénal, la juridiction des tribunaux portugais s'étend à tous les faits commis en dehors du territoire national lorsque l'Etat portugais s'y est engagé en vertu d'un Traité ou d'un Accord international.

De ce fait, il n'y a aucune difficulté juridique en ce qui concerne les obligations découlant de l'article 5 nº 1 als. *b)* et *c)* de la Convention contre la Torture.

7.2. Toutefois, l'exercice effectif de la juridiction des tribunaux portugais dépend de la vérification factuelle des connexions et des conditions établies dans ces dispositions conventionnelles et dans l'article 6 du Code Pénal, étant également soumis aux principes universellement acceptés – *ne bis in idem* et *aut dedere aut judicare.*

7.3. On peut donc affirmer que le régime pénal portugais contient des principes et des normes de juridiction universelle adéquates à empêcher l'impunité dans les cas de violation d'intérêts fondamentaux qui constituent le patrimoine commun de l'Humanité (génocide, esclavage, trafic d'êtres humains, etc.), conformément aux dispositions des articles 8 et 29 nº 2 de la Constitution de la République portugaise.

7.4. La juridiction des tribunaux portugais peut, donc, s'étendre à des cas comme le cas Pinochet; l'exercice effectif de cette juridiction dépendant, toutefois, de la vérification concrète des connexions, des conditions et des présupposés factuels prévus aux articles 5 et 6 du Code Pénal.

Réponses à des questions formulées par M. Yu (Chine)

8. Fiscalisation de détentions et d'interrogatoires illégaux – M. Yu

8.1. En réponse à la question posée par M. Yu, je me permettrais, tout d'abord, de me rapporter à la Déclaration initiale de notre délégation, concernant

la récente approbation d'un Règlement sur les conditions matérielles de détention dans des établissements de Police.

8.2. En plus de cette innovation, et en vue de la rendre plus effective, l'IGAI (Inspection Générale de l'Administration Interne) effectue des visites de fiscalisation sans avis préalable dans les établissements de police, surtout dans ceux qui ont des zones de détention et qui se situent dans des lieux plus problématiques (zones urbaines, périodes nocturnes, fins de semaine).

Dans ces occasions, les inspecteurs vérifient toujours s'il y a des détenus et, le cas échéant, si les registres de détention ont été effectués et si les dates sont correctes. Les inspecteurs parlent en privé avec le détenu et confirment ces données ainsi que les conditions dans lesquelles se trouve le détenu et, au besoin, reçoivent la plainte que celui-ci prétend présenter.

8.3. Les agents sont obligés de communiquer toutes les détentions effectuées immédiatement (dans l'heure ou l'heure et demie, au plus tard), au moyen de télécopie, au Ministère Public. A partir de ce moment, le contrôle de la détention est également effectué par le Ministère Public.

8.4. En ce qui concerne les interrogatoires, il faut tenir compte du fait que la procédure pénale ne permet pas l'interrogatoire des détenus par les agents de police. Cet interrogatoire ne peut être fait que par des magistrats.

Cette phase de l'enquête fait l'objet de recommandations rigoureuses adressées aux agents. Une action inspective de l'IGAI est actuellement en cours afin de vérifier le respect de ces règles par les forces de police tout au long de l'investigation criminelle.

9. Accélération de la procédure pénale – M. Yu

9.1. En dehors de la particulière préoccupation des autorités portugaises, notamment judiciaires, y inclus le Ministère public, pour tout ce qui a trait aux cas criminels de plus grande gravité, les articles 108 et 109 du Code de Procédure Pénale prévoient un mécanisme dénommé "procédure d'accélération de procès en retard".

Ce mécanisme permet l'intervention du Procureur général de la République, lorsqu'il s'agit d'une enquête du Ministère public ou, lorsque le procès a déjà été porté à la connaissance du tribunal, du Conseil supérieur de la Magistrature, afin de déterminer l'application de mesures exceptionnelles relatives au déroulement postérieur de ces procès en vue d'arriver à une rapide décision. Le cas échéant, il y a lieu à la détermination de la responsabilité en cas de retard.

9.2. Par delà cette possibilité, les Grandes Options du Plan pour 2000 prévoient onze mesures concrètes destinées à combattre la morosité procédurale dont on aimerait mentionner:

- La désignation de juges auxiliaires pour des situations de nature conjoncturelle;
- la prévision de procédures agiles et rapides pour les cas de plus grande simplicité, tant au niveau de l'appréciation que de la décision; et
- la prise de mesures d'encouragement au recours à l'arbitrage et à la transaction dans le procès.

10. Violence entre les détenus – M. Yu

10.1. En ce qui concerne la question posée par M.Yu relative à la violence entre les détenus dans les prisons, nous espérons y avoir suffisamment répondu moyennant les informations fournies à propos de l'établissement pénitentiaire de Porto, le seul où un problème identique se soit posé.

10.2. Dans les Rapports des visites effectuées par le Comité européen pour la prévention de la torture, bien au contraire, avec la seule exception de Porto, il a été généralement constaté un climat et des rapports assez satisfaisants entre les détenus et le personnel.

De même, il y a peu de références à ce sujet de la part d'autres entités qui régulièrement inspectionnent les prisons, tels que le Médiateur ou les Juges d'exécution des peines.

10.3. Toutefois il s'agit d'une question qui mérite toujours la meilleure attention des services pénitentiaires et qui est particulièrement liée au fait de l'ampleur des problèmes liés à la toxicomanie.

Tenant en compte ce facteur les actions menées par l'administration se dirigent vers:

- La création de meilleures conditions de traitement;
- la lutte contre le trafic de drogue dans les prisons;
- la formation du personnel en cette matière.

10.4. En ce qui concerne le traitement, la délégation espère avoir déjà suffisamment informé le digne Comité, dans sa Déclaration initiale, sur les mesures prises dans ce domaine.

Relativement à la *lutte contre le trafic de stupéfiants dans les prisons*, on a renforcé les moyens de détection et accéléré les poursuites engagées contre le personnel.

En résultat de ces actions, il y a eu lieu à 236 appréhensions de drogue à des visiteurs, pendant l'année de 1998 et 304 appréhensions aussi à des visiteurs, pendant l'année de 1999.

10.5. Toutes ces situations d'appréhension de drogue sont d'immédiat communiquées au Ministère Public et les visiteurs sont conduits aux organes de police criminelle afin d'être présentés devant le Tribunal. Nous avons connaissance que pendant ces deux années, au moins 5 visiteurs ont été arrêtés et 1 a été condamné à une peine de 7 ans d'emprisonnement.

10.6. D'autre part et ayant comme référence l'année dernière (1999):

- Un surveillant a été condamné à 8 ans d'emprisonnement, une sanction disciplinaire d'expulsion lui étant appliquée, le 3 septembre;
- une surveillante a été aussi expulsée, la procédure criminelle étant en ce moment en cours;
- une autre surveillante est en détention préventive, la procédure disciplinaire étant également en cours.

10.7. De même, de façon inopinée, les surveillants sont soumis à des contrôles dans le but d'effectuer le dépistage d'éventuels cas de consommation d'alcool ou de stupéfiants.

10.8. Finalement, en ce qui concerne la *formation*, et par delà le fait que la toxicomanie intègre depuis longtemps les programmes de formation, l'arrêté du 22 juillet 1999, prévoit la formation continue du personnel dans ce domaine et la création d'un "bureau d'appui au fonctionnaire" ayant pour but d'assurer sa stabilité émotionnelle et psychologique.

11. The right of victims to complain and to special protection – Mr. Yu

11.1. Ambassador Yu has asked whether there are any obstacles to the possibility, for victims, of presenting their complaints. The answer is definitely no.

11.2. As a result of the recognition that victims were not adequately dealt with when filing a complaint, namely in the cases of domestic violence and sexual abuses, the Portuguese competent authorities have:

- Adopted information and elucidation measures of a general character (for example in the implementation of the above-mentioned project Innovate);

- supported actions by different NGO's, having in view the creation of special offices for victim support;
- given instruction to the Chiefs of the police forces to create, at a district level, special offices with competence in this area, with a special incidence on the districts where no NGO offices are available.

11.3. Decree Law nº 423/91, of October 30, establishes a legal regime for the protection of victims of violent crimes. Furthermore, articles 129 and 130 of the Penal Code stipulate that there shall be a special legislation governing civil liability deriving from a crime and the compensation for the injured party.

11.4. There is, however, a concern on the side of the Portuguese authorities to make the access to compensation by victims easier and more effective. To that effect, they benefit from the help namely of the Portuguese NGO APAV – Portuguese Association for Victim Support, created in 1990.

(*11.5. This NGO has the aim of:*

- *Promoting victim's rights;*
- *promoting the protection and support for the victims of crime,*
- *specially, and in particular, for those in greatest need, through information, individual attention and guidance and the provision of moral, social, legal and psychological and financial aid and assistance;*
- *promotion and participation in programmes, projects and activities in the field information, training, research and investigation;*
- *increasing the understanding and public awareness of effects of crime and recognition of victim's rights;*
- *providing information and training to the professionals whose work brings them into contact with victims of crime;*).

APAV has now eleven branches in ten major cities of the country (Lisbon (2), Oporto, Coimbra, Braga, Cascais, Vila do Conde, Setúbal, Loures and Faro), where free and confidential victim support services are provided by staff and trained volunteers.

11.6. More specifically APAV can provide the following services and practical help: provides volunteers to accompany victims in emergency situations (i.e.: hospital, police, courts, etc.); refers them to other community agencies; provides legal and psychological advice and counseling; offers on-going training

on how to attend victims of crime to police forces; addresses victim-awareness issues in schools and health centers.

This institution has signed two Protocols of co-operation with both the Ministry of Justice and the Ministry for Internal Affairs. (*According to the latter, the Ministry of Internal Affairs provides the Association with funding and equally with personnel, namely with police agents, who collaborate with the association in the reception and treatment of complaints by individuals. It is our conviction that the support the Portuguese State gives to this association is a sign of the deep commitment it has to the protection of the rights of victims and to the strengthening of their capacity to file complains and to have their views and problems listened to*).

11.7. According to statistical data provided by the National Office of APAV, the number of victims having requested its support has dramatically increased over the last 10 years. In fact this number reached 4040 cases in 1998 and 4649 in 1999, which amounts to a total number of cases dealt with by APAV since 1991 to 17 911.

12. Effective prosecution in case of abuse of authority – M. Yu

I have mentioned earlier, answering one of the questions raised by you, Mr. Chairman, on the report made by Amnesty International, that there is normally an automatic investigation, by the Public Prosecution Service, of any case of torture or ill-treatment brought to their attention by any means whatsoever, even when the victims fail to lodge complaints through the prescribed legal channels.

The same applies to disciplinary proceedings, independently of the relevant agency having to conduct them. I stress, to this effect, there are now strict communication procedures among several of these agencies (namely Public Prosecution Service, Inspectorate General for Internal Affairs, Directorate General for Correctional Institutions), allowing for tighter control of all cases carried out by members of forces under their supervisory powers.

13. Compensation for victims of violent crimes

13.1. The activity of the Fact Finding Commission for the Award of compensation to victims of violent crimes stabilized in 1999. There has been a

relative growth of the demands: 60 cases in 1996, 118 in 1997, 74 in 1998, 82 in 1999. Not all the compensations requested are however granted.

The highest amount paid has also increased, from 4 million escudos in 1997 to 6 million escudos in 1999. On the other hand, the lowest amount paid has increased from 100.000 escudos in 1996 to 180.000 in 1999.

(*The total amounts paid have however decreased from 233 million escudos, in 1996, to 170 million escudos in 1997. The average compensation has in turn increased from 2.400.000 escudos in 1997 to in 3 million escudos in 1999*).

13.2. The average period for the instruction of the demands has been greatly reduced, from one year in 1993, to 4 months and ten days in 1999.

14. Problems of drug-addiction and traffic within correctional institutions – Mr. Yu

We hope to have addressed this topic sufficiently in our initial Statement, in the answer to questions 6 and 10.

Réponses à des questions formulées par M. Camara (Sénégal)

15. Contrôle d'identité – M. Camara

15.1. D'après l'article 2 de la loi n° 5/95, revoquée en partie par l'article 250 du Code de Procédure Pénale, tel que modifié en 1998, les citoyens portugais de plus de 16 ans doivent porter des pièces d'identité lorsqu'ils se rencontrent dans des lieux publics, ouverts au public ou soumis à la surveillance de la police.

Cet article 250 du Code de Procédure Pénale établit que les agents de police doivent procéder à l' identification de toute personne qui se trouve en un lieu public, ouvert au public ou sujet à la surveillance de la police, lorsqu'il y a lieu à des doutes fondés relatifs à:

- La perpétration d'un crime;
- la pendance d'une procédure d'extradition ou d'expulsion;
- l'entrée ou le séjour irrégulier dans le territoire national d'un étranger;
- l'existence d'un mandat d'arrêt.

15.2. La personne interpellée peut s'identifier, sur place, moyennant la présentation d'une pièce d'identité adéquate (carte d'identité, passeport, permis de séjour, etc.).

En cas d'impossibilité d'identification dans le local où le suspect a été interpellé, moyennant les moyens susmentionnés, les agents de police doivent essayer de l'obtenir à travers d'autres moyens:

- Communication avec une tierce personne pouvant produire l'un des documents susmentionnés;
- déplacement avec le suspect au lieu où se trouvent ses documents d'identification;
- reconnaissance par une personne dûment identifiée.

15.3. Une fois épuisés, sans succès, les essais d'identification mentionnés, les agents de police peuvent conduire la personne à identifier au poste de police le plus proche et la contraindre à y rester pour le temps strictement indispensable à son identification, en aucun cas supérieur à 2 heures. Au cas où la personne à identifier est suspect d'être dans les situations déjà mentionnées, la période ne doit pas excéder les 6 heures.

15.4. Les garanties contre des éventuels abus pratiqués dans l'exercice de ces pouvoirs policiers sont les suivantes:

- Les agents sont obligés à faire preuve de leur qualité et à communiquer au suspect les faits qui justifient la demande d'identification;
- lorsque le suspect est conduit au poste de police, le fait doit être enregistré et consigné en procès verbal;
- il faut toujours donner au suspect la possibilité d'entrer en contact avec une personne de sa confiance.

15.5. Si le suspect refuse l'identification, sans motif justifié, il peut faire l'objet d'un ordre, émis par l'autorité compétente, avec l'avertissement solennel que sa désobéissance le fera encourir dans le crime correspondant prévu à l'article 348 du Code Pénal.

16. Statistiques criminelles – M. Camara

16.1. Les statistiques présentées, page 18 du 3.ème rapport, se rapportent aux procédures criminelles. Parallèlement, et selon le principe de l'indépen-

dance, un procès de nature disciplinaire est instauré, pour les mêmes faits, au moyen des services internes de chaque force de police, ou, dans les cas de plus grande gravité, par l'IGAI.

Compte tenu de l'intervention sélective de l'IGAI, réservée à des cas de mort, de torture, d'atteintes à l'intégrité physique graves, abus d'autorité graves, les enquêtes instaurées dans ces cas par l'IGAI observent le principe de la célérité.

16.2. Les procès criminels, eux aussi, se rapportant à des cas où le responsable a été détenu préventivement, sont jugés prioritairement.

Dans les autres cas, les procès sont affectés par les problèmes généraux du fonctionnement des tribunaux (l'accumulation des procès, les diligences dilatoires, les formalités, les délais, les garanties de défense qui doivent être respectés, les recours successifs). De même, le respect du principe de la présomption d'innocence du prévenu exige le rassemblement d'éléments de preuve suffisants, sous peine d'impossibilité de continuation du procès ou d'acquitement du prévenu.

Il ne s'agit, donc, pas d'une question d'impunité, mais essentiellement de respect pour les nécessaires garanties procédurales des différents agents intervenant dans la procédure pénale.

17. Engagement de procédures disciplinaires en cas de poursuites pénales – M. Camara

17.1. Vous avez posé, M. Camara, la question de savoir s'il y a lieu à l'engagement de procédures disciplinaires en cas de poursuites pénales.

La réponse est définitivement oui.

17.2. Plusieurs situations peuvent, cependant, se présenter à ce sujet. Il peut arriver des cas où les procédures disciplinaires sont engagées avant l'instauration de la poursuite pénale. L'orsque, cependant, les organes d'inspection notamment (Inspection Générale de l'Administration Interne, Inspection des Services Pénitenciers, etc.) se rendent compte de l'existence d'un crime, ils doivent le communiquer immédiatement au parquet afin que celui-ci engage les nécessaires poursuites pénales.

L'inverse peut être également vrai, c'est-à-dire que le parquet peut engager une poursuite pénale et communiquer ultérieurement les faits l'ayant déterminée (c'est maintenant obligatoire, depuis l'émission, en 1998, d'une lettre circulaire

du Procureur-Général de la République destinée à tous les magistrats du parquet), aux services d'inspection déjà mentionnés afin que ceux-ci entament, de leur côté, les nécessaires enquêtes disciplinaires.

17.3. Il peut également arriver que les poursuites disciplinaires soient suspendues en attendant le résultat de la procédure pénale entamée, surtout lorsque les preuves rassemblées ne s'avèrent pas suffisamment conclusives.

De toute façon, les procédures sont parallèles et appliquent des peines différentes, même si les faits à leur base sont les mêmes – principe de l'indépendance et de l'autonomie des deux types de procédures.

Requests formulated by Ms. Gaer (USA)

18. Reduction of the number of complaints – Ms. Gaer

The reduction of the number of complaints, verified in the last few years, is without any doubt, due to several factors, some of which have already been addressed by this delegation, among which we would like to underline:

- The efforts made by the competent portuguese authorities in the field of the training of the law enforcement officials, particularly in the areas of human rights, ethics and professional deontology;
- the efforts developped by all agencies involved in the evaluation and monitoring of the activity of police forces and prison staff;
- the dissemination, through all levels of law enforcement agencies, of the international standards and norms, as well as the recommendations of the international treaty monitoring bodies, namely this Committee and the European Committee for the Prevention of Torture;
- the dissemination, to all law enforcement officials, of clear ideas on the inadmissibility of behaviours infringing basic human rights and on the disciplinary consequences arising from these behaviours, once perpetrated.

19. Pardon and amnesty – Ms. Gaer

19.1. On May 12, 1999 the Portuguese Parliament adopted Law N° 29 which relates to a "General Pardon and Amnesty for small offences". According to this Law there is a reduction of the prison sentences for offences committed until March 25.

According, however, to article 2 of the Law, do not benefit either from pardon or amnesty law enforcement officials having perpretated, in the exercise of their functions, actions integrating violations of fundamental rights and freedoms of individuals.

19.2. According to article 7 of the Law, an amnesty was granted to the perpetrators of administrative infractions up to a certain value, disciplinary offences which did not constitute simultaneously a criminal offence and crimes punishable with a penalty not superior to one year imprisonment.

As a consequence of this law, around 1.500 prison inmates having committed minor offences were released.

20. Application of the Convention against torture to Macau – Ms. Gaer

20.1. As of 20 December 1999, Portugal is no longer responsible for the administration of the Territory of Macau. This responsibility is now entirely incumbent upon the People's Republic of China.

One must, however, underline that Portugal did its best to ensure that before the transition Macau could be left with a solid legal framework, namely in the area of the combat against and punishment of the practice of torture.

20.2. First, we must refer to the fact that the Convention against torture was extended to Macau in July 1999, as the result of an agreement between the People's Republic of China and Portugal. The initial report to this Committee relating to Macau has thus not been presented yet. It is now an international legal obligation of the Special Administrative Region of Macau.

Secondly, the adoption of a Penal Code for Macau on 1995, must also be pointed out. In fact, this Code, which was adopted by Macau's Legislative Assembly, contains 3 provisions related to the crime of torture (articles 234 to 236), very similar to the ones included in the Portuguese Penal Code.

One might than add that the adequate provisions concerning the crime of torture were in force in Macau, 4 years before the handing over of its administration.

21. The case of East Timor and the Convention – Ms. Gaer
Evolution of the situation in East Timor

21.1. The people of East Timor exercised their right to self-determination on the 30th of August 1999, following a remarkable progress achieved in the

last 18 years, since the General Assembly requested the Secretary-General to enter into consultations with all the parties directly concerned in order to seek a solution to the problem. At the heart of the final process relating to East Timor are the 5 May Agreements, concluded through the Secretary-General's good offices (A/53/951 and S/1999/513, of 5 May 1999).

21.2. Under the terms of these Agreements, the Secretary-General was asked to consult the East Timorese people on the status of the territory by means of a direct, secret ballot on the basis of universal suffrage. This marks the culmination of the lengthy efforts made by the international community, and in particular by Portugal, to guarantee the Timorese people's right to determine their own future.

21.3. The referendum that took place on 30 August, in which 98.6 per cent of the registered voters participated, was the culmination of the struggle of the Timorese people themselves, who have never surrendered their right to decide their own destiny.

21.4. The results of the referendum was of 78.5 per cent rejected the Indonesian proposal for autonomy, thereby opening the way to independence.

Following the vague of violence which occurred in the aftermath of the announcement of the results, Portugal requested the United Nations to intervene. Measures were taken, in particular the adoption of Security Council resolution 1264, and the Indonesian Government accepted deployment of an international force in East Timor (INTERFET).

21.5. Subsequently, Security Council Resolution 1272 (1999), adopted on 22 October 1999, established the United Nations Transitional Administration in East Timor, which is "endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice".

Universal Jurisdiction and Timor

21.6. As previously mentioned, the Portuguese legal penal framework contains principles and rules on universal jurisdiction preventing impunity for the cases of violations of fundamental interests, which constitute the common heritage of mankind: genocide, slavery, trafficking of human beings, among others.

Therefore there exists no legal difficulty from a strictly legal point of view in the above-mentioned cases, to exercise the penal jurisdiction of the Portuguese courts. This depends, however, on the concrete verification of the factual conditions and requisites laid down in articles 5 and 6 of the Portuguese Penal Code and in article 5 of the Convention against torture.

Extension of the applicability of the Convention against torture to East Timor

21.7. As mentioned above, it is UNTAET which has actually the overall responsibility for the administration of East Timor. For this particular reason, Portugal cannot, from a legal point of view, extend the applicability of the Convention against torture (or any other Convention) to East Timor.

21.8. However, some minimum human rights standards are already applicable in East Timor, thanks namely to Portuguese efforts.

In fact, Regulation No. 1999/1 On The Authority Of The Transitional Administration In East Timor, of 27 November 1999, establishes in its Section 2, on the Observance of internationally recognized standards that "In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

- The Universal Declaration on Human Rights of 10 December 1948;
- The two Human Rights Covenants;
- The Conventions on the Elimination of All Forms of Racial Discrimination and Discrimination Against Women;
- The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;
- The International Convention on the Rights of the Child of 20 November 1989."

(21.9. Concerning the participation of the Portuguese Government in the transition process, one can mention operative paragraph 7 of the above-mentioned Security Council resolution NR. 1272, which «Stresses the importance of co-operation between Indonesia, Portugal and UNTAET in the implementation of [the] resolution."

The Government of Portugal actively participates in the international efforts taking place on East Timor with different kinds of contributions: monetary (Portugal is one of the greatest donors to East Timor), with personnel (CIVPOL's Chief is a Portuguese national and there is a Portuguese contingent within the international military force present in the territory), doctors, teachers and also with teaching materials, medicines and other goods indispensable to the survival of the population and the reconstruction of the territory.)

22. Sexual abuses in prisons by prison staff – Ms. Gaer

Concerning the question raised by Ms.Gaer, relating to eventual cases of sexual abuse in prisons, we must say that this problem doesn't practically exist.

In the last few years, and in an universe of more than 6000 members of prison staff, 3 cases were reported which were investigated in a strictly confidencial way and which were given all the priority these matters deserve.

The procedures lead to 1 case of expulsion of the guardian involved and two complaints of sexual harassment were made. One of them was dismissed and the other, which is more recent, is still pending.

23. Violence sur la femme et formation de la police – Ms. Gaer

La violence sur les femmes et le rôle de la police a été traité dans le cadre de la formation continue, par divers vidéos réalisés. L'un de ces vidéos a pour thème: "l'appui à la victime". On y transmet des modes de procédé concrets, à adopter par les agents, nommément en ce qui concerne l'accueil des femmes victimes de violence, lequel doit être fait en respectant la privacité de celle-ci.

Les femmes doivent être, préféremment, accueillies par des agents de police femmes et dûment acheminées vers les services compétents de l'appui social, médical, juridique, etc.

24. Information sur un cas d'espèce (mentionné dans le rapport du State Department sur le Portugal – 1994) – Ms. Gaer

Le cas mentionné (qui a eu lieu le 6 juin 1994, implicant deux éléments de la Police de Sécurité Publique pour abus sexuel d'une jeune toxicomane) a déjà été jugé.

Les deux agents ont été punis avec des peines de prison effective: celui qui était le responsible de l'abus, à une peine d'emprisonnment de 6 ans et 6 mois, celui ayant surveillé les lieux, à une peine de 5 ans et 6 mois.

Ils ont également été interdits d'exercer des fonctions publiques pendant 4 ans. En ce moment, un appel a été interjetté par les deux agents.

D'autre part, des procès disciplinaires ont été entretemps engagées, dans lesquels l'expulsion des deux agents de la PSP a été supérieurement propposée.

25. Violence inside the prisons – Ms. Gaer

This delegation hopes to have addressed this topic sufficiently when answering questions 6 and 10.

26. Removal of organs from living as well as deceased persons – Ms. Gaer

26.1. Law 12/93, dated 22 April, regulates the removal of organs of human origin. The organs taken from living persons are only regenerable substances. In extreme cases, non regenerable substances may be donated. In this case, a parental relationship until the third degree has to exist. Shall it not exist, the removal of non regenerable substances from living persons is not allowed.

(*The remotion is also not possible when it may involve a grave diminution – of a permanent nature – of the physical integrity or of the health of the donor. There has also to be a consent of the donor given to the institution which makes the removal, and never to the institution which shall benefit from the removal, for transplantation.*

Be the donor a child, he has also to give his consent. If the donor is legally incapacitated, the consent will be done through a judicial authorisation.)

26.2. The post mortem donation is the donation which can pose more problems. Every citizen is considered, for the purposes of Law 12/93, as a possible donor after his/her death, unless he/she declares not to wish to be a donor to the Ministry of Health. The consent is therefore presumed but may be overturned through a contrary declaration. This removal is always, and only, a removal for medical purposes.

26.3. To the effect of giving reality to the refusal of donation by the persons who desire to do so, a National Registry of Non Donors has been created, which operates within the Ministry of Health.

(*Decree-Law 244/94, dated 26th September, regulates the National Registry of Non Donors. The refusal to give organs after the death is declared near the Registry. A card of non donor and a copy of the mentionned declaration is given to the declarant, his/her data being introduced in a data base which has to be consulted before every removal of any organ of a deceased person. Everybody has the right to know exactly the content of the data about his/her refusal.*) Up to this moment, 36.879 persons have declared their express will not to be organ donors.

26.4. Portuguese population has been made aware of this legislation through massive information campaigns realised in 1993 and in 1994, which included public debates on the new legislation, which have been abundantly publicised through the media, namely television.

(*26.5. In what regards the removal of organs of deceased persons for the purposes of medical research, Decree-Law 274/99, dated 22 July, admits the removal of organs when the deceased person has expressly stated that she/he accepts the removal for medical research, during her/his life, or when – the deceased person having not refused to donate her organs during her/his lifetime – her family does not oppose to the removal of organs. This opposition is made through a reclamation of the body in the 24 hours counting since the time in which the family acquires knowledge of the death. This limitation does not exist for the donation for medical purposes, but it also means that this kind of donation is only admitted for medical purposes. This one is not limited because of the essential values of life that are at stake. The donation for scientific purposes is limited or may be limited by a decision of the family.*)

Request formulated by Mr. Rasmussen (Denmark)

27. Doctors and the question of torture – Mr. Rasmussen

27.1. The question of what a Doctor should do when examining a patient coming from a police-station on his/her way to a prison, or from a prison to another, has been raised by Mr. Rasmussen.

A general framework of a Doctor's duties is given by articles 54 through 56 of the Physicians' Code of Ethics. Under the title "torture", article 56 stipulates a Doctor may never cooperate in any act of torture, including the refusal of allowing for the use of medical premises, instruments or medecine. The doctor has, however, the strict duty to report to the relevant agencies all cases of torture known to him/her.

27.2. In case of "hunger strike" (article 55), the Doctor is forbidden, having examined the patient, to feed him against her/his will, even when there is a danger for her/his life.

According to article 54 a Doctor providing for health care in institutions where the patient is deprived of his/her freedom, has the duty to always respect the interest of the patient and the integrity of her/his person in accordance with deontological rules.

27.3. The need to determine all cases where possible agressions may have happened led the Prison Administration to issue a general instruction addressed to all Prison directors – circular letter 10/92, dated 14 may 1992.

In accordance with this directive, when a detainee bears wounds while entering the prison, or marks of physical agression, or when he/she complains to have been beaten, the Doctor must immediately examine him/her and the detainee must be questioned. These elements are then sent, confidentially, to the agency having supervisory powers over the officer against whom the detainee is complaining, in order for the competent procedure to be engaged.

Geneva, 4 May 2000

COMPTE RENDU DE LA 414ÈME SÉANCE DU COMITÉ CONTRE LA TORTURE

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SUMMARY RECORDS OF THE 417TH AND 421ST MEETINGS OF THE COMMITTEE AGAINST TORTURE (PORTUGAL)

COMPTE RENDU ANALYTIQUE DE LA 414ème SÉANCE

Tenue au Palais des Nations, à Genève, le mercredi 3 mai 2000, à 10 heures

Président: M. Burns

Sommaire

Examen des rapports présentés par les Etats parties (*suite*)*

Troisième rapport périodique du Portugal (CAT/C/44/Add.7; HRI/ /CORE/1/Add.20)

1. *Sur l'invitation du Président, M. Mendonça e Moura, M. Santos Pais, Mme de Albuquerque, M. Marrecas Ferreira, Mme de Matos, M. Gomes Dias et Mme Graça Carvalho (Portugal), prennent place à la table du Comité.*

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* CAT/C/SR.414, 11 mai 2000.

2. *M. Mendonça e Moura* (Portugal) salue les membres du Comité dont son pays partage les objectifs et le combat, ainsi qu'il devrait ressortir du rapport présenté (CAT/C/44/Add.7) mais aussi des renseignements complémentaires que la délégation portugaise s'apprête à donner. Comme il l'a toujours fait non seulement devant le Comité mais aussi au sein des organismes des Nations Unies et organisations internationales compétents, le Portugal souhaite collaborer activement à la lutte contre la torture.

3. Le rapport soumis au Comité devrait se caractériser par son indépendance et sa richesse, car il a été préparé par le Bureau de documentation et de droit comparé de l'Office du Procureur général, c'est-à-dire un organe indépendant du gouvernement – le ministère public étant, au Portugal, une magistrature indépendante de l'exécutif. Quant à la délégation chargée de le présenter, elle se compose de deux procureurs généraux adjoints, d'une magistrate du parquet faisant partie de l'Inspection générale de l'administration interne, d'une responsable de la Direction générale des services pénitentiaires et de deux membres du Bureau de documentation et de droit comparé. C'est dire l'importance que le Gouvernement portugais attache aux travaux du Comité.

4. *M. Santos Pais* (Portugal) signale que la période couverte par le rapport à l'examen (CAT/C/44/Add.7) s'arrête au 28 février 1998 et que depuis cette date, plusieurs changements sont survenus dans la législation et dans la pratique portugaises, ce qui appelle quelques explications. Mais il y a lieu de noter tout d'abord que pour entreprendre ces réformes, les autorités portugaises se sont directement inspirées des recommandations du Comité et d'autres organismes internationaux de contrôle tels que le Comité européen pour la prévention de la torture.

5. Le premier des changements intervenus concerne Macao. Le Comité avait fait part de son souci de voir la Convention appliquée à Macao alors que ce territoire était encore sous administration portugaise, situation qui a pris fin le 20 décembre 1999. À l'issue de longues négociations avec les autorités chinoises, le Portugal a obtenu que la Convention continue d'être appliquée à Macao, de même qu'une centaine d'autres conventions internationales, dont plus d'une dizaine se rapportant aux droits de l'homme. Lorsqu'il a cessé d'administrer le territoire, le Portugal a donc laissé en place un éventail de dispositions nationales et internationales en matière de protection des droits de l'homme qui trouvera difficilement son pareil dans la région de l'Asie et du Pacifique.

6. Au regard de la Convention, les activités de la police demeurent l'un des principaux soucis du Comité comme des autorités portugaises, et celles-ci

ont procédé à une profonde restructuration de la Police de sécurité publique. La loi 5/99, promulguée en janvier 1999 en remplacement du décret-loi 321/94, a institué une nouvelle réglementation concernant l'organisation et le fonctionnement de la Police de sécurité publique. On notera qu'"à la suite de la récente révision constitutionnelle, ces nouvelles dispositions ont été approuvées par l'Assemblée de la République et non pas simplement, comme précédemment, par le Gouvernement. La nouvelle loi poursuit trois objectifs essentiels: premièrement, mettre l'accent sur le caractère civil de l'institution policière, dont la mission fondamentale est de défendre la légalité démocratique, de garantir la sécurité interne et les droits et libertés des citoyens; en second lieu, inscrire dans le statut de la Police de sécurité publique des principes tels que celui de la légalité ou de l'interdiction des excès en matière de mesures de police; enfin, améliorer l'organisation interne de la Police de sécurité publique sur tout le territoire national en vue de renforcer l'encadrement et de rapprocher les policiers de la population qu'ils sont censés défendre. Plusieurs projets allant dans le sens de cette recherche de proximité ont d'ailleurs été mis en chantier, concernant la sécurité à l'école, la sécurité des personnes âgées et le soutien aux victimes. Enfin, le décret-loi 511/99 est venu réglementer le statut des membres de la Police de sécurité publique.

7. Lors de l'examen du précédent rapport du Portugal (CAT/C/25/Add.10), le Comité s'était inquiété d'un éventuel "fossé... entre la loi et son application", et avait recommandé aux autorités portugaises de prêter une plus grande attention au traitement des dossiers concernant les violences reprochées aux agents de la force publique, d'ouvrir des enquêtes et le cas échéant d'imposer des sanctions adéquates. Un grand effort a été entrepris en ce sens et M. Santos Pais souhaite compléter les indications déjà fournies dans le rapport. En ce qui concerne la Police de sécurité publique et la Garde nationale républicaine tout d'abord, des services d'inspection spécifiques sont chargés d'engager des procédures disciplinaires s'il y a lieu. Quant à l'Inspection générale de l'administration interne dont il est question au paragraphe 49 du rapport, elle peut également entamer des poursuites disciplinaires en cas de besoin; elle est présidée par un procureur général adjoint, c'est-à-dire qu'elle jouit d'une totale indépendance technique et fonctionnelle à l'égard de son ministre de tutelle. L'Inspection générale effectue des visites régulières mais aussi des inspections sans préavis, ce qui lui permet de surveiller les conditions régnant dans les commissariats de police et en particulier les conditions de la garde à vue. C'est ainsi que 700 locaux ont été visités ces trois dernières années et 117 d'entre eux fermés faute de conditions adéquates de fonctionnement et de détention. Quant au

ministère public, il est tenu d'engager des poursuites pénales en cas d'abus d'autorité constaté par l'Inspection générale. La police judiciaire, de son côté, est placée sous la tutelle du Ministre de la justice et relève sur le plan fonctionnel du ministère public, qui coordonne son activité en matière de procédure pénale. Tous les trois ans au moins, les services de police judiciaire reçoivent la visite d'inspecteurs du ministère public placés sous l'autorité du Procureur général de la République, qui peut aussi ordonner des inspections extraordinaires chaque fois qu'il le juge nécessaire. Les services pénitentiaires, qui relèvent également du Ministre de la justice, ont leur propre service d'inspection divisé en trois équipes afin de couvrir tout le territoire national, chaque équipe étant coordonnée par un magistrat du parquet. Par ailleurs, le ministère de la justice prépare une restructuration de sa loi organique en vue de la création prochaine d'une inspection générale des services judiciaires qui sera chargée de surveiller l'activité de divers services du ministère, dont la direction générale des services pénitentiaires.

8. En vue d'assurer un suivi permanent des procédures pénales engagées contre des agents de l'autorité, le Procureur général de la République a mis en place, en 1993, une base de données permettant de faire le point sur l'état d'avancement de toutes ces procédures: les magistrats du parquet informent l'Office du Procureur général de toute procédure ouverte contre un agent de l'autorité, ce qui permet notamment de disposer de statistiques sur le nombre de poursuites et d'en suivre l'évolution au fil des ans. Depuis quelque temps, ces données sont également transmises à la Direction générale des services pénitentiaires et à l'Inspection générale de l'administration interne chaque fois qu'il s'agit de leurs agents, afin qu'elles puissent prendre les mesures disciplinaires qui s'imposent. Le Procureur général s'apprête à doter ses services d'un département central d'investigation et d'action pénale spécialement chargé de coordonner les enquêtes relatives aux crimes contre la paix et contre l'humanité, y compris le crime de torture. Cette coordination sera assurée entre les organes de police criminelle et les services compétents du parquet dans chaque circonscription judiciaire. Toutes ces mesures attestent le souci de donner des suites judiciaires à toute allégation concernant des actes visés par la Convention contre la torture; toute infraction susceptible de tomber sous le coup de la Convention donne systématiquement lieu à une procédure, soit disciplinaire, soit judiciaire, soit les deux.

9. L'utilisation des armes à feu a tout récemment fait l'objet d'une réglementation spécifique; un décret-loi est venu en effet uniformiser les règles

d'utilisation de ces armes par tous les corps de police. En application des principes de la nécessité absolue et de la proportionnalité, l'usage d'armes à feu n'est autorisé que dans des situations extrêmes et à défaut d'autres moyens plus efficaces. Une première distinction est faite selon que ces armes sont utilisées contre des objets ou contre des personnes. Dans le second cas, elles ne doivent servir que dans le but de protéger la vie humaine et dans les trois situations prévues dans les Principes des Nations Unies concernant l'utilisation de la force et des armes à feu, à savoir: pour faire face à une agression en cas de danger imminent; pour prévenir un crime particulièrement grave menaçant des vies humaines; pour se rendre maître de la personne à l'origine de cette menace si elle résiste à l'autorité ou tente de fuir. De plus, l'usage d'armes à feu est assorti de l'obligation de faire des sommations, du devoir de secours, de l'obligation d'établir un rapport et de le communiquer au ministère public. Enfin, si la mort ou une blessure grave s'ensuit, l'Inspection générale de l'administration interne doit être avertie et ouvrir immédiatement une enquête.

10. En ce qui concerne les conditions de détention dans des locaux de la police, sujet d'inquiétude pour le Comité dans le passé, un récent arrêté ministériel a mis en place un règlement régissant les conditions matérielles de la détention applicable à tous les lieux de détention des forces de sécurité et à toute personne privée de liberté pour une période inférieure à 48 heures, y compris les personnes retenues à des fins d'identification. Ce règlement contient des dispositions spécifiques sur les cellules (surface, emplacement, matériaux de construction, éclairage, installations sanitaires, hygiène et confort) et impose l'aménagement progressif des cellules existantes. Au demeurant, 140 locaux de détention inadaptés avaient déjà été fermés. En outre, le nouveau règlement fixe les procédures à suivre pour la détention et prévoit diverses garanties: registre des mises en détention, bulletin du détenu, indication de l'heure et du motif de la détention, identité du détenu et de l'agent ayant procédé à la détention, autres éléments pertinents tels que les contacts pris avec des personnes extérieures. Le détenu a en effet le droit de téléphoner avec ses proches et son avocat, l'entretien avec ce dernier se déroulant en privé. Le détenu peut également demander à être examiné par un médecin et, en cas de blessures, il doit être conduit à l'hôpital. Enfin, tout lieu de détention peut être inspecté sans préavis par l'Inspection générale de l'administration interne, qui doit être immédiatement avisée, de même que le parquet, en cas de décès d'un détenu et de violences ou traitements inhumains ou dégradants infligés à un détenu.

11. Le Comité s'était également inquiété des conditions qui régnaient dans les établissements pénitentiaires. À ce sujet, il y a lieu de signaler que les

établissements pénitentiaires ont été inspectés à deux reprises par le service du médiateur, en 1996 et en 1999; à l'issue de la première inspection, près de 200 recommandations ont été formulées et transmises au Ministre de la justice; la seconde inspection a permis au médiateur de constater les progrès réalisés entre-temps à divers égards. De son côté, le Comité européen pour la prévention de la torture s'est rendu au Portugal à quatre reprises, en 1992, 1995, 1996 et enfin, en avril 1999; il a lui aussi relevé un certain nombre de changements importants, notamment à Porto. En effet, grâce à la mise en oeuvre du Programme d'action pour le système carcéral de 1996, le taux de surpeuplement des établissements est passé de 57% en 1996 à 14% aujourd'hui, du fait notamment de l'ouverture de nouveaux établissements et du réaménagement d'établissements existants, ainsi que d'une amnistie prononcée en 1999. Les conditions matérielles de l'incarcération se sont elles aussi améliorées: installation de sanitaires dans les cellules, salles de gymnastique, aménagement des cuisines, parloirs et autres espaces communs. Les services de santé n'ont pas été en reste: création "d'unités sans drogues" dans cinq prisons, mise en place d'une stratégie nationale de lutte contre la toxicomanie par le Conseil des ministres, qui a conféré une haute priorité à l'action en milieu carcéral; construction de nouvelles unités de santé; mise en œuvre de programmes de distribution de méthadone, de vaccination et autres à l'intention des détenus, promulgation de la loi 170/99 visant à combattre la propagation des maladies infectieuses et contagieuses dans les prisons; amélioration de la vie pénitentiaire par le développement de l'enseignement, de la formation professionnelle, des activités culturelles et sportives (y compris la possibilité offerte aux prisonniers en régime ouvert de se former et de travailler à l'extérieur); renforcement des liens familiaux avec la création en 1999, dans deux établissements pour prisonniers purgeant des peines de longue durée, de parloirs intimes. Les services pénitentiaires font l'objet de contrôles de la part de plusieurs organes extérieurs, notamment: le tribunal de l'exécution des peines, qui fait effectuer des visites mensuelles dans chaque établissement pour entendre les plaintes éventuelles de détenus de manière confidentielle; le médiateur; le Comité européen pour la prévention de la torture; la Cour européenne des droits de l'homme.

12. En ce qui concerne la formation, la loi 5/99 sur l'organisation et le fonctionnement de la Police de sécurité publique a mis en place un nouveau cadre organique pour les établissements de formation des policiers, à savoir l'Institut supérieur de sciences policières et de sécurité interne (pour les officiers) et l'École pratique de police (pour les grades inférieurs). Le Conseil des ministres a par ailleurs créé un conseil consultatif pour la formation des forces et

services de sécurité, qui est chargé d'examiner, de coordonner et de planifier les cours et les actions de formation à l'intention des personnels de police. Ce conseil compte parmi ses membres des personnalités de la société civile et des milieux universitaires. Le programme de formation continue lancé en 1997 se poursuit. Élaboré en collaboration avec l'Université ouverte, il s'adresse à tous les membres de la Police de sécurité publique et de la Garde nationale républicaine et couvre tous leurs centres d'intérêt: droits fondamentaux, éthique professionnelle, étude des milieux sociaux, police de proximité, etc. Ce programme inclut également la formation d'un grand nombre de formateurs, à l'intention desquels 21 stages ont été organisés à ce jour. Huit vidéofilms de formation et leurs manuels d'utilisation ont ainsi été réalisés; ils traitent de domaines aussi divers que les droits fondamentaux, l'éthique professionnelle, la protection des individus et le soutien aux victimes, les immigrants et les minorités, la toxicomanie, etc. Ces vidéofilms ont été distribués sur tout le territoire national et ont été présentés à plus de 45 000 agents. À la fin de chaque module, une épreuve écrite est organisée aux fins d'évaluation. D'autres vidéofilms sont en préparation.

13. La Commission nationale portugaise pour la Décennie des Nations Unies pour l'éducation en matière de droits de l'homme a entrepris de diffuser au Portugal des informations sur la Convention et sur le travail du Comité. C'est ainsi que le site Internet du Bureau de documentation et de droit comparé, qui accueille le site officiel de ladite Commission comporte une section sur la protection internationale des droits de l'homme comprenant notamment une explication des principales dispositions de la Convention (y compris celles relatives à la présentation de communications par des particuliers), ainsi que du travail du Comité. On y trouve aussi le texte des trois rapports périodiques présentés par le Portugal au Comité, les comptes rendus des séances consacrées à l'examen des deux premiers rapports, ainsi que les conclusions et recommandations formulées par le Comité à l'adresse du Portugal. Par ailleurs, le Bureau de documentation et de droit comparé publie semestriellement un Bulletin de droit comparé qui est distribué gratuitement à tous les magistrats et auquel sont abonnés un très grand nombre d'avocats et de juristes. Au début de 1999, le texte du troisième rapport périodique présenté par le Portugal en application de la Convention est paru dans le bulletin, ainsi que les comptes rendus des séances pertinentes du Comité et ses conclusions et recommandations concernant l'examen des deux premiers rapports. Un article sur la Convention et sur le fonctionnement et les compétences du Comité a également été publié dans le bulletin.

14. Enfin, la Commission nationale portugaise pour la Décennie des Nations Unies pour l'éducation en matière de droits de l'homme a entrepris de traduire

en portugais la série des "Fiches d'information" des Nations Unies, parmi lesquelles une brochure consacrée au Comité, ainsi que la Série des Nations Unies sur la formation professionnelle, dont le numéro 5 est intitulé "Droits de l'homme et application des lois. Manuel de formation à l'intention des services de police". Ces ouvrages seront publiés par la Commission et distribués notamment aux groupes professionnels directement intéressés, aux écoles, universités et autres établissements d'enseignement, aux bibliothèques publiques, etc.

15. Un nouveau texte réglemente l'entrée, le séjour, la sortie et l'expulsion des étrangers au Portugal. Il a pour principal objectif de donner effet à tous les engagements internationaux, pris par le Portugal; le nouveau régime tient également compte des décisions de la Cour européenne des droits de l'homme, notamment en ce qui concerne les limites à respecter lors de la mise en oeuvre des mesures d'expulsion. Les grandes lignes de cette nouvelle réglementation sont les suivantes: un régime différencié d'octroi de visas en vue de garantir plus d'équité, de justice et de transparence; des règles claires sur le regroupement familial; un régime exceptionnel d'autorisation de résidence pour faire face à des situations graves et notamment pour des raisons humanitaires; un dispositif d'aide au retour des immigrants dans leur pays d'origine; un régime de sanctions à l'encontre de ceux qui favorisent l'immigration clandestine ou exploitent la main-d'œuvre clandestine.

16. D'autres changements importants sont intervenus, sur lesquels M. Santos Pais ne s'attardera pas; il se contentera de mentionner le profond remaniement de la loi-cadre de coopération en matière pénale entrepris en 1999 et les modifications apportées en 1998 à la loi sur la santé mentale. Il conclut en évoquant le chemin parcouru depuis 1989, notamment grâce aux conseils et recommandations du Comité, et souligne que seuls le temps, la patience et l'expérience permettent de progresser véritablement. La tâche que l'on entreprend lorsque l'on s'engage dans la voie de la protection des droits de l'homme est ardue et ne s'achève jamais. C'est pourquoi la délégation portugaise ne manquera pas de revenir, régulièrement, faire part au Comité des victoires et des échecs dans ce combat de longue haleine.

17. Le *Président*, prenant la parole en tant que rapporteur pour le Portugal, remercie le représentant du Portugal de son exposé oral très détaillé, qui apporte une réponse à plusieurs des questions qu'il avait prévu de poser. Il rappelle que le Portugal a accepté la compétence du Comité au titre des arti-

cles 20 et 22 de la Convention et contribue depuis plusieurs années au Fonds de contributions volontaires des Nations Unies pour les victimes de la torture et note que les dernières mesures prises par le Gouvernement portugais pour mettre en œuvre la Convention sont excellentes. Le troisième rapport périodique, qui devait être présenté en 1998, a été reçu en juin 1999. Il couvre la période comprise entre le 31 mars 1996 et le 28 février 1998 et fait état de nombreux changements significatifs survenus depuis l'examen du deuxième rapport périodique.

18. Certains sujets de préoccupation subsistent. Tout d'abord, si le Portugal a renforcé sa législation en ce qui concerne l'organisation et le fonctionnement de la police, les activités et le comportement de celle-ci restent l'un des problèmes les plus délicats à résoudre, comme l'a souligné le représentant du Portugal lui-même.

19. À propos de l'article premier de la Convention, il est à signaler que le Portugal a introduit dans son Code pénal une définition de la torture et des traitements cruels, inhumains ou dégradants. Il faut cependant relever que cette définition est plus étroite que celle qui est donnée dans la Convention en ce que les infractions mentionnées peuvent dans certains cas n'être passibles que d'une sanction disciplinaire, administrative, et n'exigent pas l'ouverture de poursuites pénales. La création de l'Inspection générale de l'administration, mentionnée au paragraphe 49 du troisième rapport périodique, constitue un grand progrès. Concrètement, comment explique-t-on la réduction du nombre de personnes qui font état de violence physique de la part des forces de police, indiquée au paragraphe 51 du troisième rapport?

20. Outre les préoccupations suscitées par des informations figurant dans le rapport, le Président voudrait attirer l'attention de la délégation portugaise sur certains faits présentés par Amnesty International dans un rapport intitulé "Portugal 'Small problems'... ? A Summary of concerns". Il s'agit notamment de cas de décès survenus pendant ou après la période de garde à vue, de cas de mauvais traitements infligés à des personnes arrêtées par des policiers et de cas de détention illégale également imputables à des policiers. À ce sujet, il est particulièrement important que, dans les commissariats, les policiers remplissent correctement les registres de garde à vue. Les faits signalés par Amnesty International sont-ils exacts, ont-ils fait l'objet de poursuites et des mesures pour empêcher que des cas analogues ne se reproduisent ont-elles été prises par les autorités portugaises? Amnesty International dénonce aussi dans le même

rapport des cas d'impunité effective, due notamment à la longueur des procédures judiciaires. Des auteurs d'actes de torture ou de mauvais traitements ne seraient que peu ou pas du tout sanctionnés, ou subiraient seulement une sanction disciplinaire. Qu'en est-il exactement?

21. En ce qui concerne la situation dans les établissements pénitentiaires, les informations données oralement semblent montrer que le Gouvernement portugais a pris les mesures voulues pour prévenir les actes de torture et de mauvais traitements, répondant ainsi aux préoccupations exprimées également par Amnesty International.

22. Comme le Comité l'avait déjà signalé dans les conclusions et recommandations relatives à l'examen du deuxième rapport périodique, il serait bon que le Gouvernement portugais précise sa position en ce qui concerne l'étendue de sa juridiction pénale lorsque des actes de torture sont commis hors de son territoire. Cette position ne ressort pas clairement du troisième rapport périodique. La Convention non seulement permet, mais aussi impose, aux États d'exercer une juridiction universelle à l'égard des actes de torture.

23. Le Président se félicite que le Portugal ait réussi à assurer l'application à Macao de la Convention contre la torture et que la Chine ait accepté d'adhérer à la Convention en tant qu'État successeur. Enfin, il se déclare très satisfait des mesures prises pour réglementer l'utilisation des armes à feu par les différents corps de police et de la conformité des règlements appliqués dans ce domaine avec les Principes de base des Nations Unies sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois.

24. *M. Yu Mengjia* (Corapporteur) remercie la délégation portugaise de la qualité de l'introduction et félicite le Gouvernement portugais d'avoir complété et amélioré sa législation. Il semble cependant que des efforts supplémentaires doivent être faits pour assurer une meilleure application de l'article 11 de la Convention et pour accélérer le déroulement des procédures judiciaires qui, selon certaines sources, peuvent être excessivement longues. Un autre phénomène préoccupant qui semble perdurer est celui de la violence entre les prisonniers. Le Gouvernement portugais prend-il des mesures pour remédier à cette situation?

25. S'agissant de l'application de l'article 12 de la Convention, les deux tableaux de statistiques figurant au paragraphe 202 du rapport sont très

intéressants. En ce qui concerne l'application de l'article 13, la législation en vigueur semble tout à fait suffisante et il serait intéressant de savoir si elle est facilement et rapidement mise en œuvre. Pour ce qui est de l'article 14, il semble qu'il y ait relativement peu de demandes d'indemnisation; la délégation portugaise peut-elle en donner la raison ? Enfin, on rapporte que certains gardiens et fonctionnaires pénitentiaires se livrent au trafic de drogue avec les détenus, ce qui conduit à se demander si le Gouvernement prend des mesures pour prévenir et faire cesser la circulation de drogue dans les prisons.

26. *M. Camara* se déclare lui aussi satisfait tant du rapport écrit que de l'exposé oral. Ayant été rapporteur pour le Portugal lors de l'examen du deuxième rapport périodique, il n'est pas étonné de la qualité des mesures prises par les autorités portugaises. Mais le rôle du Comité est d'approfondir sa connaissance d'une situation et il est donc exigeant dans ses questions.

27. À propos de la détention aux fins d'identification, décrites au paragraphe 135 du rapport, M. Camara dit que ce que l'on appelle en droit français la vérification d'identité est la faculté donnée à la police de demander à des citoyens de présenter une pièce d'identité même en l'absence de toute infraction. Cette pratique, commune à plusieurs pays, ne va pas sans poser de problèmes. Au Portugal, la loi prévoit que la personne qui ne peut ou ne veut présenter une pièce d'identité est conduite au poste de police le plus proche où elle demeurera le temps nécessaire à son identification sans que ce délai dépasse deux heures, mais que se passe-t-il si l'individu refuse toujours de décliner son identité après le délai de deux heures? C'est souvent en ce genre d'occasion que des violences se produisent dans les commissariats. On ne peut exiger d'un État qu'il renonce à la procédure de la vérification d'identité, mais il est essentiel de prévoir des garde-fous et des garanties pour éviter les abus.

28. S'agissant de l'application des articles 12 et 13 de la Convention, les statistiques données dans le tableau sur les poursuites (par. 202) suscite quelques interrogations. Il faudrait savoir notamment quelle est la nature des affaires "en cours d'investigation" et des affaires "en attente de jugement" et la raison pour laquelle un aussi grand nombre de poursuites n'en sont qu'à ce stade. La Convention impose de faire procéder immédiatement à une enquête objective en cas d'allégations de torture et de mauvais traitements. Il est donc à craindre que l'extrême lenteur des procédures ne donne lieu à une impunité réelle ou à un sentiment d'impunité. Enfin, dans des cas de torture ou de mauvais traitements, il voudrait savoir s'il est arrivé qu'une procédure disciplinaire soit engagée parallèlement aux poursuites pénales, comme cela est possible.

29. *Mme Gaer* se dit impressionnée par les statistiques données au paragraphe 202 concernant l'article 12 de la Convention. Relevant la très forte diminution des plaintes déposées contre des officiers de police pour des infractions pénales commises pendant le service, elle demande si les raisons tiennent aux visites du Comité européen pour la prévention de la torture, à l'intérêt porté par le Comité contre la torture, à des efforts particuliers du Gouvernement portugais, ou au manque d'informations à ce sujet. De même, elle souhaiterait connaître le nombre de personnes qui ont bénéficié d'une amnistie, ou dont la peine a été réduite après leur condamnation.

30. Concernant les autres territoires, Mme Gaer a appris avec satisfaction qu'après la restitution de Macao à la Chine, les dispositions de la Convention continueraient d'être applicables. Toutefois, n'ayant rien lu dans le rapport sur la mise en œuvre de la Convention à Macao tant que le territoire était sous administration portugaise, elle voudrait avoir des détails à ce sujet. Il est indiqué, au paragraphe 5 du document de base (HRI/CORE/1/Add.20) que le Portugal est toujours la puissance administrante du Timor oriental mais n'a pas pu exercer l'administration depuis décembre 1975, en raison de l'occupation illégale du territoire par l'Indonésie. Mme Gaer aimerait avoir des détails sur l'incidence de la situation qui règne depuis août 1999 sur les obligations du Portugal en vertu de la Convention, en particulier compte tenu du fait que le Comité a eu connaissance d'allégations de torture et de viols commis par les forces d'occupation. Elle souhaiterait savoir si les autorités portugaises ont cherché à établir la réalité des faits et quelles sont leurs intentions à cet égard.

31. En ce qui concerne les mauvais traitements dans les prisons, Mme Gaer demande si les plaintes pour violence sexuelle sont traitées de la même manière que les autres plaintes et quelles mesures ont été prises pour prévenir les violences sexuelles. Les programmes de formation à l'intention de la police sont très encourageants; il serait intéressant de savoir si la question de la violence à l'égard des femmes fait l'objet d'un traitement particulier dans cette formation, y compris si elle est abordée dans les films vidéo dont la délégation a parlé. Étant donné que des enquêtes ont été ouvertes dans certains cas, Mme. Gaer souhaiterait savoir si des sanctions ont été prises contre des membres des forces de police.

32. Un membre du Comité s'est déjà inquiété du problème des "chefs de bande" parmi les détenus. Mme Gaer demande si des mesures sont prises par les autorités pour conserver le contrôle dans les lieux de détention et pour assurer la sécurité de la population carcérale.

33. Les paragraphes 34 h) et 91 du rapport (CAT/C/44/Add.7) traitent du prélèvement d'organes et de tissus sur des personnes décédées ou vivantes. Étant donné que selon l'article 10 de la loi No 12/93 "sont considérés comme donneurs potentiels post mortem tous les nationaux, les apatrides et les étrangers résidant au Portugal qui n'ont pas manifesté auprès du Ministère de la santé leur volonté de ne pas faire don de leurs organes", Mme. Gaer aimerait recevoir de plus amples renseignements sur les garanties mises en place sur l'étendue de cette pratique, et sur les moyens déployés pour véritablement informer les citoyens de façon à assurer que le consentement soit éclairé.

34. *M. Rasmussen* félicite le Gouvernement portugais pour la qualité de son rapport. Les paragraphes 81 à 87 du rapport (CAT/C/44/Add.7) traitent du rôle des médecins mais la question de leur rôle dans le contexte de la prévention de la torture n'y est pas abordée, alors qu'elle est essentielle. S'il y a lieu de se féliciter de ce qu'une personne en garde à vue peut faire appel à un médecin de son choix, il est aussi très important que cette personne soit examinée par un médecin dès son arrivée à l'établissement pénitentiaire. M. Rasmussen souhaite savoir s'il existe des instructions spécifiques pour les médecins pénitentiaires et des formulaires spécifiques à remplir s'ils constatent des contusions ou autres lésions et aussi si les médecins ne font que décrire les lésions constatées ou s'ils font également état des allégations de mauvais traitements ou de torture et indiquent leurs propres conclusions. Enfin, quelle est la suite donnée aux rapports des médecins pénitentiaires?

35. Le *Président* invite la délégation à répondre aux questions qui lui ont été posées au début de la séance suivante.

36. *La délégation portugaise se retire.*

La séance est suspendue à 11h25; elle est reprise à 11h45.

Questions d'organisation et questions diverses (point 5 de l'ordre du jour) (*suite*)

37. Le *Président* signale qu'Amnesty International a sollicité l'autorisation d'enregistrer en vidéo les séances publiques consacrées à l'examen des rapports de la Chine et des États-Unis d'Amérique. Lors d'une de ses toutes premières sessions, le Comité avait débattu de la question de l'enregistrement éventuel de ses séances et avait considéré qu'à priori rien n'empêchait le Comité d'autoriser

l'enregistrement des séances publiques, à condition que les travaux n'en soient pas perturbés. Les représentants d'Amnesty International se sont engagés à être discrets. Le Comité pourrait donc s'en tenir à la règle qu'il avait arrêtée, sauf si des membres y voient une objection.

38. *M. Mavrommatis* approuve le principe mais craint que le Comité ne risque d'être accusé d'autoriser l'enregistrement pour tel ou tel pays. Il serait donc souhaitable qu'en début de séance, le Président expose la position de principe du Comité, en soulignant que l'examen du rapport de tout pays peut être enregistré.

39. Le *Président* estime que la suggestion est judicieuse.

Désignation des rapporteurs et corapporteurs pour les rapports des États qui seront examinés à la vingt-cinquième session en novembre 2000.

40. Le *Président* propose de répartir les tâches comme suit: Mme. Gaer et M. Burns pour le troisième rapport périodique du Bélarus; M. Mavrommatis et M. Rasmussen pour le deuxième rapport périodique de l'Australie; Mme. Gaer et M. El Masry pour le troisième rapport périodique du Canada; M. Yakovlev et M. Mavrommatis pour le deuxième rapport de la Géorgie; M. Camara et M. Henriques Gaspar pour le deuxième rapport périodique du Cameroun et M. González Poblete et M. Rasmussen pour le troisième rapport périodique du Guatemala.

41. Au sujet de la note d'information du Comité des droits de l'enfant sur la question de la violence d'État contre les enfants (document sans cote), le Président propose de répondre en indiquant que le Comité contre la torture s'engage officiellement à appuyer l'idée de tenir cette journée de débat, exprime sa préoccupation au sujet de la violence d'État à l'encontre des enfants et s'y oppose de manière systématique, et appuie en principe toute action qui serait prise par le Comité des droits de l'enfant sur la question.

42. Après un bref échange de vues auquel prennent part *M. El Masry*, *M. Bruni*, *M. Mavrommatis*, *M. Gonzalez Poblete* et *Mme. Gaer* au sujet de la distribution des documents, le *Président* rappelle que l'ensemble de la documentation pour la session est envoyée aux membres du Comité avant la session. Pour des questions de coût et de temps, les comptes rendus spécifiques ne sont distribués à l'avance qu'aux rapporteurs et aux corapporteurs concernés. Un second jeu complet de comptes rendus pourrait être disponible en salle pour consultation.

La séance est levée à 12h15.

SUMMARY RECORD OF THE FIRST PART (PUBLIC) OF THE 417th MEETING

Held at the Palais des Nations, Geneva, on Thursday, 4 May 2000, at 3 p.m.

Chairman: Mr. Burns

Contents

Consideration of reports submitted by states parties *(continued)**

Third periodic report of Portugal (continued) (CAT/C/44/Add.7)

1. *At the invitation of the Chairman, the delegation of Portugal (Mr. Pais, Ms. De Albuquerque, Mr. Ferreira, Ms. de Matos, Mr. Dias and Ms. Carvalho) took places at the Committee table.*

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* CAT/C/SR.417, 10 May 2000.

2. *The Chairman* invited the Portuguese delegation to present its replies to the questions raised by the Committee at a previous meeting.

3. *Mr. Pais* (Portugal) thanked the Committee for its positive appraisal of his delegation's report and initial statement. The number and type of questions the Committee had raised reflected well on the thoroughness of its work as a treaty monitoring body.

4. Turning first to the Chairman's comments and questions on deficiencies in police culture and the relationship between the police and the public, he said that, while the former could not be changed overnight, the Portuguese authorities were making far-reaching efforts to modernize the Organization Acts that regulated the country's police forces: the Judicial Police were contributing to criminal investigations under the supervision of the public prosecution, the Public Security Police (PSP) was relinquishing its military connections and becoming a civilian-based force (its first non-military Chief Commander had recently been appointed), and the Republican National Guard (GNR) was also being modernized. Much greater care was being taken in recruiting new members for all those forces: admission requirements had been raised, and new initial assessment and training techniques, such as psychological testing, had been introduced, involving participation by members of civil society such as university professors and representatives of non-governmental organizations (NGOs). In the past three years, every member of the police forces he had mentioned – over 46,000 people – had attended new training programmes that made extensive reference to human rights issues and perspectives, monitored the trainees across all areas of activity, and also covered the use of firearms, supervision of other agencies, and disciplinary and criminal responsibility in cases of abuse of authority.

5. An integrated programme had been developed in order to improve the relationship between the police and the public – the latter meaning not only Portuguese nationals but all people living in or visiting Portugal. The programme was intended to bring about greater police visibility, greater police insertion in community life, and improved knowledge of and dialogue with the public and other bodies in society, particularly the municipalities. The integrated programme comprised several activities, the main ones being the "Safe School Programme", "Elderly People in Security" and "Innovate", which was concerned with contacts between the police and ordinary victims of crime. Collaborative arrangements had been established between the Ministry for Internal Affairs and the Portuguese Association for the Support of Victims.

6. With regard to the Chairman's questions on the definition of torture, he noted that the definition contained in article 243 of the Portuguese Penal Code differed from that contained in article 1 of the Convention in only relatively minor respects: for example, the words "or for any reason based on discrimination of any kind" had been excluded. The reason was that the principles of legality and typification (i.e. a strict adherence to relevant elements), as set forth in article 30 of the Portuguese Constitution and article 1 of the Penal Code, ensured that expressions with indeterminate or unascertainable meaning in the definition of elements constituting a criminal offence must be excluded from the pertinent provisions of the Penal Code. In the same context, it should be borne in mind that the incriminatory provisions of article 244 of the Penal Code applying to acts of torture frequently overlapped with other incriminatory provisions of the same Code. In such cases, the courts normally imposed the more severe punishment.

7. Turning to the Chairman's questions on trials for acts of torture, he said that in the past three years only one case of torture had been independently recorded. The case, which had been documented by Amnesty International, concerned a PSP officer at Sintra who had applied electric shocks to a prisoner. The officer had been dismissed from the force following disciplinary procedures and was currently undergoing criminal trial. Another case that might have constituted torture had occurred at Sacavém in 1996; however, following the death of the victim the GNR officer involved had been found guilty of the more serious crime of murder, thereby incurring a punishment of 12-25 years' imprisonment instead of the penalty of 1-5 years applicable to torture. The case illustrated the principle of subordination he had referred to in his previous answer, whereby punishment for the more serious crime absorbed that for the less serious crime if the same essential facts applied to both.

8. In reply to another question put by the Chairman, the cases of alleged physical abuse by members of the police forces mentioned in paragraph 51 of the Portuguese delegation's report concerned offences said to have been committed by officers of the PSP and the GNR during the period 1996-1998, and brought to the attention of the Inspectorate-General (Inspecção-Geral da Administracão Interna – IGAI). It was the practice of the IGAI to investigate only the most serious cases involving death, torture, serious physical abuse and abuses of authority. Other cases were handed over to the domestic police forces, with the IGAI maintaining a monitoring role to ensure that due process was completed.

9. Serious cases investigated by the IGAI during the period 1997-1999 comprised: in 1997, 23 cases involving one death, 6 cases of physical abuse and 3 cases involving abuse of authority; in 1998, 32 cases involving four deaths, four suicides, 11 cases of physical abuse, 2 cases of wounding by firearms and one violation of fundamental rights; in 1999, 34 cases involving four deaths, 14 cases of physical abuse, 5 cases of wounding by firearms, 1 case of abuse of authority and 1 case of violation of fundamental rights.

10. The outcome of those inquiries had been the following. In 1997, police officers had been found guilty in eight cases and the following punishments had been applied: one reprimand, three fines, three suspensions from duty, three prison terms (for GNR officers), and one dismissal. In 1998, officers had been found guilty in eight cases and the following punishments had been applied: three reprimands, one removal from active service and four suspensions from duty. In 1999, officers had been found guilty in 13 cases, leading to four suspensions from duty, one reprimand, five fines and one prison term.

11. Turning to the Chairman's questions relating to the Amnesty International report discussed earlier, he said that all 14 deaths reported as having occurred in police custody between 1996 and 1999 had been investigated. Only the death recorded at Sacavém in 1996 had been found to have been caused deliberately by a police officer. Together with two collaborators, he had been dismissed from the GNR and sentenced to prison. In two of the remaining 13 cases – those of Olivio Almada and Victor Santos – it had not been proved that their deaths had resulted from action taken by the officers during the detention. In the former case, the officers had been found guilty of illegal detention, and in the latter the evidence seemed to indicate that the victim had committed suicide and that the officers were not involved.

12. That left 11 cases, which had all involved victims shot during police operations against crime or while the perpetrators of crimes were being apprehended. In six of those cases – Carlos Araújo, Paulo Jorge, Manuel Magalhães Silva and three others not named in the Amnesty International report – it had been found that police officers had made excessive or unjustified use of firearms, and suspensions from duty had been ordered. Some officers had been tried and found guilty of negligent homicide, which carried a penalty of up to five years' imprisonment. In two cases (Fernando Azevedo and one other not mentioned in the report), the officers' use of firearms had been found to constitute a legitimate act of self-defence. The three most recent cases had occurred in

Porto in the current year, and proceedings were still in their early stages. In the first, involving police intervention in a public disturbance, the officers involved were currently in pre-trial detention.

13. With regard to the section of the Amnesty International report dealing with ill-treatment by police officers, disciplinary or criminal investigations were under way in the cases involving Marco Fernandes, Juvenal Ova and Mário Rocha. In view of its serious nature, the first case was being monitored by the IGAI in addition to the regional command of the PSP. The IGAI had also investigated the case of the GNR officers in Anadia, and sufficient evidence had been found to initiate eight disciplinary hearings. Criminal proceedings had also been initiated.

14. Of the other cases mentioned, the one involving Carlos Zurita had been closed, since the victim had declined to bring a complaint; the case involving the two Mecha brothers had been investigated by the IGAI and the officers exonerated (six officers had been wounded in attempting to deal with a public disturbance and the police were found to have used legitimate force); and in the cases of Pedro Silva and Pedro Sousa, injured during a demonstration in Lisbon, the facts of the situation had been confirmed, but only in the first case had a perpetrator been found and punished.

15. With regard to the section of the Amnesty International report on illegal detention by police officers, he did not agree that police officers were in the habit of failing to complete detention forms. All the checks carried out, in particular the unannounced inspections by the IGAI, tended to support the opposite conclusion. There had indeed been illegal detention in the cases of Olivio Almada and of several persons at Anadia, but they were exceptional. As to the case of Bruno Mauricio, the inquiries conducted by the police inspection service and the courts had failed to establish the veracity of his complaint.

16. Turning to the section on effective impunity, he rejected the allegation of a "malaise affecting the Portuguese justice system in general". While he accepted that, in general terms, the cases to which the section referred raised difficulties, criminal charges had been brought in all of them. The question whether the sentences imposed were light was one that the courts alone were able to assess, on the basis of the facts and circumstances of each case. That did not mean that the Portuguese authorities were insensitive to information presented in the media or merely paid lip-service to the principle of judicial

independence or presumption of innocence. Rather, he was satisfied that the information provided for the Committee on all the cases cited by Amnesty International demonstrated the adequacy of the measures taken to prosecute those justly accused of acts of torture or ill-treatment.

17. A register of criminal proceedings against law enforcement officials had been established in the Office of the Attorney-General, with a view to collating information from courts throughout the country and establishing tighter controls over the prevention and punishment of crimes relating to the Convention against Torture. Furthermore, the public prosecution service automatically investigated any case of torture or ill-treatment brought to its attention by any means whatsoever, even when the victims failed to lodge complaints through the prescribed legal channels. The only exception concerned the crime of minor common assault.

18. As to the question of violence against the inmates of Porto prison, raised in the Amnesty International document, a delegation of the European Committee for the Prevention of Torture (CPT) had carried out a 12-day visit to Portugal in April 1999 and the CPT, in its final observations on the visit, had requested the Portuguese authorities to prepare a report dealing specifically with the penitentiary facility at Porto. That report, submitted on 30 July 1999, described the measures adopted immediately and those planned for the medium term in order to follow up on the CPT's comments.

19. The first measure had been a thorough evaluation of the situation by the inspection service of the General Prison Services Directorate, focusing on violence between prisoners arising from overcrowding and drug problems. The evaluation had resulted in the adoption of the following measures: a reduction in the number of prisoners from 1,350 to 1,000; the installation of closed-circuit television as an additional surveillance tool; the introduction of additional compulsory patrols inside the facility; an increase (from 5 to 13) in the number of deputy chief guards responsible for monitoring the movement of prisoners in each wing (it was not the case, as the Amnesty International report stated, that prisoners performed that task); and, in recognition of the fact that most violence between inmates was drug related, improved access to health facilities, including more health personnel, better availability of methadone and antidotes, more support for HIV-positive prisoners, and stronger measures to tackle drug trafficking in the prison, including more searches and more sophisticated techniques. Finally, in the current year to date two Porto prison guards had

been arrested, one of whom had been placed in preventive detention pending disciplinary action, while the other was simultaneously the subject of a disciplinary inquiry and criminal proceedings.

20. Already, the measures he had described had led to a certain easing of tension and improvements in the relationship between guards and inmates at Porto prison.

21. Turning to the question on universal jurisdiction raised by the Chairman, he said that under article 5.2 of the Penal Code, Portuguese courts enjoyed jurisdiction over all acts committed outside national territory provided they were covered by the terms of a treaty or international agreement to which the State of Portugal was committed. Portugal therefore had no legal difficulty in accepting the commitments deriving from article 5 (a), (b) and (c) of the Convention against Torture. However, effective implementation of the jurisdiction of Portuguese courts depended on verification of the conditions specified in the Convention and in article 6 of the Penal Code, and was also subject to the universally accepted principles of *ne bis in idem* and *aut dedere aut judicare.*

22. The Portuguese penal system was adequately provided with the principles and norms of universal jurisdiction necessary to prevent impunity in cases where basic human rights were violated, in compliance with articles 8 and 29.2 of the Portuguese Constitution. The jurisdiction of Portuguese courts could thus be extended to cases such as that of General Pinochet. However, its effective implementation was dependent on concrete verification of the circumstances, conditions and alleged facts, as stipulated in articles 5 and 6 of the Penal Code.

23. Replying to questions raised by Mr. Yu, he said that a code on the physical conditions of detention facilities in police stations had recently been approved. In addition, the IGAI conducted unannounced inspection visits in police stations, especially those located in difficult areas and which had detention facilities. The inspector checked whether there were detainees, whether the detention logs had been filled out, and whether the dates were correct. The inspector spoke privately with the detainee, checked his information, and heard complaints.

24. Police agents must immediately inform the Public Prosecutor's Office of any detentions. The Code of Criminal Procedure forbade the questioning of

detainees by police officers; hearings could be conducted only by judges. The IGAI was currently assessing whether the rigorous recommendations governing the criminal investigation phase were respected by police officers.

25. The Code of Criminal Procedure provided for the acceleration of the trial in cases involving serious crimes, through the intervention of the Procurator-General or, if the case had already come before the court, the Supreme Council of the Judiciary. Delays were investigated to determine responsibility. Various additional measures had been taken to tackle procedural delays, including the appointment of additional judges on an emergency basis, the establishment of quick, easy procedures for the simplest cases, and the creation of measures encouraging recourse to arbitration and court settlements.

26. The delegation believed that the information it had provided concerning the Porto prison, which was the only such establishment where a problem of violence between prisoners had arisen, should be sufficient. After visiting Portuguese prisons, the CPT had reported that the general climate and relations between prisoners and staff were fairly satisfactory. Violence between prisoners, a problem related to drug addiction, nonetheless deserved the close attention of prison administrations. Measures had been taken to improve the treatment of prisoners, to combat drug traffic in prisons, and to provide appropriate training to staff.

27. The delegation had provided information on steps taken to improve the treatment of prisoners in its introductory statement. With a view to combating the drug trade in prisons, detection methods had been improved and proceedings had been initiated against staff. A number of staff members had been expelled, and one had been sentenced to eight years in prison. Several hundred visitors carrying drugs had been apprehended in 1998 and 1999. Five of those had been arrested, and one had been sentenced to seven years in prison. In addition, prison guards were subject to impromptu check-ups to assess their consumption of alcohol and narcotics. Although staff training courses covered the subject of drug addiction, a recent law required continuing training of staff in that subject and provided for the creation of staff support offices, with a view to ensuring their psychological and emotional stability.

28. Victims indeed had the right to lodge complaints and to receive special attention. Acknowledging that victims of domestic violence and sexual abuse had received inadequate attention when filing complaints, the Government had

adopted information and education measures, supported the creation by NGOs of special victim-support offices, and instructed police chiefs to establish such offices in areas where NGOs had not done so. The Portuguese Association for the Support of Victims currently had 11 branches in 10 major cities that provided free, confidential support services, including accompanying victims in emergency situations, referring them to community agencies, providing legal and psychological counselling, offering police forces training in the treatment of victims of crime, and introducing victim-awareness programmes into schools and health centres. The number of victims that had requested support had dramatically increased over the previous decade to over 4,500 cases in 1999.

29. Even when victims did not lodge complaints through the appropriate channels, the Public Prosecutor's Office automatically investigated any case of torture or ill-treatment brought to its attention; the same applied to disciplinary proceedings. Strict communication procedures had been established between the Public Prosecutor's Office, the IGAI and the Directorate-General of Prison Services, allowing for closer supervision of cases handled by those entities.

30. The number of cases that came before the Fact Finding Commission for the Award of Compensation to Victims of Violent Crimes had grown steadily, reaching 82 in 1999, and award amounts had also risen. The average time required to process requests had also dropped considerably, and was currently about four and a half months.

31. Replying to questions raised by Mr. Camara, he said that under current legislation Portuguese citizens over the age of 16 must carry identification papers in public places, places open to the public and places under police surveillance. Article 250 of the Code of Criminal Procedure provided that police officers should request persons in such places to identify themselves if they had reasonable suspicions that a crime had been committed, that an extradition or expulsion procedure was pending, that a foreigner had entered or was residing illegally in the country, or that an arrest warrant existed.

32. If the person concerned failed to produce the proper identification document, the police could attempt to identify him by communicating with a third party able to produce it, by escorting the suspect to the place where the document was, or by having the suspect recognized by a third, duly identified person. If those efforts failed, police agents could then escort the unidentified person to the nearest police station and keep him there only for as long as it

took to identify him, which must not exceed 2 hours, or 6 hours for a person suspected of one of the irregularities listed.

33. Police officers were required to show the suspect their badges, to inform him of the reasons for the identification request, to record the facts, and to allow him to contact someone. If the suspect unjustifiably refused to identify himself, he would be formally advised that his refusal was justifiable under the Criminal Code.

34. The report contained statistics on criminal proceedings instituted against police personnel. Simultaneously, the police station concerned initiated disciplinary measures. In grave cases involving death, torture, severe physical injury or grave abuses of authority, the IGAI conducted the disciplinary investigation, which was handled with due rapidity. Criminal proceedings involving cases in which the accused had been previously detained were also given priority.

35. Other, less serious, cases were subject to the general problems afflicting the Portuguese courts, including the backlog of trials, slow proceedings and the obligation to respect legal safeguards, and repeated appeals. In addition, the principle of the presumption of innocence required collection of sufficient evidence, or the trial could not proceed. That was not a matter of impunity but of respect for the necessary procedural safeguards of any criminal proceeding.

36. Disciplinary and criminal proceedings could indeed be undertaken simultaneously. Disciplinary proceedings sometimes began before the start of the criminal prosecution. When, however, the IGAI was informed of the occurrence of a crime, it must immediately communicate that information to the Public Prosecutor's Office, which in turn initiated the criminal proceedings. Conversely, the Public Prosecutor's Office, having initiated proceedings, was obliged to communicate the facts to the police station or the IGAI, so that disciplinary measures could also be taken. Occasionally, disciplinary proceedings were suspended pending the outcome of the criminal trial, especially when the evidence was inconclusive. In all circumstances, the principle of independence of the two kinds of proceeding was observed.

37. Responding to questions raised by Ms. Gaer, he said that the number of complaints had dropped in recent years owing to the training of law enforcement officials in human rights and professional ethics; the evaluation

and monitoring of the activities of police forces and prison staff; the dissemination of information about international standards and norms (including the recommendations of the Committee against Torture and the European Committee for the Prevention of Torture) to all personnel working in law enforcement agencies; and the dissemination of information regarding behaviour that infringed on human rights and the disciplinary consequences arising therefrom.

38. The newly adopted amnesty law for minor offences had resulted in the release of about 1,500 prison inmates. It did not affect violations of fundamental rights and freedoms by law enforcement officers in the performance of their duties.

39. In late 1999, the administration of the territory of Macau had passed from Portugal to the People's Republic of China. Before that transition, Portugal had attempted to ensure that Macau would benefit from solid legal protections, particularly in the area of torture. By agreement between the two countries, the Convention against Torture had been extended to Macau in mid-1999. The reporting obligation now fell to the Special Administrative Region of Macau; a report had not yet been presented. Furthermore, the Macau Criminal Code, adopted in 1995, contained three provisions relating to the crime of torture.

40. Under the terms of the 5 May Agreements, a referendum had been held in East Timor, marking the culmination of lengthy efforts by the international community, and particularly by Portugal, to ensure the Timorese people's right to determine its own political future. Following the wave of violence that had followed the announcement of the results, Portugal had requested the United Nations to intervene, the Security Council had taken action, and an international force had been deployed. In October 1999, the Security Council had established the United Nations Transitional Administration in East Timor (UNTAET), according it overall responsibility for the administration of that territory, including the exercise of legislative and executive authority and the administration of justice. Portugal could not legally extend the applicability of the Convention against Torture or of any other international instrument to East Timor. The Portuguese legal criminal framework nonetheless contained principles and rules that prevented impunity for such fundamental violations of human rights as genocide, slavery and traffic in human beings. There were no legal obstacles to exercising the jurisdiction of the Portuguese courts in such cases, if and when the factual conditions were consonant with the Portuguese Criminal Code and with article 5 of the Convention against Torture.

41. The Government had, however, made efforts to apply some minimum human rights standards in East Timor: regulations issued by UNTAET provided that persons performing public duties should observe internationally recognized human rights standards, citing the major United Nations human rights instruments.

42. Sexual harassment and abuse almost never occurred in Portuguese prisons. In recent years, three cases had been reported, one of sexual abuse and two of harassment; all had been investigated on a confidential basis. In the sexual abuse case, the guard had been dismissed. In one of the sexual harassment cases, the staff member had been dismissed; the other case was still pending.

43. Ongoing training programmes dealt with the role of the police in cases of violence against women. Those programmes featured videotapes that discussed support for women victims, described appropriate treatment methods, and emphasized that women victims should preferably be handled by women police officers and directed toward social, medical and legal support services.

44. The two officers who had sexually abused a young drug addict had been sentenced to six and a half and five and a half years' imprisonment respectively (the first for committing the abuse, the second for acting as lookout) and banned from exercising public duties for four years. They had appealed against the decision. Disciplinary proceedings had also been instituted with a view to their expulsion.

45. With regard to the matter of organ donations, a law enacted in 1994 had created a national registry of non-donors, and authorized persons to stipulate that they did not wish to donate organs after their deaths. That law had been widely publicized by the media.

46. Replying to a question raised by Mr. Rasmussen, he said that the code of medical ethics provided a general framework for the duties of doctors, and stipulated that a doctor must never cooperate in any act of torture, nor allow premises, instruments or medicine to be used for that purpose. In addition, doctors were strictly required to report to the competent bodies any case of torture that came to their attention. Doctors were also forbidden to feed against his will a patient on hunger strike, even when his life was at risk. Doctors providing

health care in prison and detention facilities were obliged to respect the interests and personal integrity of the patient. Furthermore, if a person admitted to a prison was wounded, bore marks of abuse, or complained of having been beaten, the doctor must immediately examine and question the detainee. The results were sent to the perpetrator's superiors, who then initiated the appropriate proceedings.

The public part of the meeting rose at 4.05 p.m.

SUMMARY RECORD OF THE 421st MEETING

Held at the Palais des Nations, Geneva, on Monday, 8 May 2000, at 3 p.m.

Chairman: Mr. Burns

Contents

Consideration of reports submitted by states parties *(continued)**

Third periodic report of Portugal (continued) (CAT/C/44/Add.7)

Conclusions and recommendations of the Committee

1. *The Chairman* (Country Rapporteur) read out the following text:

"1. The Committee considered the third periodic report of Portugal (CAT/C/44/Add.7) at its 414th, 417th and 421st meetings on 3, 4 and 8 May 2000 (CAT/C/SR.414, 417 and 421), and adopted the following conclusions and recommendations.

* CAT/C/SR.421, 15 May 2000.

A. *Introduction*

2. The Committee notes with satisfaction that the third periodic report of Portugal, which was received in a timely manner, conform to the general guidelines for the preparation of periodic reports. It expresses its satisfaction at the full, detailed and frank nature of the report.
3. The Committee received with interest the oral statement of the Portuguese delegation which elaborated upon events that had occurred since the submission of the report. It noted, in particular, the extension of the Convention to the territory of Macau, which has been confirmed by the Peoples' Republic of China.

B. *Positive aspects*

4. The Committee notes the ongoing initiatives of the State party to ensure that its laws and institutions conform to the requirements of the Convention.
5. The Committee particularly notes the following developments:

a) The restructuring of the police agencies which is designed to emphasize the civil features of policing;

b) The advice that an Inspectorate of Prisons is about to be set up;

c) The creation of a database to streamline information relating to cases of abuse of public power;

d) The enactment of regulations governing police use of firearms that reflect the United Nations Basic Principles on the Use of Firearms by Law Enforcement Officials;

e) The enactment of regulations relating to conditions of detention in police lockups, setting out the minimum standards to be observed;

f) Acknowledgement by the European Committee for the Prevention of Torture as a result of its 1999 inspection that improvements in prisons have taken place, including the creation of a national drug unit for prisons as well as setting up new prison health units;

g) The initiation of the practice of prison visits on a monthly basis by magistrates to receive prisoner treatment complaints;

h) The introduction this year of a new system of police training with a curriculum developed by a board that has members from civil society;

i) Active measures that have been taken to reduce inter-prisoner violence in Portuguese prisons;

j) The active dissemination of information relating to the Convention, including publication to the judiciary of the proceedings relating to the second periodic report in an official periodical.

C. *Subjects of concern*

6. Continuing reports of a number of deaths and ill-treatment arising out of contact by members of the public with police.
7. Continuing reports of inter-prisoner violence in prisons.

D. *Recommendations*

8. The State party should continue to engage in vigorous measures, both disciplinary and educative, to maintain the momentum moving the police culture in Portugal to one that respects human rights.
9. The State party should particularly ensure that criminal investigation and prosecution of public officers are undertaken where appropriate *as a matter of course* where the evidence reveals the commission of torture, or cruel or inhuman or degrading treatment and punishment by them.
10. The State party should continue to take such steps as are necessary to curtail inter-prisoner violence."

2. *Mr. Pereira Gomes* thanked the Committee for its conclusions and recommendations, and said that he would submit them to the Portuguese Government, which would take them into account in implementing its policies and submitting its next periodic report.

DIREITOS DA CRIANÇA

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CHILD PARTICIPATION

1. The Convention on the Rights of the Child is a landmark in the history of the United Nations standard-setting. It entered into force in a very short period of time, just 9 months, and has reached an unprecedented number of ratifications – 191, that is all countries but two (US and Somalia).

The Convention also stands as a unique achievement – being the first legal instrument adopted after the cold war and bridging two political blocs, bridging North and South, bridging civil and political rights, as well as economic, social and cultural rights, associating State responsibility with the active involvement of civil society.

More important than that, the Convention has provided a new vision of children. While acknowledging that the child is a vulnerable human being that requires the protection and assistance from the family, the society and the State, the child is envisaged as a subject of rights, who is able to form and express opinions, to participate in decision-making processes and influence solutions, to intervene as a partner in the process of social change and in the building up of democracy.

With the Convention, *children can no longer be perceived as not-yet persons*, waiting in the lobby of life to become mature by the magic effect of reaching the age of maturity. *They are not simply the passive recipients of care or of adult's decisions.* If we address child's health, their ability to have access to information becomes essential; if we address education, their evolving capacity in gaining skills, experience and responsibility, becomes critical; if we consider the situation of the child within the family, their active contribution to decisions that may affect their lives is essential – be it the case of adoption, custody or place of residence when the parents are separated. With the Convention, *solutions need to be built with children,* considering their perspective on the realities we want to address and ensuring that they are empowered to make informed choices and enrich results.

With the Convention, the relationships between adults and children also change. Parents, teachers, care givers and others interacting with children evolve from mere providers, protectors or advocates to negotiators and facilitators. They are expected to create spaces and promote processes designed to enable and empower children to express views, to be consulted, to influence decisions.

Several provisions in the Convention reflect this innovative approach, but one in particular reveals this special dimension – *article 12. This article sets one of the fundamental values of the Convention,* as well as one of its basic challenges. In essence, it affirms that the child is a fully-fledged person having the right to express views in all matters affecting him or her, and requiring that those views are heard and given due weight. *It recognises the potential of the child* to enrich decision-making processes, to share perspectives and participate as a citizen and an actor of change.

In the light of this provision, the child has the right to participate in decision-making processes that may be relevant for their lives and to influence decisions taken in their regard – within the family, the school or the community. It is for this reason that article 12 is often identified as portraying the right of the child to participation.

Article 12 is a visionary provision, but it has also a very practical meaning which needs to be considered in each and every matter relevant to the child. It indicates *the way* the process of the realisation of the rights of the child needs to be promoted – *with children.* And it further shows that *as a fundamental right of the child, it stands on its own,* requiring a clear commitment and effective actions to become a living reality, and being much more than a simple strategy.

It was for this reason that the Committee on the Rights of the Child identified article 12 as one of the fundamental principles of the Convention, – *an underlying value* which needs to guide the way each individual right is ensured and respected; ***a criteria*** to assess progress in the implementation process of children's rights; and *an additional dimension* to the universally recognised freedom of expression, implying the right of the child to be heard and to have his or her views taken into account.

2. *At a first sight, article 12 may be perceived as a simple reaffirmation of the right to freedom of expression.* And they are closely related. But article 12 stands for much more than just the recognition of the right to seek, impart and receive information and ideas of all kinds. In fact it highlights *the right of the child to express views freely, and further to have those views*

taken into consideration in all matters which may be of relevance to the child. It applies to the family setting, the school context or the community level and it includes the right to be heard in administrative and judicial proceedings affecting the child (for instance the place of resident in case of separation of parents or a decision on the adoption of the child).

But what does this mean? *Respecting the views of the child means that they should not be ignored; but it also means that child's opinions should not be simply endorsed.* Expressing an opinion is not taking a decision. But it implies the ability to influence decisions. Thus, a process of dialogue and exchange needs to be encouraged to prepare the child to assume increasing responsibilities and to become active, tolerant and democratic – combining adults direction and guidance to the child with the consideration of the child's views in a manner that is consistent with the age and maturity of the child; giving the child an opportunity and ability to understand why a particular option and not another is followed, why a particular decision is taken and not the one the child might have preferred.

3. *It is important to note that child's participation is a right, and should not be perceived as a duty.* It implies for the child the freedom of expressing views or preferring not to do so. It means the *opportunity to take a stand but not to be forced to do so.*

The child should therefore not suffer any pressure, constraint or influence that might prevent a free expression of opinions or lead to the manipulation of his or her feelings. This certainly applies to legal solutions according to which a child is forced to participate as a witness in a judicial proceeding, even if it is clear that such a solution is contrary to his or her best interests. In this regard, it is interest to note that in many countries while children are expected to join a judicial proceeding as witnesses, often without any minimum age limit, they are rarely entitled to directly launch a complaint as a victim – including in the case of ill-treatment or sexual abuse. The law often foresees the possibility for parents or care-givers to do it on behalf of the child – which of course does not address the situation of a child victim within his or her own family.

4. *The Convention does not set any lower age limit on children's right to express views* freely, nor upon where those views may be expressed. *The Convention acknowledges that children can and do form views from a very early age.* References in the Convention to the "evolving capacities" of the child emphasise the child's developing capacity for decision making. This means, for example, that parents and, where appropriate, members of the family

and wider community are expected to give appropriate direction, guidance or advice. But, as the child grows and evolves, gains maturity and experience, direction will lead to an increasing degree of autonomy and responsibility of the child, and guidance and advice gain greater value and meaning. In an *evolving way and in manner consistent with the age and maturity of the child,* there will be various ways of creating the right atmosphere to enable the free expression of the views by the child – even at a very young age, the child interacts with adults and cries or smiles to express feelings, wishes, fears and expectations.

For those close to children, particularly members of their family, it is *important to be available to listen and understand children, to give them the time and space for them to feel confident and encouraged to express their opinions.*

And there will be different ways of promoting and ensuring participation in view of the child's age and, within each age group, in the light of the individual child's ability, confidence and experience in assessing its own situation, considering possible options, expressing views thereon and influencing decision-making processes. Amongst children, it is important that the older and more advantaged foster the participation of the younger and most disadvantaged, including girls, the poorest, children belonging to minority groups and indigenous groups, or migrant children.

But, the child's evolving capacity represents just one side of the equation: the other has to do with adults' evolving capacity and willingness to listen to, understand, and weigh the views expressed by the child. The implementation of this right therefore calls for the training and mobilisation of those who live and work with children, preparing them to give children the chance of freely and increasingly participating in society and of gaining democratic skills. This includes, most obviously, parents and other family members, but also relates to society at large, to groups such as teachers, social workers, lawyers, psychologists, and the police.

5. *Article 12 is far from being the only provision addressing children's participatory rights.* As mentioned already, it is closely linked to freedom of expression. It is also related to the fulfilment of the right to information, which is a key prerequisite for the participation of the child to be relevant and meaningful. It is in fact essential that the child be provided with the necessary information about the possible existing options and the consequences arising therefrom, so that an informed decision, and a free decision, be made. Providing the child with information means enabling him or her to gain skills, confidence and maturity in expressing views and influencing decisions.

Moreover, article 15 guarantees the right to create or join associations, and to peaceful assembly. Both imply the opportunity to express political opinions or engage in political processes, to participate in decision-making processes and both are critical to the development of a democratic society, and to the realisation of children's rights ensured with the participation of children themselves.

But the right to participation is relevant to the exercise of all other rights, within the family, the school or the larger community context.

Thus, for example:

— *In the case of adoption*, the child, as one of "*the persons concerned*", is to be heard in any judicial or administrative proceedings, and in fact Article 21 (a) refers to the informed consent of persons concerned, including the child;
— If a decision is to be taken on the need to *separate the child from his or her parents*, on the basis for instance, of abuse or neglect, the child, as one "*interested party*", must be given an opportunity to participate and make his or her views known;
— If a decision is to be taken on the *change of the name* of the child, the views of the child should be taken into consideration;
— To ensure the enjoyment of the *right to health*, children are entitled to be informed, have access to information and be supported in the use of basic knowledge of child health and nutrition... (article 24 para. 2 *e)*).
— Similarly, in the area of *education*, the participation of the child gains a special dimension. In fact, it means a process of learning which provides an opportunity for the child to develop his or her talents and abilities to their full potential, to gain confidence and self-esteem, to promote initiative and creativity, to gain life-skills and make informed decisions, to understand and experience pluralism, tolerance and democratic coexistence. In brief, *the right to education means the right to experience citizenship.*

And all this can only happen if children are *perceived not as recipient of knowledge, but rather as active players in the learning process*. It is for this reason that the Convention puts so much emphasis on the aims of education and on a system that respects the human dignity of the child. And a few consequences arise therefrom:

a) First, it implies the need to support learning by doing and experiencing, avoiding simple repetition and memorisation.

b) Second, it reflects the recognition of the right of the child *to diverge in his or her views;* to test, error and retry, to know and not know without fearing penalisation or sense of failure.

c) Third, it requires the need to *establish a violence free environment,* where the dignity of the child is respected, inhuman discipline or corporal punishment forbidden and where negotiation and dialogue prevail as a means of preventing and solving conflicts.

d) Fourth, it indicates that children should be given *opportunities for active participation, decision making and responsibility within the school* in order to prepare them for life in a free democratic society. In this regard, it is important to note the trend to ensure students' representation in school councils and disciplinary boards, the consideration of their views when the curriculum is being revised, the schedule in school is being decided or recreation activities are being promoted. It is equally relevant to ensure students' participation in proceedings specifically relevant to them – in particular, when a decision on suspension or expulsion may be at stake.

The school plays a decisive role in this process when it provides the democratic setting for views to be expressed openly and discussed, for fairness and justice to be ensured, for participation to be encouraged and experienced.

We assist to a visible trend to ensure the participation of children in schools. *In France,* for instance, elected students sit at National Board of Education and take part in major discussions on the educational system. *In Chile,* students centres are being established as a channel through which the concerns and needs of young people can be expressed and shared, and as a forum to promote the development of members' ability of reflection and critical judgement and their willingness to take action and become prepared for a democratic life and for participation in cultural and social change. *In Namibia,* the Code of Conduct for Schools recognises the right of students to have their opinions taken into consideration in setting school policy regarding discipline, and provides grievance and appeal procedures. *In Bulgaria,* children over 14 are entitled to express their preference in the choice of school and type of education, as well as to put proposals forward regarding the organisation and conduct of its activities. *In Colombia,* children also participate in the planning of their school activities and children's councils are established as part of education for citizenship, and in fact as a means of reverse in the marginalisation of children living in rural areas or belonging to indigenous groups.

6. Participation is an entitlement, and cannot be genuine if it gives no opportunity for the child to *understand the consequences and the impact of his or her opinions*. 'Participation' should therefore not be used to disguise for any form of manipulation or tokenism. Again, the issue is, as the Convention as stressed, how to express respect for the views of the child.

It is for this reason that, in addition to facilitate and support activities where children can freely participate, it is becoming increasingly important to consider *whether and how we are prepared to ensure a follow-up to children's recommendations or expression of concern.*

With the expression of the child's views comes the responsibility for adults to listen and learn from them, to understand and consider the child's point of view and re-examine adults' own opinions and attitudes, be willing to change them and to envisage solutions which address children's ideas. For adults, as well as for children, participation is a challenging learning process and cannot be reduced to a simple formality.

7. This also applies to UNICEF. Committed to support the implementation of the CRC and ensure the realisation of the right to participation, the Organisation is going through an important debate on the requirements for a genuine participation of children, its potential and impact, including on the way we work – not less in the assessment of the reality in countries, the development of programmes of cooperation, monitoring and evaluation.

One trend we note is the support to the realisation of children's elections, which provide an important learning democratic experience. This was clearly the case when elections on children's rights were organised in *Mozambique,* even before any political experience of that kind had ever occurred in the country. Through children, adults became familiar with the registration process, the awareness and information campaigns, the identification requirements and the prevention of fraud, the secret ballot, the public announcement of results and the welcoming of the most widely voted right of the child – the right to an identity. And the meaning of such a choice was certainly undeniable for a country devastated by war. It gave a strong sense of citizenship and hope in the consolidation of peace. This experience galvanised the country, and later led to a national campaign for birth registration. Children became visible and clearly associated with the democratic process in the country.

In Ecuador, the children's election was organised at the same time as the national election for Congress. This constituted an important reason to mobilise attention and to lead to comparison between the adults' and children's process. But more interesting was even the result of the vote – in the view of children,

the most relevant right was the right to be protected against abuse and ill-treatment, a hidden phenomenon but certainly important enough to become critical in their eyes. Unfortunately no visible follow up was given to the message conveyed by the children and their expression of concern remained simply an expression of concern...

In Mexico, the election was organised with the Independent Federal Electoral Institute, which had for a few years organised programmes on civic education for school age children, to promote the values of pluralism, dialogue and tolerance. Similarly to what had happened in Ecuador, the elections were organised the same day of the Federal elections, although using child-friendly places, including schools and parks for children's ballots. The results indicated the need for a priority attention to the area of education. Differently from Ecuador, in Mexico there was an attempt to consider the message from the children and to envisage an effective follow-up. In a Pact around children, all the political parties agreed to envisage a plan to address the absenteeism of teachers, to promote the reform of the school curricula and to ensure relevance to the education system. It is still too soon to anticipate results, but hopefully the process will generate change and children will be involved in its development and implementation.

In Chile, Unicef promoted an interesting experience – an opinion poll for children to evaluate the relevance of the existing education system. Similarly to Mexico, their assessment indicated a clear need for change and reform.

These are but a few examples of a world-wide movement to increase the spaces and opportunities for child participation. And while each experience brings valuable lessons, we must build into our efforts strong monitoring and evaluation components where we constantly test our initiatives against the principles of the Convention – is what we are proposing, or doing, in the best interests of the child?; are we acting without discrimination of any form?; have we made spaces, given voice and listened to the most disadvantaged and marginalised?; how do we work genuinely with children and curb adult tendencies to control and manipulate outcomes or at least to pretend that children are able to make a difference in decision-making processes?

Conclusion:

In the vision that I have outlined today the participation of children is a right in itself and essential to consideration of what is in the best interests of the child.

This means that answers will have to be found to several questions: the question of why, even in countries where democratic institutions proclaimed to be based on participation and public scrutiny have been established, the voices of children continue to go unheard, with little consideration given or effort made to change the system to tap their special needs and unique potential. Why the voices of children are silent when public policy is being considered: why urban areas, particularly facilities for children, are planned without consulting the users – children... phones out of reach, play areas designed by adults, little thought to creating spaces where children can safely meet, and so on.

Many challenges but many reasons to continue our struggle to see the participation of children achieved in their very best interests. Thank you.

Harvard, May 1999

CONSELHO DA EUROPA

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THE PREVENTION OF HUMAN RIGHTS VIOLATIONS: MONITORING MECHANISMS OF THE COUNCIL OF EUROPE

The present study is an up-dated version of a paper presented at an international colloquy entitled "The Prevention of Human Rights Violations" which was held at the Panteion University in Athens, Greece, on 24 and 25 May 1999 to celebrate the 20th anniversary of the Marangopoulos Foundation for Human Rights. The colloquy proceedings will be published in 2000 (editor-in-chief A. Sicilianos).

Outline:

I. Some general observations
II. Prevention of human rights violations: the statutory framework
III. Consolidation of the Organisation's legal *acquis*
IV. Core human rights monitoring procedures
V. Necessity to safeguard standards subsequent to upheavals in Central/Eastern Europe
VI. An interim assessment

I. Some general observations

The Colloquy title "The Prevention of Human Rights Violations" reminds us of why the Council of Europe was created: "Never Again!" was the slogan in 1949 [1]. That individuals can successfully plead their cases before the European Court of Human Rights, that war between France and Germany is no longer possible and that democracy is well-embedded – since the late 1970's – on the Iberian Peninsular and, more recently, in a number of countries in Central and Eastern Europe, are surely clear indicators of the historical role the Council of Europe has played in *preventing* human rights violations and in consolidating pluralistic democracy and respect for the Rule of Law. But can this momentum be maintained? We are no longer in the privileged situation of being a club of relatively sophisticated and economically – more or less – comfortable States which reflect liberal-democratic Western European standards and achievements.

After the initial euphoria of 1989 and 1990, our continent is now again faced with difficult, serious challenges, new fears and anxieties. The recent tragedies of Bosnia and Kosovo – on the parameters of the Organisation – remind us of the fragility of 'democracy' as perceived by the Organisation's founding fathers. We have not rid ourselves of (potential) barbarities which we had mistakenly considered to be confined to the annals of history of our

[1] See A. H. Robertson *The Council of Europe. Its Structure, Functions and Achievements* (1961), *passim.*

'civilised' continent. The situation in South East Turkey [2] and the more recent Chechen crisis in Russia are obvious examples of unacceptable and tragic situations. But could the Council of Europe have been able to prevent, or at least limit, the human suffering caused by these conflicts? Should or could have other regional or international organisations been able to do so? History will judge.

Over the last few years the Council of Europe's capacity – and with it the Organisation's credibility – to *prevent* (major) human rights violations has been put to a severe test [3]. That being said, it is too simplistic and unfair to try to place, onto the shoulders of the Council of Europe, blame for all the recent ills of Europe which are the collective responsibility of many actors.

On a related matter: has the Council of Europe adequate means at its disposal, in terms of logistics, infrastructure and support from capitals (at least from the major contributors, as concerns the Organisation's budget), to consolidate respect for the Rule of Law and to take appropriate *preventive measures* in order to appropriately "monitor" human rights violations in a manner *commensurate* with the tasks assigned to it [4]? If not, why not? What exactly are the political and legal parameters within which the Organisation is meant to

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[2] See Interim Resolution DH (99) 434 of the Committee of Ministers adopted on 9th June 1999 (entitled "Human Rights. Action of the security forces in Turkey: measures of a general character") and article "Legal system to be overhauled" in *Turkish Daily News*, of 27th September 1999. Allegations of serious violations of human rights have been documented: see, for example, P. Mahoney, in vol. 20 *Human Rights Law Journal (HRLJ)* at pp. 3-4 (in which the Strasbourg Court's case-law is cited).
See also critical comments by M. T. Kamminga "Is the ECHR Sufficiently Equipped to Cope with Gross and Systematic Violations?" in vol. 12 *Netherlands Quarterly of Human Rights (NQHR)* (1994), pp. 153-164 and A. Reidy, F. Hampson and K. Boyle "Gross Violations of Human Rights: Invoking the ECHR in the Case of Turkey", in vol. 15 *NQHR* (1997), pp. 161-173.

[3] See, for example, *Le Monde* of 6th November 1999, front page article entitled "Tchétchénie: l'honneur perdu du Conseil de l'Europe", or Ralph Dahrendorf's comments, in the Polish weekly *Wprost*, of 18th July 1999, pp. 19- 21 at p. 20, that the ECHR's influence on countries such as Russia, Ukraine and more recently Georgia, is non-existent ("the Council of Europe – nominally guarantor of the [ECHR] – no longer has any influence on the latter" [with respect to the countries cited]). See also *The Economist*, of 8th March 1999 "Europe's council of correctness", at p. 29 & A. Gimbal "Europarat und Europäische Menschenrechtskonvention" in *Jahrbuch der Europäischen Integration 1998/99* (W. Weidenfeld & W. Wessels, eds., 1999), pp. 411-418, *passim*.

[4] See, for example, *Official Gazette of the Council of Europe, passim*, in which the Organisation's multi-faceted work is regularly reported, the Organisation's Intergovernmental Programme of Activities for 2000, and document SG/INF (2000) 4 in which the Council of Europe's Activities for the Development & Consolidation of Democratic Stability (ADACS) Programme for 2000 are enumerated.
For an excellent overview, see D. Huber *A Decade which made History. The Council of Europe 1989-1999* (1999), *passim*, as well as the Council of Europe's Web Site *http://www.coe.int*.

be working *vis-à-vis* those provided to other (European) international organisations [5]? Perhaps decision-makers in the capitals of 'more important' member States have not yet realised the costs – both it terms of human suffering and economic realities – in having to rebuild institutions after (irreparable) damage has been caused in situations were appropriate *preventive* action could have been taken?

The above issues merit reflection.

The prevention of human rights violations by means of a variety of monitoring procedures established under the auspices of the Council of Europe presupposes that the term "monitoring mechanisms" is clearly understood. I am not sure that it always is (see Part VI). If the present survey were limited to "monitoring" undertaken within the context of the European Convention of Human Rights (ECHR), "the jewel in the crown of the Council of Europe [which has prevented] a return to the atrocities of the Nazi regime and the Holocaust" [6], it might be relatively easy to circumscribe the parameters of what is at issue. This would necessarily entail an analysis of 'Strasbourg-proofing/vetting' by long-standing member States [7], emphasis would need to be placed on the fact that in the foreseeable future *all* States Parties will have incorporated the ECHR into their domestic law (thereby reinforcing the *subsidiary* role the Strasbourg control mechanism [8]), and mention would also need to be made of the seriousness

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[5] See, in this connection, presentations made by, *inter alia,* C. Gearty, P. Alston, A. Clapham, P.-H. Imbert. and H. P. Furrer at a conference "The Protection of Human Rights in the 21st Century: Towards Greater Complementarity within and between European Regional Organisations", held in Dublin on 3-4 March 2000.
For earlier commentaries see M. Lucas & A. Kreikemeyer "Pan-European Integration and European Institutions: the New Role of the Council of Europe" in vol. 14 *Journal of European Integration* (1992), pp. 89-107; H. Delétraz "Le Conseil de l'Europe et le O. S. C. E. sont-ils complémentaires ou concurrents?" in vol. 47-48 *Objectif Europe* (1997), pp. 38-52 and H. Klebes *The Quest for Democratic Security. The Role of the Council of Europe & U.S. Foreign Policy* (United States Institute for Peace, 1999).

[6] *Per* Lord Lester of Herne Hill, General Report on the theme "The ECHR in the New Architecture of Europe", 8th International Colloquy on the ECHR held in Budapest in 1995, in vol. 38, *A Yearbook of the ECHR* (bilingual, English/French version, 1997), pp. 223-236 at p. 223.

[7] See *The ECHR: 1950-2000* (eds. R. Blackburn and J. Polakiewicz, to be published in 2000). This book contains contributions, by several authors, of an analysis of the impact the ECHR has had in the legal and political systems of member States, including 'preventive' measures taken to ensure compliance with Strasbourg standards elaborated by the Convention control organs.

[8] See numerous contributions to the *Leiden Seminar* entitled "The Domestic Implementation of the ECHR in Eastern and Western Europe" in vol. 2 *All-European Human Rights Yearbook* 1992 (1993); French-language version in vol. 4 *Revue Universelle des Droits de l'Homme (RUDH)* (1992), pp. 353-460 and E. Lambert *Les effets des arrêts de la Cour européennne des Droits de l'Homme* (1999), *passim.*

– or otherwise – with which new democracies have carried out compatibility studies prior to the ratification of the ECHR [9].

The ambit of the present survey, however, invites the author to go much further than this. The title intentionally chosen by the Conference organisers asks the author to deal not only with the Organisation's core human rights mechanisms – important as they obviously are – but also solicits discussion of 'political' monitoring mechanisms put into place principally, but not exclusively, by the Parliamentary Assembly and the Committee of Ministers subsequent to the historic events of 1989/90. So this is the wider context within which this survey is undertaken.

The specific mandate assigned to the Council of Europe – in so far as "monitoring" is concerned – has been clearly delineated: the Organisation has had to become more pro-active. The Heads of State and Government of the member States of the Council of Europe, meeting for the first time in the Organisation's history at the Vienna summit conference in 1993, solemnly reaffirmed that:

> "... accession [to the Organisation] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people's representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept

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[9] See, *inter alia*, P. Leuprecht "Innovations in the European System of Human Rights Protection: is enlargement compatible with reinforcement?" in vol. 8 *Transnational Law & Contemporary Problems* (1998, University of Iowa, College of Law journal), pp. 313-336 and F. Sudre "La Communauté européenne et les droits fondamentaux après le traité d'Amsterdam: vers un nouveau système européen de protection des droits de l'"homme?" in *La Semaine Juridique, JCP* (1998), I, pp. 9-16. Further research can be undertaken on this subject by consulting reports undertaken in the context of accession procedures, listed in vol. 20 *HRLJ* (1999) at pp. 112-113; see also vol. 14 *HRLJ* (1993), at p. 248 together with Council of Europe documents. Monitor/Inf (99)1 of 18 February 1999 and Addendum thereto and Monitor/Inf (2000)3 of 22 May 2000 (with respect to Georgia).
As to compatibility exercises, see Council of Europe doc. H (96)12, prepared by P. Titiun, and A. Drzemczewski "Ensuring Compatibility of Domestic Law with the ECHR prior to Ratification: the Hungarian Model" in vol. 16 *Human Rights Law Journal (HRLJ)* (1995), pp. 241-260 (a shorter, French-language version, can be found in vol. 7 *RUDH* (1995), pp. 195-212.

the Convention's supervisory machinery in its entirety within a short period is also fundamental. *We are resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe*" [10].

II. Prevention of human rights violations: the statutory framework

The Council of Europe was founded in 1949 as a European organisation for intergovernmental and parliamentary co-operation. It is considered to be a democratic "club", often referred to as 'the conscience of Europe'. It is now geographically the most extensive European political organisation comprising of 41 member States (including all 15 European Union(EU) member States and the States which have posed their candidature to join the EU) [11]. Today, it's principal *political* role is the consolidation of democratic security in Europe [12].

Article 3 of the Statute of the Organisation provides that every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Read together with Article 1 of the Statute, it further provides that members must collaborate sincerely and effectively, by discussion of questions of common concern and by agreements and common action, in the realisation of the aim of the Council of Europe as set out in Article 1 (a), namely "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and

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[10] Vienna Declaration, 9 October 1993, emphasis added. (The full text of the Declaration can be found in D. Huber's book, *supra,* note 4, at pp. 247-255).
See also "Respect des engagements pris par les Etats membres: évolution de la procédure de suivi du Comité des Ministres [du Conseil de l'Europe]" in vol. 10 *RUDH* (1998), pp. 371-382, *passim.*

[11] Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, 'The former Yugoslav Republic of Macedonia', Turkey, Ukraine and the United Kingdom.
Six States have applied for membership, namely, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Monaco and Yugoslavia (although procedures with respect to Belarus have been suspended).

[12] As stipulated/confirmed in the Final Declaration of the Strasbourg (Second) Summit of Heads of State and Government, 11th October 1997 (the full text of which can be found in D. Huber's book, *supra,* note 4, at pp. 257-263). See, on this subject, J.-L. Laurens "Democratic security for Europe" in vol. 15 *Ritsumeikan Law Review* (1999), pp. 73-78; H.-P. Furrer and J. Gützkow "The Concept of Democratic Stability and its Implementation by the Council of Europe" in vol. 2, *International Affairs* (Romanian Institute of International Studies), 1996, pp. 13-23 and *The Challenges of a Greater Europe. The Council of Europe and Democratic Security (Council of Europe Publishing, 1996), passim.*

facilitating their social and economic progress". Hence, by joining the Organisation, States make a firm commitment to abide by the principles espoused therein.

It follows that all member States of the Council of Europe are required to respect their obligations under the Organisation's Statute, the European Convention on Human Rights (ECHR) and other conventions to which they are Parties as well as to observe a series of principles, rules, standards and values which have been elaborated over the past 50 years within the Organisation with regard to democratic pluralism, human rights and the rule of law.

In addition to the obligations referred to above, the authorities of certain States which have become members since 1989 (principally from countries of Central and Eastern Europe) have also entered into additional and specific commitments during the examination of their request for membership. These commitments, undertaken in contacts with the Committee of Ministers (the Organisation's executive organ), and in particular the Parliamentary Assembly of the Council of Europe, are explicitly referred to in the relevant Opinions adopted by the Assembly to which reference is, in turn, often made by the Committee of Ministers when it invites States to become members of the Council of Europe. For example, signature of the ECHR upon accession and its prompt ratification thereafter (including declarations pursuant to Articles 25 and 46, ECHR, ie., acceptance in full of the individual and inter-State complaints system before the Strasbourg Commission and Court, pending entry into force of Protocol No. 11 on 1st November 1998) was an essential undertaking which all new member States had to make when joining the Organisation [13]. Membership

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[13] For a study of this subject consult H. Klebes and D. Chatzivassiliou "Problèmes d'ordre constitutionnel dans le processus d'adhésion d'Etats de l'Europe centrale et orientale au Conseil de l'Europe", in vol. 8 *RUDH* (1996), pp. 269-286 and publications cited therein. See also vol. 14 *HRLJ* (1993), p. 248 and *Le Conseil de l'Europe acteur de recomposition du territoire européen* (C. Schneider, ed., 1997), Cahier de l'Espace, No. 10, May 1997, Grenoble, *passim*.
For additional commentaries on this subject consult, amongst others, see K. Drzewicki, "The Future Relations Between Eastern Europe and the Council of Europe", *Legal Aspects of a New European Infrastructure* (A. Bloed and W. de Jonge, editors, 1992), pp. 41-60; J.-F. Flauss, "Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe", in vol. 5 *European Journal of International Law* (1994), pp. 401-422; E. Gelin, "Les critères d'admission des nouveaux Etats indépendants au Conseil de l'Europe", in *Revue de droit international et de droit comparé* (1996), pp. 339-367; vol. 14 *NQHR*, Editorial (1996), pp. 3-4, and H. Winkler, "Democracy and Human Rights in Europe. A Survey of the Admission Practice of the Council of Europe", in vol. 47 *Austrian Journal of Public and International Law* (1995), pp. 147-172. A complete list of specific commitments entered into by member States can be found in "Compliance with commitments entered into by member States: Undertakings entered into upon accession to the Council of Europe", Council of Europe doc. Monitor/Inf (99)1, of 18 February 1999, and Addendum as well as Monitor/Inf (2000)3, of 22 May 2000 (as concerns Georgia).

does not necessarily entail compliance with all the criteria of membership, and especially requirements established by the Strasbourg ECHR control organs case-law *ab initio*: according to Article 4 of the Organisation's Statute, States must be 'willing and able' to abide by the conditions of membership [14].

So, when human rights standards have been breached within one or more member State, the Council of Europe and its other member States – with a variety of "monitoring procedures" at their disposal – must try to ensure that the situation is put right and that the State concerned lives up to one of the Organisation's principal aims, namely that of "the maintenance and further realisation of human rights and fundamental freedoms" (Article 1 of the Statute of 1949).

Committee of Ministers

The Committee of Ministers has an inherent power to invite States to become members, to suspend them and to monitor the obligations of members as they derive from the Statute. For example, by virtue of Article 21 (b) of the Statute, the Committee of Ministers may determine what information shall be published regarding its discussions and conclusions, including any decision it may have taken under Articles 8 and 9 of the Statute [15].

Articles 4 and 5 of the Statute provide that the ability and willingness to fulfil the provisions of Article 3 are a precondition to membership (or associate membership) of the Council, the only other criterion being that the applicant State be European [16].

A member State which seriously violates Article 3 may, by virtue of Article 8, be suspended from its rights of representation and requested by the

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[14] For a critical analysis, consult F. Sudre "La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: vers un nouveau système européen de protection des droits de l'Homme?", in *La Semaine Juridique,* 1998, I, pp. 9-26, esp at pp. 9-10.
See also T. Meron and J. S. Sloan "Democracy, Rule of Law and Admission to the Council of Europe" in vol. 26 *Israel Yearbook on Human Rights* (1996), pp. 137-157.

[15] Such a decision requires unanimity of the votes cast and a majority of the representatives entitled to sit on the Committee (Article 20 of the Statute of the Council of Europe).

[16] For a thorough study of conditions of membership see B. Haller "L'Assemblée parlementaire et les conditions d'adhésion au Conseil de l'Europe" in *Law in Greater Europe. Towards a Common Legal Area.* Studies in Honour of H. Klebes (B. Haller, H-C. Krüger and H. Petzold, editors, 2000), p. 27-79. See also Parliamentary Assembly doc. 1703 of 10 June 1994, Report on the enlargement of the Council of Europe (Rapporteur Mr Reddemann) and Conclusions of the Bureau of the Assembly, appended thereto and also published as "The Geographical Extension of the Council of Europe: Policy Options and Consequences", in vol. 13 *Human Rights Law Journal (HRLJ)*, 1992, pp. 230-236 (see also vol. 14, *HRLJ*, 1993, p. 248).

Committee of Ministers to withdraw under Article 7. If a member State does not comply with this request, the Committee of Ministers may decide that the State concerned has ceased to be a member State of the Council of Europe. Such action was contemplated *vis-à-vis* the Greek colonels' regime back in 1969. However, this was short-circuited by the decision of the Greek authorities to withdraw from the Organisation, in December 1969, just before the decision to suspend Greek membership was to be taken [17].

Failure by a member to fulfil its financial obligation to the Council may also result in a decision by the Committee of Ministers, under Article 9 of the Statute, to suspend its rights of representation in the Committee and in the Parliamentary Assembly.

In short, the *possibility* or *threat* of suspension from the 'democratic club' is a weapon in the Organisation's armoury whose potential it is difficult to ignore.

Parliamentary Assembly

Article 23 (a) of the Statute provides, in particular, that the Parliamentary Assembly (referred to as "Consultative Assembly" in the Statute) shall discuss and make recommendations upon any matter referred to it by the Committee of Ministers with a request for its opinion.

It is important to note, in this connection, the key role played by the Parliamentary Assembly with the accession, principally, of countries from Central and Eastern Europe to the Organisation [18]. Here, it should be recalled that although the power of decision to admit a State to the Council of Europe "which is deemed to be able and willing to fulfil the provisions of Article 3" (Article 4 of the Statute) lies with the Committee of Ministers, an opinion of the Parliamentary Assembly must first be sought and obtained (see Statutory Resolution(51)30). Under Statutory Resolution (51) 30, the Committee of Ministers also decides that, before inviting a member of the Council of Europe to withdraw in accordance with Article 8 of the Statute, it shall first consult the Parliamentary Assembly. Thus, whereas the decision to suspend a member State remains that of the Committee of Ministers, the fact that the Parliamentary Assembly must give its prior agreement to any accession or, where appropriate, to any suspension, provides the latter with substantial political weight.

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[17] See A. Drzemczewski *European Human Rights Convention in Domestic Law. A Comparative Study* (1983), at pp. 142-143 & references therein.

[18] See B. Haller, *supra,* note 16 and references therein.

The Joint Committee of the Council, governed by Statutory Resolution (51) 30, allows for the co-ordination and discussion of questions common to the Committee of Ministers and the Parliamentary Assembly [19]. As of 1999 one Joint Committee meeting *per* year is now dedicated to monitoring of compliance with commitments, in addition to the recent institutionalisation of informal exchanges of views between the Chairman of the Committee of Ministers and the Bureau of the Assembly's Monitoring Committee.

In the particular context of the monitoring of obligations and commitments entered into by member States, the Parliamentary Assembly initially adopted a special procedure under Order No. 488 (1993), replaced by Order No. 508 (1995) which in turn has been superseded by Resolution 1115 (1997). These procedures are described in more detail in Part V.

The role of the Secretary General

Finally, a few words about the role of the Secretary General of the Organisation. Under Articles 10 and 37 (b) of the Statute, the Secretary General is responsible to the Committee of Ministers for the work of the Secretariat in serving the Committee and the Parliamentary Assembly. However, under present statutory provisions no mandate with respect to monitoring is conferred on the Secretary General. It follows that, for the Secretary General to have any independent role in the monitoring of obligations of members, this has to be explicitly attributed to him under a Convention or an Agreement or otherwise by resolution of the Committee of Ministers. Such a power was *expressly* provided for in paragraph 1 of the 1994 Committee of Ministers Declaration on Compliance with Commitments (see Part V below).

Also, in its Declaration on the Protection of Journalists in Situations of Conflict and Tension (3 May 1996), the Committee of Ministers "considers in this context that, in urgent cases, the Secretary General could take speedily all appropriate action on receipt of reports on infringements of rights and freedoms of journalists in member States in situations of conflict and tension and calls on the member States to co-operate with the Secretary General in this regard" (paragraph 7 of the Declaration). See also Recommendation No. R (96) 4 of the Committee of Ministers on the same subject, *passim.*

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[19] The complementary powers of the Parliamentary Assembly to discuss and make recommendations upon any matter within the aim and scope of the Council of Europe, as well as its relations with the Committee of Ministers, are governed by Articles 19, 22, 23, 24, 29 and 35 of the Statute of the Council of Europe.

Prevention of human rights violations by means of 'reporting' is recognised as a useful tool. In this context, specific mention needs to be made of the power of inquiry provided to the Secretary General under the ECHR. Article 52 (previously Article 57) of the European Convention on Human Rights provides the Secretary General with the possibility to request Contracting Parties to furnish an explanation of the manner in which their internal law ensures the effective implementation of the Convention's provisions (discussed below, in Part IV) [20].

III. Consolidation of the Organisation's legal *acquis* [21]

Conventions concluded within the Organisation

Under Article 15 of the Statute, the aims of the Council of Europe are furthered, in particular, by the conclusion of Conventions or Agreements (treaties) and by the adoption by Governments of common policies, a number of which provide for specific monitoring / compliance verification procedures.

The Statute of the Council of Europe contains no provision of a general nature conferring upon the Committee of Ministers or any other organ the task of monitoring the implementation of treaties elaborated within the Council of Europe. This is because treaties elaborated within the framework of the Council of Europe and listed in the European Treaty Series (ETS) are not strictly speaking acts of the Organisation as such [22]. The adoption of the text of a Convention and its opening for signature give the treaty an independent life. Only those links with the Council of Europe which are explicitly foreseen by the treaty itself maintain it in the sphere of the Organisation.

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[20] For a general survey of how violations of human rights can be *prevented* by the use of reporting procedures see V. Dimitrijevic "The monitoring of human rights and the prevention of human rights violations through reporting procedures" in *Monitoring Human Rights in Europe* (A. Bloed, M. Nowak and A. Rosas, eds., 1993), pp. 1-24.

[21] See D. Simon & others "Rapport sur l'évaluation de l'acquis du Conseil de l'Europe comparé aux contraintes du droit de l'Union Européenne dans la perspective de l'adhésion d'un Etat membre à l'Union Européenne", Council of Europe doc. Dir/Jur (97) 13, and *Law in Greater Europe, supra*, note 16, *passim*, esp. articles by G. de Vel and T. Market and W. Schwimmer.
[This part of the paper is based on information contained in doc. Monitor/Inf. (2000)1].

[22] The adoption of texts of Conventions requires a two-thirds majority within the Committee of Ministers, as set out in Article 20.d of the Statute: see, in this connection, Statutory Resolutions (51) 30 of 3 May 1951 and (93) 27, of 14 May 1993, adopted by the Committee of Ministers. But see, in this connection, ideas mooted by J. Malenovsky in *Law in Greater Europe, supra*, note 16.

Instead, these matters are primarily governed by general principles of international law and/or by specific provisions contained in the treaties themselves. The vast majority of the 174 treaties elaborated to date within the Council of Europe contain no provision at all about monitoring. Hence, in the absence of particular provisions, parties are responsible *vis-à-vis* one another for the reciprocal implementation of treaty obligations. And difficulties between the parties, when they occur, are resolved without any intervention of the Council of Europe as such [23].

Nonetheless, steering committees or other committees set up under Article 17 of the Statute are often entrusted with the task of examining the general operation of treaties falling within their competence, even in the absence of specific provisions to this effect in the treaties themselves. In this way, of legal / human rights standards are, in effect, verified by means of 'preventive' monitoring procedures within the daily – bread-and-butter – work of the Organisation's various committees. In other words, through work which is carried out at the intergovernmental level.

Recommendations of the Committee of Ministers

Under Article 15 (b) of the Statute of the Council of Europe, the Committee of Ministers may request the Governments of member States to inform it on the action taken by States with regard to Recommendations and Resolutions addressed to them by the Committee of Ministers [24].

This procedure provides for the possibility of subtle, behind-the-scenes, readjustment and improvement of legal standards in member States. Steering committees and *ad hoc* committees of experts are invited (not often enough, in my view) to select and examine Resolutions and Recommendations on matters falling within their jurisdiction. The way in which the said texts are adopted and implemented at the domestic level are then analysed and possible

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[23] An excellent study of this subject is provided by J. Polakiewicz in *Treaty-making in the Council of Europe* (1999, Council of Europe Publishing), esp. chapters 1 to 3 and 8 (follow-up, monitoring and settlement of disputes).

[24] Recommendations apply to Governments of member States and are adopted by the Committee of Ministers by the unanimous vote of representatives casting a vote and, of a majority of the representatives entitled to sit on the Committee. For further information consult Council of Europe publication "Methods and Instruments of Co-operation in the Council of Europe", 1975 and *The Committee of Ministers of the Council of Europe* (by G. de Vel, Council of Europe Press, 1995, pp. 37-38).

problems of implementation are discussed, where deemed appropriate. The Committee of Ministers is subsequently provided with information as to what follow-up action, if any, should be envisaged.

Work at the inter-governmental (committee) level

As explained above, according to Article 17 of the Statute of the Council of Europe, the Committee of Ministers may set up or authorise the setting up of advisory and technical committees for such specific purposes as it may deem desirable. These committees are often established in order to prepare draft conventions, draft recommendations and propose or implement other activities which are of direct relevance and contribute to furthering the aims of the Council of Europe. Normally it is for a "steering committee" to instruct and supervise appropriate committees of experts to which it delegates specific tasks. The terms of reference of a steering committee may be modified or cancelled at any time by the Committee of Ministers; these are usually of a generalised, political nature.

The committees of experts are, in turn, mostly composed of specialists in a certain field of the Council of Europe's activity. Although the committee members of these subordinate committees are designated by the Governments of member States, they sit, in specific instances, on committees as individual experts of the Council of Europe and are not considered as representatives of their Governments. Hence, constructive, critical analysis of legal/human rights standards – analysed in a comparative context – often leads to a marked improvement of domestic standards.

An overview of monitoring procedures

In an overview such as this one, highlighting the Council of Europe monitoring procedures which contribute to the *prevention* of human rights violations and the consolidation of democratic stability in Europe, it is impossible to treat this subject in an exhaustive manner and refer to each and every procedure which may possibly be classified as 'monitoring' [25]. Work is presently being

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[25] For further references, see Polakiewicz, *supra*, note 23, esp. *bibliography*, at pp. 191-193. Also consult Council of Europe *Intergovernmental Programme of Activities for 2000* and regular *Statutory Reports* submitted by the Secretary General to the Parliamentary Assembly, *passim;* see also Council of Europe Internet Site: *www.coe.int*

carried out by over twenty steering committees [26]. An example may be provided for illustrative purposes: the European Committee on Legal Co-operation (CDCJ). As part of its permanent agenda the CDCJ considers the operation of Conventions, Agreements and Recommendations within its sphere of competence. A number of such instruments are selected for discussion at each of the meetings of the CDCJ, and members are asked to provide information on their application and interpretation to facilitate these discussions.

Also, a smaller number of treaties provide for a procedure or set up a machinery with a view to monitoring implementation of the treaty and/or fostering further co-operation between the parties: monitoring may be entrusted to existing bodies [27] and/or to newly created bodies. In the latter case, several treaties [28] set up "Standing Committees", whose powers may vary, but usually comprise of general monitoring of treaty norms, proposing amendments/updates of treaties, making recommendations to Parties and using their best endeavours to settle differences between Parties, when need arises.

The reports of these monitoring bodies are usually forwarded to the Committee of Ministers for information, or are transmitted to the Committee of Ministers with specific proposals for action.

Some treaties provide for consultations between the Parties, to be convened at the request of a Party or by the Secretary General at regular intervals. The purpose of these consultations is, in all cases, to examine the application of the treaty, and, usually, to examine the advisability of revising the treaty or extending its provisions [29]. Conciliation mechanisms are also sometimes foreseen, as are arbitration procedures in case of failure of the conciliation.

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[26] See, in this context, Annual Intergovernmental Programmes of Activities, *passim*. For an overview, see Polakiewicz, *supra*, note 23.
As concerns working methods, consult Resolution (76) 3 of the Committee of Ministers "On Committee Structures, Terms of Reference and Working Methods".

[27] For example, the European Convention on Social Security (ETS 78, 1972 and Protocol, ETS 154, 1994) and the (not yet in force Revised) European Code of Social Security (ETS 139, 1990) are reviewed by the CDCS; the European Cultural Convention (ETS 18, 1954) is reviewed by the CDCC (education and culture) and CDDS (sport).

[28] For example, the European Convention on the Legal Status of Migrant Workers (ETS 93, 1977) and the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS 108, 1981). An outstanding case is the European Convention for the *Prevention* of Torture and Inhuman and Degrading Treatment of Punishment (ETS 126, 1987), where the Committee which is set up is the very object of the Convention (see below for more details).

[29] Examples of such Conventions are: the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (ETS 105, 1980), the European Convention on Insider Trading (ETS 130, 1990 and Protocol, ETS 133, 1990), the European Convention on Certain International Aspects of Bankruptcy (ETS 136, 1990) and others.

Monitoring procedures: a couple of examples

The first example concerns the European Charter for Regional or Minority Languages. This text (ETS, 148, 1992) has been signed by 18 and ratified by 8 member States. It entered into force in 1998. The Charter establishes a system of monitoring, based on reports by a Committee of Experts. These reports may contain proposals for recommendations to be addressed to a State Party by the Committee of Ministers on the implementation of the Charter.

One outstanding feature of this monitoring system is that, besides the information provided by the Governments, any organisations or associations legally established within a State Party can draw the attention of the Committee of Experts to irregular situations concerning the Charter. After verification with the interested Party, the Committee may decide to reflect this information in the report. The publication of the report by the Committee is contingent on a decision to this effect by the Committee of Ministers.

Interestingly enough, both the Framework Convention for the Protection of National Minorities (described below) and the European Charter on Regional or Minority Languages form part of the legal standards upon which the work of the OSCE High Commissioner on National Minorities is often based.

The second legal instrument to which reference can here be made is the European Convention on Transfrontier Television, ratified by 21 member States and signed by 13 [30]. This Convention (ETS 132, 1989) applies Article 10 of the ECHR (freedom of expression and information) to the specific context of transfrontier television services. It guarantees freedom of reception and retransmission.

In case of an alleged violation of the Convention, States Parties try to find a solution themselves and, if they fail to do so, the matter is referred to a Standing Committee which serves as a forum for conciliation.

A Protocol to amend the Convention was adopted in 1998 (although it is not yet in force). It defines a number of new rules, in particular as regards the criteria for determining the Parties' jurisdiction *vis-à-vis* broadcasters, access by the public to events of major importance, advertising, sponsorship and teleshopping, as well as the abuse of rights conferred by the Convention.

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[30] For more information consult "Council of Europe Activities in the Media Field", doc. DH-MM(2000)1; the Media Division's Web Site *www.humanrights.coe.int/media* in which can be consulted the latest Intergovernmental Programme of Activities of the Council of Europe as well as Opinions and Recommendations of the Standing Committee on Transfrontier Television.

The above two examples (selected form a plethora of legal instruments negotiated under the auspices of the Organisation) provide good illustrations of how the Council of Europe carries out important but unspectacular (human rights) monitoring of a principally *preventive* nature. The fact that this work doesn't 'hit the headlines' of newspapers in no way diminishes its utility; the fact that the European Union is also strongly influenced by, and often elaborates its own standards on the basis of the Council of Europe norms – the so-called *acquis juridique* – tends to confirm this assertion.

IV. Core human rights monitoring procedures [31]

The Commissioner for Human Rights

The post of Commissioner for Human Rights was created on 7 May 1999 by Committee of Ministers Resolution (99)50 [32]. The resolution defines the Commissioner for Human Rights as "a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe" (Article 1). Elected by the Parliamentary Assembly from a list of candidates drawn up by the Committee of Ministers for a non-renewable six-year term of office, the Commissioner functions "independently and impartially" (Article 2; see also Article 6).

The Commissioner may be regarded as a dynamic link between the Council of Europe's two general statutory organs, the Committee of Ministers and the Parliamentary Assembly, and various institutions at national and international level.

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[31] See, *inter alia*, Council of Europe Internet Sites: *www.coe.int; www.echr.coe.int; www.dhdir.coe.int; www.cpt.coe.int* and *www.ecri.coe.int*. For a good, incisive overview, see P. Leuprecht "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", in vol. 8 *Transnational Law and Contemporary Problems* (1998, B. H. Weston and S. Marks (eds.)), Journal of University of Iowa, College of Law, pp. 313-336.

[32] Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. Mr. Alvaro Gil-Robles took up office on 15 October 1999 and subsequently made a fact-finding visit to the Russian Federation, including the northern Caucasus. The Commissioner submitted a report to the Committee of Ministers (see the Ministers' Deputies decision of 15 December 1999, item 4.6, CM/Del/Dec (99) 692) and to the Parliamentary Assembly (see the Parliamentary Assembly Bureau's declaration of 13 December 1999 on the situation in Chechnya). For more details, consult J. Schokkenbroek's contribution in the proceedings of the Athens colloquy, May 1999, and J. Jaskiernia "Komisarz Praw Czlowieka Rady Europy-nowa instytucja miedzynarodowej ochrony praw" ["The Council of Europe Commissioner for Human Rights – a new international institution for the protection of rights"], in vol. LIV, *Panstwo i Prawo* (1999), pp. 3-17.

The Commissioner therefore acts principally as a *preventive* mechanism in the human rights field, without prejudice to the range of other supervisory machinery in existence at the Council of Europe. The Commissioner does not, however, possess the mandate to take up individual complaints (Article 1, paragraph 2).

The Commissioner has several types of function, including the promotion of human rights and the provision of advice and assistance to member States when he identifies "possible shortcomings in the law and practice of member States". The Commissioner promotes "the effective implementation of [human rights] standards by member States and assists them, with their agreement, in their efforts to remedy such shortcomings" (Article 3e). The Commissioner also acts as a watchdog: "whenever the Commissioner deems it appropriate" he may alert the organs of the Council of Europe through reports, opinions and recommendations.

European Convention on Human Rights

By virtue of Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5, 1950) [33] States Parties undertake to secure for everyone within their jurisdiction the rights and freedoms defined by the Convention. By ratifying the Convention and its protocols, States Parties accept the double commitment resulting from Article 1 – to ensure that their domestic law and practice is compatible with the Convention and to remedy any violation of the rights and freedoms protected by the Convention.

Any State Party may refer to the European Court of Human Rights an alleged breach of the provisions of the Convention and its protocols by another State. This procedure is rarely used. To date, there have been 20 such inter-State applications [34]. Also individuals may bring applications under Article 34 of

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[33] The following account of the system is based on the Convention as amended by Protocol No. 11 (ETS 155, 1994) on 1st November 1998. For a commentary on Protocol No. 11 see vol. 15 *HRLJ* (1994), pp. 81-115 esp. at pp. 82-83 (also in vol. 6 *RUDH* (1994), pp. 81-155 at pp. 82-83) and my studies "A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11" in vol. VI (1995), Book 2, *Collected Courses of the Academy of European Law* (Florence, 1997), pp. 121-244; "Le Protocole n° 11 à la Convention européenne des Droits de l'Homme: aperçu du processus de négociation" in vol. 69/70 *Boletim de Documentação e Direito Comparado* (1997), pp. 375-445 and "The ECHR: Protocol No. 11. Entry into force and first year of application" in vol. 79/80, *Boletim de Documentação e Direito Comparado* (1999), pp. 220-267.

[34] Two applications by Greece v. United Kingdom; Austria v. Italy; four applications by Denmark, Norway, Netherlands and Sweden v. Greece (and one joint application by Denmark, Norway and

the Convention to the (new) Court. In this case, the State undertakes "not to hinder in any way the effective exercise" of the right to individual petition [35].

The procedure before the Court develops in two stages: one on admissibility and one on the merits. The judgments are final and binding. The Committee of Ministers supervises that the necessary measures are taken to prevent new violations and to remedy fully the situation of the applicants.

This monitoring system is considered to be the most successful international human rights control mechanism in existence. It would be difficult to deny that the existence of the ECHR and case-law elaborated thereunder has not had a profound effect in preventing many human rights violations [36]. The system of control of the Convention allows for remedying individual situations and has undoubtedly brought about substantial improvements of the respect for human rights in member States by the adoption of measures of general nature (Article 46), often with repercussions far beyond the case (and State) in question. Nevertheless, the present system has certain shortcomings: it is ill-equipped to deal with serious and/or systematic violations of human rights. Here, the system's capacity to deal with major violations depends very much on the initiative of the Committee of Ministers and (the possibility of) joint action of all the constituent parts of the Council of Europe [37].

Under Article 52 (formerly Article 57) of the Convention, the Secretary General has the right to request from any State Party an explanation of the manner in which its internal law ensures the effective implementation of the provisions of the Convention and its protocols. The States Parties are under an obligation to furnish the requested explanations. In such instances, the Secretary General acts on his own responsibility and discretion, in the exercise of the powers conferred to him by the Convention independently from any other powers

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Sweden against Greece; three applications by Cyprus v. Turkey; two applications by Ireland v. United Kingdom; five applications by Denmark, France, Norway, Netherlands and Sweden v. Turkey and one application by Denmark v. Turkey.

[35] For a recent set of statistics see, for example, vol. 20 *HRLJ* (1999) at p. 114.

[36] For up-to-date information consult the Court's Web Site *(www.echr.coe.int)* and D. Gomien's *Short Guide to the ECHR* (2nd ed., 1999) *passim* (in which a list of the most important/recent commentaries on the ECHR is provided). See also *Law and Practice of the ECHR and the European Social Charter,* by D. Gomien and L. Zwaak (Council of Europe Publishing, 1996). Many important Recommendations of the Committee of Ministers to Governments of member States and other instruments in the human rights field are not expressly referred to in the present paper. Reference to these may be found in *Collection of Recommendations, Resolutions and Declarations of the Committee of Ministers concerning Human Rights 1988-1995* (Strasbourg, 1996), which complements an earlier volume covering the period 1949-1987.

[37] See, in this connection *'general observations'* made in Part I and, in particular, references in footnote 2, *supra.*

which he may have by virtue of the Statute of the Council of Europe; these powers under Article 52 of the Convention are not subject to any outside control or instructions.

To date, the Secretary General has used this prerogative six times [38], requesting every time – except in the most recent 1999 request – from all States Parties information on their legislation concerning certain provisions of the Convention. In two instances, the Secretary General undertook comparative studies of the explanations provided by the Governments with a view to exploring the conclusions although up till now, no follow-up has been given to these studies.

In December 1999, the present Secretary General, Mr W. Schwimmer, used this prerogative under Article 52 for the first time with regard to one member State only, namely the Russian Federation, concerning the situation in Chechnya. Upon receipt of the Russian Federation's reply, he made a supplementary request for information. Subsequent to yet another exchange of letters, the Secretary General indicated that the replies received "cannot be considered as satisfactory 'explanations' for the purpose of Article 52 of the Convention". He therefore transmitted a report containing the said correspondence to the Committee of Ministers and the Parliamentary Assembly "for any action they might consider appropriate in the circumstances", adding that he had "requested a team of recognised experts in international human rights law to analyse in greater depth [the said exchange of correspondence] in the light of the obligations incumbent on a High Contracting Party which is the recipient of a request under Article 52 of the Convention [39].

As concerns the ECHR, two subjects merit particular attention, namely the subtle change in the nature of a rising number of cases which the Strasbourg Court must now be prepared to deal with and that of the substantial enlargement of the European Human Rights Convention's geographical parameters.

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[38] In 1964, 1970, 1975, 1983, 1988 and, on 13th December 1999, for the sixth time in respect of the Russian Federation. See also footnote 20, *supra*.
A first-rate analysis of Article 52 [formerly Article 57] of the ECHR can be found in P. Mahoney's "Does Article 57 of the ECHR serve any useful purpose?" in *Protecting Human Rights: the European Dimension.* Studies in honour of G. J. Wiarda (F. Matcher & H. Petzold, editors, 1988), pp. 373-393 (a shorter, French-language, version of which can be found in *La Convention européenne des Droits de l'Homme.* Commentaire article par article (L.-E. Pettiti, E. Decaux & P.-H. Imbert, editors, 1995/1999, at pp. 881-891).

[39] Citation taken from page 5 of document "Request for explanations concerning the manner in which the Convention is implemented in Chechnya and the risks of violation which may result therefrom. Report by the Secretary General on the use of his powers under Article 52 of the ECHR in respect of the Russian Federation", SG/Inf (2000)21 of 10th May 2000. (See also Addendum to this document).

There is a marked tendency – over the last few years – for primary facts to be disputed, especially where serious human rights violations are alleged, as illustrated by the number of applications brought against Turkey [40]. This will require the new Court to undertake difficult and expensive fact-finding missions. It is likely that this type of issue may well arise in a number of new States Parties to the Convention. The extent to which this more 'active' role of the Court will help prevent (potential) human rights violations is difficult to determine at present.

The substantial geographical enlargement of the Council of Europe, tied principally to the upheavals in Central and Eastern Europe that commenced in 1989, is the other subject which merits separate analysis, especially in the context of enormous efforts undertaken in order to ensure the conformity of States' law and practice with the Convention's requirements. As already explained, admission to the Organisation presupposes a commitment, on behalf of candidate States, to join the Convention system and for them to make appropriate adjustments beforehand. Numerous 'compatibility exercises' have been and continue to be organised in order to bring domestic law and practice into harmony with the Court's standards. However, standards in a number of new States Parties to the Convention are below those established by the Convention control organs [41]. Thus States "willing and able" (Article 4 of the Organisation's Statute of 1949) to guarantee rule of law, pluralistic democracy and respect of human rights, and which have made specific undertakings to remedy shortcomings in their constitutional, political and legal orders as part of the membership package need additional assistance beyond the framework of the ECHR control mechanisms. It is in such instances that *political* monitoring mechanisms can come into play.

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[40] Noted by N. Bratza & M. O'Boyle in "The Legacy of the Commission to the New Court under Protocol No. 11" in *The Birth of European Human Rights Law.* Studies in honour of C. A. Norgaard (1998, M. de Salvia & M. E. Villiger, editors), pp. 377-393. See also A. Drzemczewski "Fact-finding as part of effective implementation ; the Strasbourg experience" to be published in *Enforcing International Human Rights Law: the Treaty System in the 21st Century* (2000, editor A. Bayefsky).

[41] See footnotes 2, 9 & 13, *supra* (together with, *inter alia*, reports undertaken in the context of accession procedures, conveniently listed in vol. 20 *HRLJ* (1999) at pp. 112-113).
As P. Mahoney, the Court's Deputy Registrar, has rightly pointed out "While it may be possible at the intergovernmental and parliamentary level of the Council of Europe to make concessions to new members on the grounds that they are in a process of transition and on the road to full democracy, it is of vital importance, for the continuing integrity of the Convention system, that the Convention institutions avoid a concessionary approach when applying the principle of universality to cases before them". This citation is taken from an article Mahoney wrote on the subject of free speech in *EHRLR* (1997), pp. 364-379 at page 371, footnote 19.

Another 'complication' – as concerns member States from the ex-Soviet Union – has been the adoption of the Commonwealth of Independent States (CIS) Convention on Human Rights in Minsk in 1995 [42].

European Social Charter

The European Social Charter (ETS 35, 1961) complements the European Convention of Human Rights in the field of economic and social human rights. It provides a systematic control of the totality of the undertakings accepted by States Parties, at regular intervals (from two to four years depending on the provision). 'Compatibility exercises', as concerns conformity with the Charter's provisions, are carried out *before* the deposit of instruments of ratification.

State Parties undertake to send to the Secretary General, at regular intervals, a report on the application of the provisions of the Charter which they have accepted.

The control procedure itself is implemented in two stages. The European Committee of Social Rights, composed of nine experts elected by the Committee of Ministers and assisted by an International Labour Organisation observer, examines the reports submitted by the Contracting Parties and gives a legal assessment of compliance with the accepted provisions.

A follow-up to this evaluation – based on social, economic and other policy considerations – is then carried out within the Governmental Committee of the Social Charter, in collaboration with social partners. The Governmental Committee indicates 'situations' which should, in its view, be the subject of individual recommendations to Contracting Parties. The Committee of Ministers then adopts a Resolution covering the entire supervision cycle, containing individual recommendations to the Contracting Parties concerned and the time limits within which the procedure should be accomplished.

Twenty-four member States are Contracting Parties to the European Social Charter and five to the Revised Social Charter (ETS 163, 1996). A total of 37 member States have signed or ratified these instruments. The number of ratifications are expected to continue to increase significantly in 2000. The provisions of the Charter do not have to be accepted all at once, subject however

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[42] English-language text available in vol. 17. *HRLJ* (1996), pp. 159-164. For analyses of the legal implications for States intending to ratify the ECHR and the CIS Convention on Human Rights, see A. A. Cançado Trindade & J. A. Frowein in vol. 17 *HRLJ* (1996), pp. 164-180 & 181-184 respectively. See also Venice Commission "opinion" in vol. 10 *RUDH* (1998), pp. 469-474. The subject of overlapping human rights guarantees is discussed in *The Monitoring System of Human Rights Treaty Obligations* (E. Klein, editor, 1998), esp. at pp. 147-194.

to the acceptance of a majority of the provisions of the "hard core" and a minimum total of 10 Articles (16 under the Revised Charter), which allows States to extend their acceptance within a certain time-span in accordance with the development of their social and economic situation.

Article 22 of the Charter specifies that the Committee of Ministers can ask States Parties to produce reports on those provisions which they have *not* yet accepted. This procedure permits a periodical recapitulation of the situation in law and in practice as regards non accepted provisions as well as the promotion of their acceptance.

This control procedure was modified in 1991 (ETS 142) and has already been partially implemented following a decision by the Committee of Ministers in December 1991, asking the supervisory bodies to apply it before its entry into force, in so far as the text of the Charter allows. This procedure has now been consolidated in the Revised Social Charter.

The Additional Protocol to the European Social Charter, providing for a system of collective complaints (ETS 158, 1995) came into force on 1 July 1998. So far, the procedure has been accepted by nine States Parties to the Charter or the Revised Charter. Its purpose is to permit collective complaints alleging violations of the Charter to be dealt with as a complement to the current procedure for examining Government reports.

Collective complaints can be submitted by the following: European organisations of employers and trade unions which participate in the work of the Governmental Committee, other international non-governmental organisations with consultative status with the Council of Europe and appearing on a special list drawn up for this purpose by the Governmental Committee, as well as national organisations of employers and trade unions from the Contracting Party concerned. In addition, each State may, in a declaration to the Secretary General, authorise national non-governmental organisations to lodge complaints against it.

Collective complaints are first examined by the European Committee of Social Rights which assesses their admissibility according to certain criteria listed in the Protocol. Following this and after having collected information from the initiator of the complaint, from the State concerned, from the other Contracting Parties to the Charter and from the social partners, the Committee draws up a report to the Committee of Ministers containing its opinion on whether or not the State in question has ensured the satisfactory application of the Charter.

The first collective complaint was submitted in October 1998. The procedure was closed by the adoption of the Committee of Ministers of a

Resolution in December 1999. The European Committee of Social Rights is currently examining several other complaints.

European Convention for the Prevention of Torture [43]

By ratifying the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS 126, 1987 and Protocols, ETS 151 and 152, 1993), the States Parties accept to permit visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), established by the Convention, to all places within their jurisdiction where persons are deprived of their liberty by a public authority. In fact, the establishment of the Committee with its strong monitoring powers is the very subject of the Convention.

The prerogatives of the CPT include, under Article 8, paragraph 2 (c), of the Convention, the right to interview in private and without restriction persons deprived of their liberty. The Committee has the mission to examine the treatment of persons deprived of their liberty (in prisons, police stations, military barracks, mental hospitals, etc.) with a view to making recommendations, where necessary, to protect such persons from ill-treatment.

The protective mechanism is of a non-judiciary character and rests on two pillars: co-operation between the Committee and the States Parties and confidentiality. The Committee submits to the Committee of Ministers, under Article 12 of the Convention, a yearly general report on its activities.

The CPT is entitled, after each visit, to establish a confidential report which contains its recommendations. By transmitting it to the Party concerned, the Committee initiates a dialogue and co-operation with that State Party, which may decide to take measures to meet the recommendations of the Committee.

According to Article 11, paragraph 2, of the Convention each State Party may decide to lift the confidentiality of the relevant report of the Committee. To date the vast majority of States have made use of this provision, which of course is an important development that permits the informed public to evaluate work accomplished and progress achieved.

Under Article 10, paragraph 2, of the Convention, when a State Party fails to cooperate or refuses to improve the situation in the light of the recommendations of the Committee, the latter may decide by a two-thirds majority of its members and after the Party concerned has had the opportunity to present

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[43] For a more thorough study consult R. Morgan & D. Evans (eds) *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture in Context* (1999).

its views, to make a public declaration on the subject. This is clearly an exceptional procedure which, to date, has been adopted twice by the CPT [44].

By the end of 1999, ten years since the CPT began its activities, the Committee had undertaken a total of 96 visits, namely 67 visits of a periodic nature and 29 *ad hoc* visits [45].

European Commission against Racism and Intolerance

By signing the Vienna Declaration on 9 October 1993 (referred to above), the member States undertook to combat as energetically as possible racism, xenophobia, antisemitism and intolerance.

A new mechanism (the European Commission against Racism and Intolerance: ECRI) was established in order to review member States' legislation, policies and other measures to combat racism and intolerance and to propose further action at local, national and European level.

The ECRI monitors the situation as regards racism and intolerance in the member States through a "country-by-country approach". This approach involves an in-depth study of the situation in each of the member countries as a prelude to drawing up specific proposals. These are designed to help Governments by suggesting arrangements which may help to solve current problems or to remedy shortcomings observed in their countries.

ECRI's analyses are communicated in the form of draft texts to national liaison officers based in the countries concerned and are the subject of a confidential dialogue with these officers. This process is intended to allow the national authorities to provide ECRI with their observations concerning its analysis of the country in question. After this confidential dialogue, ECRI adopts its final reports and transmits them to the Governments of the member States in question through the Committee of Ministers. The reports are made public two months after their transmission to the Governments in question unless the latter are expressly against making these texts public.

Having completed the first round of its reports in 1998, ECRI is now in the second stage in its country-by-country work. This combines the follow-up (monitoring) of proposals made in the first reports of ECRI, together with a more in-depth analysis of particular issues in each country.

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[44] Public declarations concerning Turkey of 15 December 1992 and 6 December 1996.

[45] See Annual Reports of the CPT; the 9th Annual Report was published in August 1999, doc. CPT/Inf (99)12. The Convention has been ratified by 40 of the 41 member States i.e., all except Georgia. See also CPT Internet Site, *www.cpt.coe.int*

The second stage takes place over a four-years period and covers all member States of the Council of Europe, with the aim of producing a minimum of some ten individual country-by-country reports annually. In order to obtain as detailed and clear a picture as possible of the situation as regards racism and intolerance in each country, contact visits are organised for the relevant ECRI rapporteurs before they prepare their reports on each country [46].

Framework Convention for the Protection of National Minorities [47]

This Convention (ETS, 157, 1995), entered into force, after twelve ratifications, on 1 February 1998. As of 1 February 1999, it had been signed by 37 States, of which 24 had also ratified it.

In accordance with Articles 24-26 of the Framework Convention and the Committee of Ministers' Resolution (97) 10, the monitoring of the implementation of the Framework Convention is to be carried out by the Committee of Ministers, assisted by an Advisory Committee of independent experts. The Parties are required to submit a report containing full information on legislative and other measures taken to give effect to the principles of the Framework Convention, within one year of the entry into force. Further reports must be made on a periodical basis (every five years) and whenever the Committee of Ministers so requests. These reports are made public upon their receipt by the Council of Europe.

State reports are first examined by the Advisory Committee, which is composed of 18 ordinary members appointed by the Committee of Ministers. The Advisory Committee – which commenced its work in June 1998 – prepares an opinion on the measures taken by each reporting State. In order to do so, it may request additional information from a State Party, take into account – and solicit, if need be – information from other sources (including individuals, NGOs, etc.) and, in certain instances, hold meetings with government representatives and other interested parties.

Having received the opinion of the Advisory Committee, the Committee of Ministers must adopt conclusions and, where appropriate, recommendations

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[46] For more information, consult Annual Report on ECRI's activities, 1999 and the ECRI Web Site: *www.ecri.coe.int*

[47] This overview must be read in conjunction with R. Hofmann's contribution, to be published in the proceedings of the Athens colloquy, May 1999, in which he lays emphasis on the preventive mandate of the control system created by the Framework Convention. See also his article "Minority Rights: Individual or Group Rights? A Comparative View on European Legal Systems" in vol. 40, *German Yearbook of International Law, 1997* (1998), pp. 356-382.

in respect of the State Party concerned. The conclusions and recommendations of the Committee of Ministers will be made public upon their adoption, including – as a rule – the opinion of the Advisory Committee. The Advisory Committee may be asked by the Committee of Ministers to help monitor follow-up action taken to the latter's conclusions and recommendations.

Twenty-three reports from States Parties were due on 1 February 1999 (one year after the entry into force). In 2000, the Advisory Committee should receive four additional State reports and one in 2001.

V. Necessity to safeguard standards after the historic changes of 1989

As is already clear from the above, the Organisation's functions have evolved substantially: its role is no longer limited to the preservation of relatively sophisticated human rights standards and the maintenance of pluralistic democracy, a role which it assumed until the mid-1980's. With the substantial geographical enlargement of the Council of Europe, subsequent to the upheavals in Central and Eastern Europe that commenced in 1989, long-standing member States (together with their new partners) have given the Organisation a new task, namely that of "democracy-building" principally (but not exclusively) aimed at former communist countries. States "willing and able" (Article 4 of the Organisation's Statute of 1949) to abide by Council of Europe standards have – rightly or wrongly – been let into the fold on the understanding that they remedy shortcomings in their constitutional, political and legal orders as part of the membership package. This concessionary approach was deemed to constitute "a sound legal and political basis [upon which could be conducted] meaningful admission procedures ... which enabled the organs of the Council of Europe to maintain the credibility of the Organisation without imposing obligations on the new members, which would have made membership impossible for a long time to come" [48].

Here, reference can again be made to the undertakings by Heads of States and Government at the Vienna (1993) and Strasbourg (1997) Summits. The Vienna summit conference, solemnly reaffirmed that "... accession [to the Organisation] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy,

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[48] *Per* H. Winkler "Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe" in vol. 47, *Austrian Journal of Public International Law* (1995), pp. 147-172 at p.155.

the rule of law and respect for human rights", with the Second Summit stressing member States' attachment to the fundamental principles of the Organisation – pluralist democracy, respect for human rights, the rule of law – and their commitment to comply fully with the requirements – and responsibilities – arising from membership.

In their 1997 "Action Plan to strengthen democratic stability in member States" Heads of State and Government specified:

> "3. *Compliance with member States' commitments:* the Heads of State and Government resolve to ensure that the commitments accepted by the member States are effectively honoured, on the basis of a confidential, constructive, non-discriminatory dialogue carried on within the Committee of Ministers and taking into account the monitoring procedures of the Parliamentary Assembly; they reiterate their determination to work together to solve the problems faced by member States and consider that this monitoring process must be supported, where necessary, by practical assistance from the Council of Europe."

It may be recalled that political monitoring (to consolidate democracy and to prevent human rights violations in the future) commences at the very outset, in other words, when accession to membership of the Council of Europe is contemplated. The procedure formally starts when the Committee of Ministers expresses its intention to invite a State to become a member. The Committee is obliged to seek an opinion of the Parliamentary Assembly before issuing such an invitation (Resolution (51) 30A). The Assembly expresses its views on the candidate State's ability and willingness to comply with Articles 3 and 4 of the Statute, after having thoroughly analysed the State's legal and human rights standards. This procedure often takes several years. Although this opinion is not legally binding on the Committee of Ministers, in practice the latter takes account of it; the Assembly's opinion is referred to in the Committee of Ministers Resolution inviting the candidate State to become a member.

When examining the application for membership, the Assembly (first through its committees and subsequently in plenary) assesses whether the applicant is a European State, whether it is willing and able to comply with the provisions of Article 3 of the Statute, whether it is prepared to sign and ratify the ECHR and, when appropriate, its additional protocols, within a reasonable time, and whether it can be considered to be a "genuine" democracy. In addition, the Assembly may also take into account whether the candidate State is ready to subscribe to certain Council of Europe legal instruments and

to respect the rights of minorities. These specific commitments are freely entered into by the authorities of applicant States upon their accession to the Council of Europe and often involve difficult, long and drawn-out negotiations [49].

Commitments of a political nature tied to statutory obligations: Parliamentary Assembly

Once States become members of the Organisation, they can be (and often are) "monitored" by the Assembly. These procedures have evolved substantially over the last few years.

In its Order No. 488 (1993), the Parliamentary Assembly instructed its Political Affairs Committee and the Committee on Legal Affairs and Human Rights "to monitor closely the honouring of commitments entered into by the authorities of new member States and to report to the Bureau at regular six-monthly intervals until all undertakings have been honoured". Also, in its Order No. 485 (1993), the Assembly instructed its Committee on Legal Affairs and Human Rights "to report to it when problems arise on the situation of human rights in member States, including their compliance with judgments by the European Court of Human Rights".

In Resolution 1031 (1994) the Assembly observed "that all member States of the Council of Europe are required to respect their obligations under the Statute, the ECHR and all other Conventions to which they are Parties. In addition to these obligations, the authorities of certain States which have become members since the adoption in May 1989 of Resolution 917 (1989) on a special guest status with the Parliamentary Assembly freely entered into specific commitments on issues related to the basic principles of the Council of Europe during the examination of their request for membership by the Assembly. The main commitments concerned are explicitly referred to in the relevant opinions adopted by the Assembly." In the same Resolution the Assembly considered that "persistent failure to honour commitments freely entered into will have consequences [...]. For this purpose, the Assembly could use the relevant provisions of the Council of Europe's Statute and of its own Rules of Procedure" [50].

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[49] See B. Haller, *supra* note 16 and references therein.

[50] For an analysis of this procedure consult H. Klebes & D. Chatzivassiliou, and C. Schneider, *supra*, note 13, *passim*.
See also, in this context, the critical comments of J. Malenovsky "Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblée parlementaire: une course difficile entre droit et politique", in vol. XLIII, *Annuaire français de droit international* (1997), pp. 633-656.

Taking into account the Declaration on compliance with commitments accepted by member States of the Council of Europe, adopted by the Committee of Ministers on 10 November 1994 (described below [51]), the Assembly has since then – on two occasions – extended and strengthened its own monitoring procedure. In April 1995, by Order No. 508 (1995) [52] on the honouring of obligations and commitments by member States of the Council of Europe, the Assembly instructed its Committee on Legal Affairs and Human Rights (for report) and its Political Affairs Committee (for opinion) to continue monitoring closely the honouring of obligations and commitments in *all* member States concerned. This Order also specified that these committees report directly to the Assembly; in other words, parliamentary debates on monitoring were to be held in *public.*

The above-described procedure under Order No. 508 (1995) was, in turn replaced – as of 25th April 1997 – by a new monitoring mechanism which is now being implemented by an Assembly committee on the honouring of obligations and commitments by [all] member States of the Council of Europe (the Monitoring Committee). This procedure was instituted by Resolution 1115 (1997), adopted by the Assembly on 29th January 1997.

The Monitoring Committee is responsible for verifying the fulfilment of obligations assumed by member States under the terms of the Organisation's Statute, the ECHR and all other Council of Europe Conventions, as well as the honouring of commitments entered into by the authorities of member States upon accession to the Council of Europe (see para's 5, 13 and 14 of the Resolution 1115 (1997)) [53]. Paragraph 12 of the Resolution stipulates that "The Assembly may sanction persistent failure to honour obligations and commitments accepted, and/or lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation or by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary

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[51] See also doc. Monitor/Inf (20009) 4 rev, available on the Council of Europe's Internet site: *http://www.coe.int/cm*

[52] Text adopted by the Assembly on 26 April 1995 (12th Sitting). [This order superseded Order No. 488 (1993) and Resolution 1031 (1994)]. [Information concerning the Parliamentary Assembly's monitoring procedure was provided to the author by D. Chatzivassiliou].
Assembly debate on 26 April 1995 (12th Sitting) (see doc. 7277, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr. Columberg; doc. 7292, opinion of the Committee on Relations with European Non-Member Countries, rapporteur: Mr Seitlinger; and doc. 7294, opinion of the Committee on Rules of Procedure, rapporteur: Lord Finsberg).

[53] Text adopted by the Assembly on 29 January 1997 (5th Sitting). This Resolution abrogated Order No. 508.
See also Parliamentary Assembly Resolution 1176 (1998) of 4th November 1998, on the terms of reference of Assembly committees.

session, or by the annulment of ratified credentials in the course of the same ordinary session in accordance with [the relevant rule of its] Rules of Procedure. Should the member State continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 8 and 9 of the Statute of the Council of Europe". In addition, the new Rules of Procedure of the Assembly, in force as of 24 January 2000, explicitly refer to the "persistent failure to honour obligations and commitments and [to the] lack of co-operation with the Assembly's monitoring procedure" as "substantial grounds" for which the unratified credentials of a national delegation may be challenged (Rule 8.2). Moreover, as far as the procedure is concerned, a report of the Monitoring Committee is one of the two ways by which the unratified credentials may be challenged (Rule 8.1).

By virtue of Resolution 1115 (1997), the Monitoring Committee is required to report to the Assembly once a year on general developments in monitoring procedures and to submit to it at least once every two years a report on every country monitored. To date, three such Reports have been issued (doc. 8057 of 2nd April 1998, doc. 8359 of 19th March 1999 and doc. 8734 of 4th May 2000).

And what is the present situation concerning the Assembly's monitoring procedure? In 1997, the Committee presented to the Assembly reports on the Czech Republic and on Lithuania (docs. 7898 & Addendum and 7896 respectively). These reports led to the adoption of Recommendations 1338 (1997) and 1339 (1997) whereby the Assembly closed the monitoring procedure for these States, although dialogue was pursued with the national authorities on certain issues. Annual reports on the progress of the Assembly's monitoring procedure were presented in 1998 and 1999 (as indicated above), as well as the following country reports: information reports on Russia (doc. 8127), Bulgaria (doc. 8180), Turkey (doc. 8300) and Latvia (doc. 8426). In addition, a report on Slovakia (doc. 8496) led to the adoption, in September 1999, of Recommendation 1419 (1999) and of Resolution 1196 (1999), whereby the Assembly formally closed its monitoring procedure with respect to Slovakia, without prejudice to the maintenance of dialogue with the Slovak authorities on certain issues.

Two reports on Ukraine (docs. 8272 & 8424) which led to the adoption of Resolution 1179 (1999) and of Recommendation 1395 (1999), in January 1999, and of Resolution 1194 (1999) and of Recommendation 1416 (1999), in June 1999 and a report on Croatia (doc. 8353) which led to the adoption of Resolution 1185 (1999) and of Recommendation 1405 (1999), in April 1999, probably merit special mention. In both instances, substantial pressure was exerted on Ukraine

and Croatia to comply with commitments entered into. For example, in Resolution 1179 (1999) the Assembly "considers that the Ukrainian authorities, including the Verkhovna Rada, are responsible to a great extent for the failure to respect the commitments Ukraine entered into when becoming a member of the Council of Europe ..." (paragraph 14) and that "should substantial progress in honouring these commitments not be made [within a given time period], it shall: i) proceed to the annulment of the credentials of the Ukrainian parliamentary delegation ...; ii) recommend that the Committee of Ministers proceed to suspend Ukraine from its right of representation, in conformity with Article 8 of the Statute of the Council of Europe" (paragraph 15). Similarly, in Recommendation 1405 (1999) the Assembly indicated that it "regrets that little progress had been made by Croatia in honouring commitments and obligations ..." (paragraph 1, viii) [54].

In January 2000, the Monitoring Committee presented the Assembly with a new report on Bulgaria (doc. 8616) which led to the adoption of Recommendation 1442 (2000) and of Resolution 1211 (2000) which closed the monitoring procedure (with, again, a proviso that dialogue be pursued with the Bulgarian authorities on certain issues).

Presently, nine States are on the Committee's agenda, namely Albania, Croatia, Georgia, Latvia, Moldova, Russia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine. Almost all of these States have in common a number of specific commitments, such as those relating to the judicial system (independence of the judiciary, role of public prosecutors, etc.), prison conditions, freedom of the media and minority rights.

Commitments of a political nature tied to statutory obligations: Committee of Ministers

In its "Declaration on compliance with commitments accepted by member States of the Council of Europe", adopted by the Committee of Ministers on 10 November 1994, at its 95th Session, the Committee of Ministers decided that it

> "1. ... will consider the questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State which will be referred to it either:
>
> – By member States,
> – By the Secretary General, or
> – On the basis of a recommendation from the Parliamentary Assembly.

[54] Full texts of most of the Assembly Recommendations and Resolutions referred to can be found in the *Official Gazette of the Council of Europe* and on the Assembly's Internet site *http://www.stars.coe.int*

When considering such issues the Committee of Ministers will take account of all relevant information available from different sources such as the Parliamentary Assembly and the CSCE [now OSCE]."

Unlike the Parliamentary Assembly, which undertakes individual scrutiny of States, the principle methodology of the Committee of Ministers monitoring procedure is to examine all forty-one States through the perspective of a chosen "theme" [55]. Also, unlike the Assembly's procedure which is public, the Committee of Ministers procedure is *confidential,* based principally on persuasion, peer pressure and diplomatic negotiation.

The first stage of the Committee of Ministers' procedure consists of the preparation of country-by-country "overviews". At the core of the "overview" are contributions submitted by member States ("national contributions") on the selected themes in line with an agreed framework of basic issues. These contributions are supplemented by short "*comments*" prepared by the Secretary General's Monitoring Unit identifying facts which might need to be brought to the Committee of Ministers attention. The "national contributions" are made public, whereas the "*comments*" remain confidential.

The monitoring itself takes place in the strictest of secrecy. There are at least three such meetings per year, each of them scheduled for two days. The information contained in the "overview" is debated and a set of conclusions, in the form of "decisions" by the Committee of Ministers, is agreed upon. In this process the Committee of Ministers has the task of "encouraging member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion" (paragraph 2 of the 1994 Declaration). "Follow up" activities take a variety of forms including adjustments to intergovernmental work, review of co-operation programmes such as Activities for the Development and Consolidation of Democratic Stability (ADACS) and "specific action" as provided in paragraph 4

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[55] An overview of "the state of play" concerning the six themes retained by the Committee of Ministers can be found in doc. Monitor/Inf (2000) 2, which can also be consulted on the Organisation's Internet Site, *http://www.coe.int/cm* The six themes that have been under consideration since the Committee of Ministers' monitoring procedure began functioning in 1996 are 'freedom of expression & information' (see doc. Monitor/Inf (2000)2, Appendix I), 'functioning & protection of democratic institutions' (see doc. CM/Monitor(99)16 & four-part doc AS/MON/Inf(2000)01), 'functioning of the judicial system' (see doc. CM/Monitor (99)15 rev), 'local democracy' (see doc. Monitor/Inf (2000) 2, Appendix IV), 'capital punishment' (see doc. CM/Monitor (2000)3) and 'police and security forces'(see doc. .CM/Monitor (99)11 and Addendum thereto). For a description of how this procedure has evolved see note 10, *supra,* and documents Monitor/Inf (98)2 & Monitor/Inf (2000)4 rev., which can also be consulted on the Organisation's Internet site.

of the 1994 Declaration [56]. The approach is thus generally a constructive one, with the Committee of Ministers primarily giving effect to its monitoring through co-operation and assistance activities. And, although based on persuasion and 'dialogue', it does not rule out the possibility of a graduated form of "sanctions" (see paragraph 4 of the 1994 Declaration and Article 8 of the Organisation's Statute).

Congress of Local and Regional Authorities in Europe

This overview of political monitoring procedures merits a few words about the Congress of Local and Regional Authorities in Europe (CLRAE). The CLRAE, which was established in 1994 by Statutory Resolution (94) 3 in 1994, subsequent to the Council of Europe's first Summit of Heads of State and Government in Vienna in 1993. It constitutes, along with the Parliamentary Assembly, one of the Organisation's principal consultative bodies.

The Congress, which is composed of locally and regionally elected representatives of member States of the Council of Europe and consists of two Chambers, the Chamber of Local Authorities and the Chamber of Regions, issues resolutions directed at all the municipalities and regions of Europe, as well as opinions and recommendations to the Parliamentary Assembly and the Committee of Ministers [57].

The Congress carries out numerous (preventive) monitoring functions. An example of the CLRAE's monitoring functions is its Resolution 31 (1996) on guiding principles for the action of the Congress when preparing reports on local and regional democracy in member States and applicant States. Paragraph 11 of this Resolution specifies that "[Congress] [a]sks the Bureau to ensure that over a reasonable period of time all member States be the subject

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[56] Paragraph 4 reads:
"4. The Committee of Ministers, in cases requiring specific action, may decide to:
- Request the Secretary General to make contacts, collect information or furnish advice;
- Issue an opinion or recommendation;
- Forward a communication to the Parliamentary Assembly;
- Take any other decision within its statutory powers".
This procedure was resorted to for the first time in January 2000 with regard to the theme "democratic institutions": see Council of Europe, doc. CM/Monitor (2000)2, also issued as AP/ /MON/Inf.(2000)01.

[57] For further details concerning the competence and functioning of the CLRAE, consult Statutory Resolution (94) 3 relating to the setting-up of the Congress of Local and Regional Authorities in Europe (adopted by the Committee of Ministers on 14 January 1994 at the 506th meeting of the Ministers' Deputies).

of a detailed report on local and regional democracy, even where no express request is made by a Party recognised in point 8 above" [58].

In addition, the CLRAE carries out political control of commitments entered into by States upon ratification of the European Charter of Local Self-Government (ETS 122, 1985). This is done in two ways; by means of *ex officio* monitoring (article-by-article of the Charter and, if appropriate, country by country) and monitoring upon request (following requests received by local authorities or their associations).

VI. An interim assessment

Rather than provide a summary of what has been discussed above, this "interim assessment" will limit itself only to two observations of a general nature, one concerning the notion of "monitoring" generally and the other a critical overview of practice and perspectives for the future.

"Monitoring" undertaken by the Council of Europe

The word "monitoring" is not defined, either in the Organisation's Statute of 1949 or in any of the principal legal instruments which have set up so-called "monitoring procedures". So what does this word actually mean? The Shorter Oxford English Dictionary defines a "monitor" as "[o]ne who (or that which) admonishes another as to his conduct", with the term's historical origins probably being traceable to the monitory lizard found in Africa, Asia and Australia, known for its faculty of warning persons of the approach of any venomous animal by, for example, hissing or whistling when in the vicinity of crocodiles. Another, much less flattering, but journalistically amusing, definition was provided by Miles Kingsley in *The Independent* (London) newspaper, on 17th February 1998: "*Monitor:* A verb meaning, To ignore, to do nothing about, to treat with apathy, as in 'We are monitoring the situation on a 24-hour basis'."

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[58] Point 8 of the Resolution refers to a number of 'parties', including the Committee of Ministers, the Parliamentary Assembly and the Working Party responsible for monitoring the implementation of the European Charter of Local Self-Government.
"Local democracy" was the fourth theme considered by the Committee of Ministers in its own confidential monitoring procedure. A stock-taking of progress achieved (on the basis of decisions taken on this subject back in October 1998) is to be undertaken in 2001: see Appendix IV of doc. Monitor/Inf (2000) 2, *supra* note 55.

A more serious attempt at defining "monitoring" – in the context of potential human rights violations – is the following: "Monitoring ... means ... a sustained (that is, repeated, at regular intervals), standardised (that is, systematic) effort to gather data from a variety of sources on a set of occurrences involving human rights violations and/or warning indicators pointing to the probable occurrence of such violations in many cases and places (countries and territories) ...The monitoring should in the end result in a capacity to make policy recommendations on the basis of accurate early warning enabling prevention or at least mitigation of the predicted outcome by some kind of humanitarian intervention" [59]. This may be an appropriate working definition for NGOs, but it doesn't fit in neatly into Council of Europe context, in that the latter probably encompasses two distinct forms of "monitoring". I will try to explain what I mean.

Express reference to Council of Europe "monitoring" procedures can be found in the recent Report of the Committee of Wise Persons transmitted to the Committee of Ministers in November 1998. Under the sub-title *Monitoring the compliance of member states with their commitments,* the Wise Persons wrote:

> *"In addition to the "monitoring" par excellence undertaken in the proceedings before the European Court of Human Rights, an important task of the Council of Europe is to ensure that every member respects the values and the important system of norms and standards developed by the Organisation over the years and embodied in some 170 conventions and a great number of recommendations.* This requires both efficient and effective mechanisms of monitoring and control, and the reinforcement of the programmes of co-operation and technical assistance." (paragraph. 69) [60].

In other words, a distinction is made between, on the one hand, "monitoring" carried out by the European Court of Human Rights (and other independent bodies, such as the CPT and the newly appointed Human Rights Commissioner?) and, on the other hand, "monitoring" carried out by political bodies, such as the

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[59] *Per* A. P. Schmid & A. J. Jongman "Introduction" in *Monitoring Human Rights Violations* (A. P. Schmid and A. J. Jongman, editors, 1992) at p. 3.

[60] *Building Greater Europe without dividing lines. Report of the Committee of Wise Persons to the Committee of Ministers* (under the Chairmanship of Mário Soares), November 1998 (also available on the Council of Europe's Internet Site: *www.coe.int/cm/indexes/rep.0.htm)*, doc. CM(98)178 of 20.10.98.

Committee of Ministers and the Parliamentary Assembly. The latter's "monitoring" must be understood within the context of "compliance with commitments", "[political?] obligations entered into" and "undertakings". Somewhere in between are "legal obligations" entered into which must, presumably, stand up to scrutiny before the political monitoring bodies, in situations where no independent supervisory/verification procedure exists.

When trying to understand "monitoring" carried out by the Committee of Ministers – especially as concerns the *prevention* of human rights violations – two, if not more, procedures must be distinguished. The first relates to the Committee of Ministers quasi-judicial functions under the ECHR, namely "monitoring" carried out within the context of Article 46, paragraph 2, of the ECHR [61]. One could also argue that other 'core' human rights mechanisms should likewise be classified under this rubric. The second type of "monitoring", exemplified by the 1994 Declaration on Compliance with Commitments, provides for the subtle use of two inter-related and yet distinct procedures. It provides not only a forum in which States may be 'persuaded' to take corrective measures on the basis of behind-the-scenes political peer pressure and diplomatic negotiation, but it also provides a legal basis upon which there now exists a permanent inter-governmental procedure (after the Parliamentary procedure set up the year before) for monitoring of member States' "commitments" that is linked directly to adjustments in the Organisation's intergovernmental co-operation, ADACS and assistance activities.

As concerns the Parliamentary Assembly:

"i) The purpose of monitoring is to help ensure that all countries build upon, and stay within, a common legal and political framework of the rule of law, of parliamentary democracy, and human rights protection according to the standards of the Council of Europe;

ii) The opening of a monitoring procedure – in respect either of a limited number or wide rage of issues – has, as such, no implications for the status of any country as a member of the Council of Europe;

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[61] See P.-H. Imbert "L'exécution des arrêts de la Cour européenne des droits de l'homme et des décisions du Comité des Ministres" in *Le nouveau système de protection prevu par la CEDH à la lumière du Protocole n° 11* (seminar organised by the Italian Court of Cassation, Rome, 4th June 1999) and other academic studies referred to in note 36 *supra*.

iii) Monitoring is the expression of the Assembly's political will to ensure that:

- No unnecessary strains are placed on the European Court of Human Rights;
- Commitments entered into upon accession to the Council of Europe are met;
- The principles of pluralistic democracy are respected;
- A crisis of state authority does not put basic human rights at risk" [62].

The way in which this monitoring mechanism helps *prevent* or solves potentially difficult human rights problems is self evident. The Assembly monitoring proceedings are by and large publicly conducted, country-specific and based on visits by two co-rapporteurs of different political conviction. The procedure is based on close co-operation with national parliamentary delegations, as well as confidential discussions with States' national authorities (including the opposition and other interested parties). Reports issued often identify shortcomings, establish priorities and include proposals to redirect Council of Europe co-operation and assistance programmes, when need for this arises. The Monitoring Committee holds its meetings *in camera,* whereas debate on the final version of a Report is always held in public during Assembly plenary meetings [63].

If any conclusion can be made on the subject of "monitoring" in the context of the present paper, it is this: "Monitoring is an indispensable element in any human rights strategy. Systematic, reliable, and focused information is the starting point for a clear understanding of the nature, extent, and location of the problems which exist and for the identification of possible solutions. It is also a necessary element in any strategy to garner the support of civil society and the community at large for measures to promote and protect the human rights of vulnerable groups" [64]. This ties in neatly with what an old Chinese proverb says: the whole

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[62] Parliamentary Assembly document. Quotation taken from D. Huber's book, *supra,* note 4, at page 171. See also the 1997-1998 [First Activity] Progress Report of the Assembly's Monitoring Committee: "Monitoring is understood as a process of seeking solutions to specific problems rather than a process of confrontation" (doc. 8057 of 2nd April 1998), at p. 9.

[63] Those who harbour doubts as to the utility of such procedures would do well to consult R. Bindig & T. Kleinsorge "Monitoring the compliance of member States with obligations and commitments: The case of Estonia" in *Law in Greater Europe, supra,* note 16, pp. 102-130.

[64] *Per* P. Alston and J. H. H. Weiler. Introductory remarks in *The EU and Human Rights* (ed. P. Alston, 1999), at p. 55. In this introductory chapter of the book the authors go on to suggest

year's harvest depends on the spring time when the seeds are sown. Simply put, *prevention* is better than cure.

Practice and perspectives for the future

The Council of Europe is presently living a difficult period of its history, having been asked to contribute to "democratic stability" in Europe, without the economic or military clout that other organisations in the region possess [65]. As was recently observed in *The Economist,* on 27th November 1999: "To be fair to the Council [of Europe], it works hard to help its new members to understand their responsibilities. Many of its efforts go 'hardly noticed by the majority of the European public', laments Mr Schwimmer [the Organisation's Secretary General]. Every month it runs roughly 100 workshops, conferences and study visits across Central and Eastern Europe on topics such as press freedom, education and legal reform, as part of its permanent programme for the 'development and consolidation of democratic stability'." It possesses a number of highly sophisticated human rights mechanisms, whose standards must be maintained, independently of the fact that the process of transition to full democracy in certain new member States may necessitate concessions. Thus, the Organisation must absorb, into these human rights mechanisms, new member States, whose "[l]egal standards ... often fall far below those required by the [European Human Rights] Convention control organs" [66].

The present situation is compounded by the fact that within the capitals of the 41 member States of this Organisation – encompassing inter-governmental, parliamentary and (quasi-) judicial mechanisms – it is sometimes difficult to

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that there is a "principal need [...] to produce an annual survey of human rights within the EU which would be factual, objective, and designed to facilitate informed policy-making", adding that such monitoring would be distinct from policy-making, policy implementation and enforcement.

[65] See, e.g., *The Challenges of a Greater Europe. The Council of Europe and democratic stability* (1996), *passim* and D. Huber's book, *A Decade which made History. The Council of Europe 1989 – 1999* (1999).

[66] Citation taken from H. Suchocka's General Report from the proceedings of a European regional colloquy held at the Council of Europe in Strasbourg on 2-4 September 1998: *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration* (1998), pp. 161-178 at p. 176. The proceedings were also published in French. Mrs H. Suchocka is Poland's Minister of Justice.
In her General Report Suchocka quotes Professor Sudre's finding (see footnote 9 *supra*) in which Sudre states that "... il est clair que nombre de nouveaux Etats membres sont incapables de respecter l'engagement fondamental inscrit dans l'article 3 du Statut du Conseil. L'abaissement des standards du Conseil de l'Europe est manifeste et la ratification de la Convention EDH par les nouveaux Etats semble relever de l'alibi ..." (at p. 175).

identify the existence of a clearly defined role for the Council of Europe within the new so-called *European architecture.* How should the Council of Europe's work be assessed and compared with that of other institutions with a substantially overlapping membership, be it the European Union or the OSCE. The fact that the Council of Europe's work encompasses a plethora of diverse and yet often very important activities might explain, in part, why – comparatively speaking – rather limited resources are put at the disposal of the Organisation.

It is obviously inappropriate for a staff member of the Council of Europe directly involved in a confidential "monitoring procedure" to attempt a stock-taking of the Organisation's achievements or to comment on political decisions taken by member States. That being said, it is probably instructive to reflect upon what two former senior officials of the Organisation have written on these and related subjects. In his paper "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", published in 1998, Peter Leuprecht has written that "intellectual honesty requires acknowledging that some of the countries admitted in recent years [into the Council of Europe] clearly did not comply with the statutory requirements at the time of accession", adding that "it is at the pre-accession stage that the Council of Europe's representatives have the most leverage and can press for the reforms needed to bring the applicant country into line with the Council's standards"[67]. The views of the Parliamentary Assembly's former Clerk, Heinrich Klebes, are also worth citing in this respect: "Avec le slogan 'integration, pas exclusion', les conditions d'admission au Conseil de l'Europe ont *de facto* changé. L'élargissement vers l'Est – trop rapide mais politiquement inévitable – a modifié le caractère de l'Organisation. De 'club des démocraties', elle s'est développée en 'école de démocratie' [68].

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[67] See *supra* note 9 at page 328. He has written that it "is indisputable that the Council of Europe has lowered its standards for admission in recent years", citing specifically Romania's accession in 1993, that of the Russian Federation in 1996 and Croatia in 1996 (see pp. 329-332), adding that "serious monitoring is essential if the basic values and standards of the Council of Europe are not to be further diluted" (at p. 333). Professor Leuprecht is presently Dean of McGill Law School, in Canada, having held, *inter alia,* the functions of, respectively, Director of Human Rights and Deputy Secretary General for a number of years within the Council of Europe.

[68] H. Klebes "Le Conseil de l'Europe survivra-t-il à son élargissement?" in *Le Droit des Organisations Internationales. Recueil d'études à la mémoire de Jacques Schwob* (eds. J.-F. Flauss & P. Wachsmann, 1997), pp. 175-202 at p. 200. He then goes on to explain "Notons en passant que l'influence de l'Union Européenne, un bloc de 15 Etats parmi les [41] Etats membres du Conseil de l'Europe, n'a pas non plus été négligeable. Ainsi, à plusieurs reprises, le Conseil de l'Union a pris position en faveur de l'entrée de la Russie au Conseil de l'Europe – sans faire état du fait que pour la Russie, comme pour d'autres candidats, il n'y a pas de perspectives d'adhésion à l'Union Européenne dans un avenir prévisible: il s'agissait d'ancrer la Russie dans une organisation européenne

Whether or not one shares the views expressed by Leuprecht or Klebes, one thing is certain:

> "[For the Council of Europe] it is no longer simply a question of enabling member States to remain democratic, but rather of assisting several of them to become democratic. Monitoring activities, more necessary than ever, should be accompanied by support and back-up activities. There should be as much – if not more – emphasis on prevention and education as on condemnation. Even more than the law and institutions, society as a whole requires action and help in changing mentalities" [69].

A postscript

As the moral guardian of human rights standards in Europe, those who work in the Organisation (whether within its Secretariat, in one of its statutory bodies or within one of its core human right monitoring institutions) could do no better than reflect upon what Pastor Martin Niemöller has said:

> *First they came for the Jews*
> *and I did not speak out –*
> *because I was not a Jew.*

... En ce sens, le Conseil de l'Europe est un moyen et non une fin, et les observateurs critiques se demandent dans quelle mesure les gouvernements, guidés par des considérations politiques 'supérieures' se souciaient de la sauvegarde du Conseil de l'Europe en tant que communauté de valeurs".

See also, in a similar vein, *The Economist* of 5th December 1998, A Survey of Human Rights Law, esp at pp. 7-8: "It remains to be seen whether the European Convention system can help Eastern Europe establish as firm a rule of law and respect for human rights as in Western Europe. It will be a stern test ... For those [such as Poland, the Czech Republic and Hungary], the prospect of joining the EU before too long is an added, crucial, incentive. But it is difficult to imagine the Strasbourg court exercising much influence on the chaos in Russia in the near future. (...) There are severe limits to what any international human-rights regime – monitoring, self-reporting on compliance with treaties, or judicial – can achieve on its own ... A government determined to crush opposition is unlikely to heed panels of experts, monitors or distant judges".

[69] *Per* P.-H. Imbert "Towards a European system of Human Rights protection", English translation (in doc. AS/Jur/DH (1998) I of the Assembly's Committee on Legal Affairs & Human Rights) of Imbert's article "Pour un système européen de protection des droits de l'homme" in *Mélanges en hommage à L. E. Pettiti* (G. Flécheau, editor, 1998), pp. 449-464.

Then they came for the communists
and I did not speak out –
because I was not a communist.

Then they came for the trade-unionists
and I did not speak out –
because I was not a trade-unionist.

Then they came for me –
and there was no-one left to speak out for me [70].

[70] Quotation taken from *The Human Rights Handbook. A Practical Guide to Monitoring Human Rights* (K. English & A. Stapleton, 1995), at p. 14.

DIREITO COMUNITÁRIO

PEDRO CABRAL *

Administrador, Tribunal de Justiça das Comunidades Europeias, Luxemburgo

O DIREITO COMUNITÁRIO DA IGUALDADE EM PERSPECTIVA: ALGUMAS REFLEXÕES A PROPÓSITO DO ACÓRDÃO DO TRIBUNAL DE JUSTIÇA NO CASO *GRANT*

* Administrador, Tribunal de Justiça das Comunidades Europeias, Luxemburgo. As opiniões expressas neste estudo vinculam exclusivamente o seu autor.

O presente artigo baseia-se na comunicação que tivemos a ocasião de apresentar em Varsóvia, em Setembro de 1999, no âmbito de um seminário realizado no quadro do Programa PHARE e subordinado ao tema "Sex Discrimination and European Community Law". Procedemos agora à publicação do texto dessa comunicação na sua forma original, nela introduzindo apenas as notas de actualização absolutamente fundamentais. Uma palavra de agradecimento é devida aos Professores Francis Snyder (Colégio da Europa, Bruges, e Instituto Universitário Europeu, Florença) e David O'Keeffe (Colégio da Europa, Bruges, e University College, London) e à Dr.ª Patrícia Cunha (Faculdade de Direito, Universidade de Lisboa), pelas suas preciosas sugestões quanto à melhor forma de abordar um tema delicado e complexo.

I. Introdução

Pedra angular do Direito Comunitário, o princípio da igualdade de tratamento tem constituído ao longo dos últimos anos um terreno de intervenção privilegiada do Tribunal de Justiça das Comunidades Europeias [1]. Importa realçar, porém, que se a política daquela jurisdição relativamente à aplicação do referido princípio às situações de discriminação clássica em razão do sexo [2] se tem pautado, de uma maneira geral, por uma progressiva afirmação na ordem jurídica comunitária de um princípio de igualdade substancial [3] e pela criação e desenvolvimento de uma jurisprudência marcada pela proibição de todas as

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[1] A seguir, "Tribunal" ou "TJCE".

[2] Situações em que uma determinada medida é aplicada de forma diferenciada aos indivíduos de sexo masculino por um lado e aos indivíduos do sexo feminino por outro lado.

[3] A este propósito ver Patrícia Cunha e Pedro Cabral, "O princípio da igualdade em direito comunitário e o seu âmbito e limites face à recente jurisprudência do Tribunal de Justiça", *Revista Jurídica, Associação Académica da Faculdade de Direito de Lisboa*, n.º 23, Novembro, 1999, págs. 307-328; Sandra Fredman, "European Community Discrimination Law: A Critique" (1992) *Industrial Law Journal*, pág. 119; Ian Ward, "Beyond Sex Equality: The Limits of Sex Equality in the New Europe", in Hervey & O'Keeffe (eds.), *Sex Equality Law in the European Union*, 1996, London, Wiley; H. Fenwick e T. Hervey, "Sex Equality in the Single Market: New Directions for the European Court of Justice" (1995), *Common Market Law Review*, pág. 443. Para uma detalhada análise da jurisprudência comunitária dos anos 1994-1998 em matéria de igualdade de tratamento, ver Evelyn Ellis, "Recent Developments in European Community Sex Equality Law" (1998), *Common Market Law Review*, pág. 379. Mais recentemente, ver o excelente estudo de G. F. Mancini e S. O'Leary, "The new frontiers of sex equality in the European Union" (1999), *European Law Review*, pág. 331, e ainda Benoît Guiget, "Le droit communautaire et la reconnaissance des partenaires de même sexe", *Cahiers de Droit Européen*, n.º 5-6, 1999, pág. 537.

formas de discriminação directa ou indirecta [4], já no que respeita a outra categoria de situações, que designaremos de "discriminações atípicas" [5], a mesma tem apresentado contornos bem menos claros, que evidenciam bem as hesitações do Tribunal em "invadir" um domínio da mais elevada sensibilidade política, social e moral.

Neste contexto, o contraste entre duas recentes decisões do Tribunal de Justiça da Comunidade Europeia relativas a situações de discriminações atípicas merece particular destaque. Assim, o Tribunal teve por um lado a ocasião, no seu acórdão *P. c. S. e Cornwall County Council* [6], em que se estava perante um caso de discriminação contra um transexual, de adoptar, seguindo as eloquentes conclusões do seu Advogado-Geral Tesauro, uma interpretação ampla do princípio da igualdade, considerando que o mesmo é aplicável em todo e qualquer caso em que se verifique uma situação de discriminação fundada em *conotações relacionadas com o sexo e/ou com a identidade sexual da pessoa em causa*" [7]. De acordo com esta concepção, o sexo deve

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[4] De acordo com a Comissão, "indirect discrimination arises where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex and is not objectively justified by any necessary condition or reason unrelated to the sex of the person concerned" (Commission proposal for a Council Directive conceming the burden of proof in the area of equal pay and equal treatment for men and women, COM (88) 269 final, O. J. 1988 C176/5, art. 5, n.º 1). Constituem exemplos típicos de discriminação indirecta as situações em que uma determinada norma, aparentemente neutra, prevê um tratamento mais favorável para os trabalhadores a tempo inteiro do que para os trabalhadores a tempo parcial, quando estes últimos são na verdade, na quase totalidade dos Estados membros, maioritariamente do sexo feminino. A este propósito ver os acórdãos do Tribunal de Justiça de 31 de Março de 1991, no proc. 96/80, *Jenkins c. Kingsgate*, Col. 1981, pág. 911 e de 13 de Maio de 1986, no proc. 170/84, *Bilka Kaufhaus*, Col. 1986, pág. 1607. Só muito excepcionalmente o TJCE admitiu excepções a este princípio. A este respeito, ver Anne Peters, "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis" (1996), *European Law Journal*, pág. 177, nota 84; Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra nota 3, págs. 308 e 324-325.

[5] Referimo-nos a situações de discriminação que não se fundam directamente na pertença de uma pessoa a um sexo determinado, mas antes na mudança deste ou baseadas na orientação sexual. Sobre as várias formas de discriminação atípica, ver, em geral, K. Waaldijk e A. Clapham (Eds.), *Homosexuality: A European Community Issue*, Dordrecht, Martinus Nijhoff, 1993; A. C. Loux, "Is He Our Sister? Sex, Gender, and Transexuals Under European Law" (1997), 3 *Web Journal of Current Legal Issues*; P. Skidmore, "Sex, Gender and Comparators in Employment Discrimination" (1997), *Industrial Law Journal*, pág. 51; R. Wintermute, "Recognising New Kinds of Direct Sex Discrimination: Transexualism, Sexual orientation and Dress codes" (1997), *Modern Law Review*, pág. 334.

[6] Acórdão do Tribunal de Justiça de 30 de Abril de 1996, no proc. C-13/94, *P. c. S. e Cornwall County Council*, Col. 1996, pág. I-2143. Sobre este julgamento ver, entre outros, Leo Flynn (1997), *Common Market Law Review*, pág. 367; Angus Campbell e Heather Lardy (1996), *European Law Review*, pág. 412.

[7] Conclusões do Advogado-Geral Tesauro apresentadas em 14 de Dezembro de 1995, no proc. C-13/94, *P. c. S. e Cornwall County Council*, Col. 1996, pág. I-2143, parágrafo 19, sublinhado nosso.

ser visto como irrelevante no tratamento que cada indivíduo recebe e todas as discriminações que se fiquem a dever a este factor deverão pois ser interditas.

Por outro lado, já no que toca à discriminação em razão da orientação sexual, o Tribunal veio a sustentar recentemente, no seu acórdão *Grant* [8], um entendimento consideravelmente mais restritivo do princípio da igualdade demonstrando, dessa forma, estar a afastar-se claramente do activismo e das interpretações marcadamente teleológicas que caracterizaram a sua jurisprudência dos anos 80 e princípios da década de 90 [9] e operar actualmente em moldes muito mais contidos, não ousando em momento algum contrariar ou colocar em causa as prioridades definidas pelo todo-poderoso legislador comunitário [10]. Chamado a pronunciar-se sobre a questão de saber se a recusa de uma entidade patronal de conceder reduções no preço dos transportes a favor do concubino, do mesmo sexo, com o qual um trabalhador mantinha uma relação estável, constituía ou não uma discriminação proibida pelo direito comunitário, quando essa redução era, nas mesmas circunstâncias, concedida ao cônjuge do trabalhador ou ao seu concubino, de sexo diferente, com o qual este mantinha uma relação estável sem casamento, o Tribunal veio a decidir que, não se encontrando à época em que ocorreram os factos que deram origem ao processo, a discriminação em razão da orientação sexual abrangida pelo Tratado ou prevista em qualquer acto de direito derivado, tal recusa não poderia constituir uma discriminação incompatível com o direito comunitário. Procuraremos, neste estudo, examinar de forma rigorosa e sistemática esta

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[8] Acórdão do Tribunal de Justiça de 17 de Fevereiro de 1998, no proc. C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.*, Col. 1998, pág. I-621.

[9] Para uma definição de activismo judicial, ver Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra na nota 3, pág. 325, nota 71. Ver também nesta matéria, H. Rasmussen, *On Law and Policy in the European Court of Justice*, Martinus Nijhoff, Dordrecht, 1986, págs. 25-29; "Between Self-Restraint and Activism" (1988), *European Law Review*, pág. 28; J. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration" (1993), *Journal of Common Market Studies*, pág. 417.

[10] Ver H. Fenwick e T. Hervey, "Sex Equality in the Single Market ...", cit. supra, nota 3, pág. 443. Exemplo paradigmático da referida tendência é o acórdão *Keck* (julgamento de 21 de Novembro de 1993, nos processos apensos C-267/91 e C-268/91, Col. 1993, pág. I-6097), em matéria de liberdade de circulação de mercadorias, através do qual as medidas nacionais respeitantes a modalidades de venda dos produtos deixaram, em princípio, de estar abrangidas pelo âmbito de aplicação do artigo 28.º (ex-artigo 30.º) do Tratado. Neste contexto, M. Poiares Maduro, "The saga of Article 30 EC Treaty: to be continued" (1998), *Maastricht Journal of European and Comparative Law*, pág. 298, sugere que a política judicial do Tribunal é dominada por mecanismos que permitem aos Estados membros exercer uma influência decisiva nas suas decisões, numa manifestação de um fenómeno que designa de activismo maioritário (majoritarian activism). Para mais desenvolvimentos quanto ao pensamento deste autor, ver *We the Court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty*, Hart publishing, Oxford, 1998.

decisão de impacto profundo nos meios políticos, jurisdicionais e académicos da União Europeia [11], assim como proceder a uma apreciação crítica dos argumentos de ordem política, social e moral que a terão motivado.

II. O acórdão do Tribunal de Justiça de 17 de Fevereiro de 1998, no caso *Grant*

1. Matéria de facto

O presente acórdão teve origem num pedido de decisão prejudicial dirigido pelo *Industrial Tribunal*, Southampton (Reino Unido), ao Tribunal de Justiça, destinado a obter, da parte deste último, uma interpretação do artigo 141.° (ex-artigo 119.°) do Tratado CE, da Directiva n.° 75/117 do Conselho, de 10 de Fevereiro de 1975, relativa à aproximação das legislações dos Estados membros no que se refere à aplicação do princípio da igualdade de remuneração entre os trabalhadores masculinos e femininos [12], e da Directiva n.° 76/ /207/CEE do Conselho, de 9 de Fevereiro de 1976, relativa à concretização do princípio da igualdade de tratamento entre homens e mulheres no que se refere ao acesso ao emprego, à formação e promoção profissionais e às condições de trabalho [13].

Lisa Grant interpôs, no referido tribunal inglês, acção judicial contra a sua entidade empregadora, *South West Trains Ltd.* (SWT), invocando a violação, por parte desta última, do artigo 141.° do Tratado CE, ao ter visto ser-lhe recusada a atribuição de reduções no preço dos transportes ao seu parceiro de sexo feminino. Em causa, estava o regulamento adoptado por SWT para aplicação

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[11] O acórdão Grant deu origem a inúmeras anotações e comentários. Ver, entre outros, Catherine Barnard (1998), *The Cambridge Law Journal*, pág. 352; Tim Connor (1998), *European Law Review*, pág. 378; Kenneth Armstrong (1998), *The Journal of Social Welfare and Family Law*, pág. 455; Pedro Cabral, *Revue du Marché Unique Européen*, 1998, n.° 2, pág. 254; Laurence Helfer (1999), *American Journal of International Law*, pág. 200; Tracey Reeves (1999), *New Law Journal*, pág. 558; Mark Bell (1999), *European Law Journal*, pág. 63; Eva Brems (1999), *The Columbia Journal of European Law*, pág. 141; John Mcinnes (1999), *Common Market Law Review*, pág. 1043.

[12] JOCE 1975, L 45, pág. 19.

[13] JOCE 1976, L 39, pág. 40.

das cláusulas de regalias concedidas nos transportes contidas nos seus contratos de trabalho. Este regulamento previa no seu artigo 8.º:

> "As reduções no preço dos transportes são concedidas a todos os trabalhadores casados (...) em relação ao seu cônjuge legítimo, salvo se este último estiver legalmente separado do trabalhador assalariado (...). As reduções no preço dos transportes são concedidas ao '*common law opposite sex spouse*' do agente (...) desde que seja apresentada uma declaração solene de que existe uma relação significativa há dois anos ou mais (...)"

Foi com base na referida disposição que Lisa Grant pediu que lhe fossem concedidas reduções no preço de transportes em benefício da parceira de sexo feminino com a qual havia declarado ter uma relação significativa há mais de dois anos. Deparou-se então com a recusa da entidade patronal que sustentou que, no caso de pessoas não casadas, tais reduções apenas poderiam ser concedidas a um parceiro de sexo diferente.

O tribunal de Southampton, confrontando-se com dúvidas quanto à compatibilidade da regulamentação em causa com o direito comunitário, submeteu ao Tribunal de Justiça seis questões prejudiciais. Estas podem, no essencial, resumir-se a três pontos fundamentais: 1) Na acepção do artigo 141.º do Tratado, o conceito de 'discriminação em razão do sexo' inclui uma situação em que esta última se funda no sexo do parceiro de um trabalhador?; 2) Situações de discriminação em razão da orientação sexual de um trabalhador encontram-se ou não compreendidas no âmbito da referida disposição?; 3) Pode a entidade empregadora justificar a recusa de concessão do direito a viagens a um parceiro do mesmo sexo do trabalhador com o fundamento de que as relações entre pessoas do mesmo sexo não têm sido e ainda não são geralmente consideradas pela sociedade como equivalentes ao casamento ou a relações de longa data entre parceiros de sexos opostos?

2. Argumentos das partes

2.1. Os argumentos de Lisa Grant

L. Grant considera, em primeiro lugar, que a recusa de concessão de reduções no preço dos transportes que lhe é oposta por SWT constitui uma discriminação directamente baseada no sexo. Funda esta conclusão no argumento que a sua entidade patronal teria, com toda a certeza, tomado uma

decisão diferente, se os benefícios em causa no litígio no processo principal tivessem sido reclamados por um homem que coabitasse com uma mulher. L. Grant aduz ainda, neste contexto, que o facto de o trabalhador masculino que ocupou o seu lugar anteriormente ter podido beneficiar de tais reduções para a sua parceira de sexo feminino, sem ser com esta casado, é suficiente para marcar a diferença entre ambas as situações e indicia claramente a existência no processo *sub judice* de uma discriminação directa baseada no sexo [14].

L. Grant considera ainda que esta recusa, ainda que constituindo uma discriminação baseada na orientação sexual, cabe na noção de "discriminação em razão do sexo" referida pelo artigo 141.° do Tratado. Segundo ela, as diferenças de tratamento baseadas na orientação sexual têm a sua origem em preconceitos relativos ao comportamento sexual ou afectivo das pessoas de um determinado sexo e baseiam-se, na realidade, também elas, no sexo dessas pessoas. Esta interpretação resulta do acórdão proferido pelo Tribunal de Justiça no processo *P. c . S. e Cornwall County Council* [15], e corresponde tanto às resoluções e regulamentações adoptadas pelas instituições comunitárias, como à evolução das normas internacionais em matéria de direitos do homem [16] e das normas nacionais em matéria de igualdade de tratamento. Finalmente, sustenta que a recusa em causa não é objectivamente justificada.

2.2. Os argumentos de South-West Trains e dos Governos francês e britânico

SWT, bem como os Governos francês e do Reino Unido, consideram que a recusa de um benefício como o que está em causa no litígio no processo principal, não é contrária ao artigo 141.° do Tratado.

Alegam, em primeiro lugar, que o acórdão *P. c. S. e Cornwall County Council* deve ser enquadrado no contexto específico das discriminações baseadas na mudança de sexo de uma pessoa em que foi proferido. Argumentam, em seguida, que a diferença de tratamento de que L. Grant se queixa não tem

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[14] No fundo, se um trabalhador do sexo feminino não tem os mesmos benefícios que um trabalhador do sexo masculino, sendo todas as outras coisas iguais, é vítima de uma discriminação baseada no sexo (perspectiva dita do «critério do elemento distintivo único» — «but for test»).

[15] Cit. supra na nota 6.

[16] L. Grant refere-se em particular, neste contexto, à Comunicação n° 488/1992 (*Toonen c. Australia*, de 31 de Março de 1994, 50.ª sessão, ponto 8.7) do Comité de Direitos Humanos, instituído pelo artigo 28.° do Pacto Internacional das Nações Unidas Relativo aos Direitos Civis e Políticos de 19 de Novembro de 1966, de acordo com a qual, a referência no Pacto às discriminações em razão do sexo abrange também as discriminações motivadas pelas preferências sexuais. Ver o parágrafo 43 do julgamento.

por fundamento a sua orientação ou tendência sexual, mas o simples facto de a mesma não preencher as condições fixadas pelo regulamento da empresa. Finalmente, alegam que as discriminações baseadas na orientação sexual não constituem "discriminações em razão do sexo", na acepção do artigo 141.° do Tratado ou da Directiva 75/117 [17].

2.3. Os argumentos da Comissão

A Comissão, por seu turno, toma uma posição, no essencial, em sintonia com a assumida pela entidade patronal de L. Grant e os Governos supra-referidos. Assim, considera também que a recusa oposta a L. Grant não é contrária nem ao artigo 141.° do Tratado nem à Directiva 75/117. A diferença reside, todavia, na circunstância de, no seu entender, as discriminações baseadas na orientação sexual dos trabalhadores poderem ser consideradas como "discriminações em razão do sexo", no sentido do artigo 141.° do Tratado. No entanto, do ponto de vista da Comissão, a discriminação de que se queixa L. Grant não seria baseada na sua orientação sexual, mas no facto de ela não viver "em casal" ou com um "cônjuge", na acepção que o direito da maior parte dos Estados membros, o direito comunitário e o direito resultante da Convenção Europeia dos Direitos do Homem dão a estas noções. Assim, conclui que a diferença de tratamento resultante da regulamentação em vigor na empresa onde trabalha L. Grant não é incompatível com o artigo 141.° do Tratado.

3. Conclusões do Advogado-Geral Elmer [18]

No entender do Advogado-Geral, as questões referidas pelo tribunal inglês devem ser respondidas exclusivamente com base no artigo 141.° do Tratado. O presente processo, pode, segundo ele, considerar-se como mais um passo em diante na evolução do direito comunitário em matéria de igualdade de tratamento, na linha da de continuação lógica da decisão progressista proferida pelo Tribunal de Justiça da Comunidade Europeia no processo *P. c. S. e Cornwall County Council,* ilustrativa da adesão por parte do Tribunal a uma concepção ampla da igualdade de tratamento.

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[17] Invocam nomeadamente, a este respeito, a redacção e os objectivos deste artigo, a falta de consenso entre os Estados membros quanto à equiparação das relações estáveis entre as pessoas do mesmo sexo às relações estáveis entre pessoas de sexo diferente, a falta de protecção destas relações ao abrigo dos artigos 8.° ou 12.° da Convenção Europeia dos Direitos do Homem e a consequente ausência de discriminação na acepção do artigo 14.° da referida Convenção.

[18] Conclusões apresentadas no dia 30 de Setembro de 1997.

De acordo com o Advogado-Geral, dado o carácter geral e a visão abrangente que fornece sobre o conjunto da ordem jurídica comunitária em matéria de igualdade o acórdão *P. c. S.*, possui um significado que transcende o contexto específico da discriminação em razão da mudança de sexo de um trabalhador, com implicações importantes no que toca à interpretação do artigo 141.º do Tratado. Sustentando uma interpretação ampla daquela disposição, no sentido de que a mesma se opõe a todas as formas de discriminação sofridas por um trabalhador, desde que fundadas, principal ou exclusivamente, no sexo deste, o Advogado-Geral vai pois concentrar-se na questão de determinar se, objectivamente, no caso *sub judice,* se estava perante tal tipo de discriminação.

Nesta análise, o Advogado-Geral começa por assinalar que o regulamento sobre regalias no preço dos transportes de SWT não contém qualquer referência à orientação sexual do trabalhador ou do seu parceiro. No entanto, esse mesmo regulamento condiciona a concessão das reduções em causa à circunstância de o trabalhador e o respectivo concubino possuírem sexos diferentes. Assim sendo, verifica-se um tratamento diferenciado de L. Grant, face aos outros trabalhadores da empresa os quais possuam um concubino de sexo oposto. Esta circunstância constitui, do ponto de vista do Advogado-Geral, uma discriminação em razão do sexo, visto que, na prática, a concessão do benefício litigioso depende em absoluto do sexo do trabalhador, na medida em que este deve forçosamente ser diferente do seu concubino.

O Advogado-Geral considera ainda que a concepção de moralidade de SWT não tem qualquer relevância neste caso. Com efeito, de acordo com o artigo 220.º (ex-artigo 164.º) do Tratado, é a observância do direito comunitário que o Tribunal tem o dever de salvaguardar e não questões de moralidade, digam as mesmas respeito aos Estados membros ou à própria Comunidade. Por outro lado, acrescenta que nada no Tratado CE ou no Tratado da União Europeia parece indicar que os direitos (e obrigações) que deles fluem e, designadamente o direito de cada indivíduo de não sofrer qualquer discriminação em razão do sexo, não devam aplicar-se também aos homossexuais [19]. Efectivamente, a igualdade perante a lei é um princípio fundamental em qualquer Comunidade respeitadora do direito, pelo que conferir um tratamento desfavorável a 35 milhões de cidadãos comunitários, simplesmente em função

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[19] Neste contexto, o Advogado-Geral refere-se também a outras categorias desfavorecidas, às quais o direito comunitário também não pode, em bom rigor, deixar de se aplicar, designadamente, os deficientes e as pessoas pertencentes a determinados grupos étnicos ou possuidoras de determinadas convicções religiosas.

do facto que os mesmos são homossexuais, resultaria numa suprema injustiça e num completo desvirtuamento do referido princípio da igualdade.

4. Julgamento

O Tribunal começa por reiterar a sua jurisprudência tradicional, segundo a qual, as reduções no preço dos transportes concedidas por uma entidade patronal aos seus empregados, aos cônjuges destes ou às pessoas a seu cargo, são elementos integrantes do conceito de remuneração, na acepção do artigo 141.º do Tratado [20].

De seguida, o Tribunal traça os caracteres fundamentais do litígio em apreço, considerando que, se é pacífico que uma redução no preço dos transportes concedida por uma entidade patronal ao cônjuge ou à pessoa de sexo diferente com quem o trabalhador mantém uma relação estável se encontra abrangida pelo artigo 141.º do Tratado, o mesmo não se verifica na circunstância de a redução dizer respeito, como no caso *sub judice,* a um parceiro do mesmo sexo do trabalhador com quem este mantém uma relação duradoura. O Tribunal concentra-se particularmente na questão de saber se esta diversidade de circunstâncias constitui uma justificação suficiente para o comportamento da empresa em questão ou se, pelo contrário, a condição do sexo do parceiro do trabalhador, fixada no regulamento desta empresa, configura uma discriminação baseada directamente no sexo do trabalhador.

O Tribunal considera que a recusa oposta a Lisa Grant é legítima, e isto porque, no seu entender, ela não preenche os requisitos constantes da regulamentação da empresa para ter direito aos benefícios em questão, ficando tal a dever-se ao facto de não viver nem com um cônjuge, nem com uma pessoa de sexo diferente, com a qual mantenha uma relação significativa há mais de dois anos. A conclusão de que a recusa é válida baseia-se justamente nesta última condição. Na verdade, o Tribunal entende que esta exigência de que o trabalhador tenha uma relação estável com uma pessoa de sexo diferente, se aplica independentemente do sexo do trabalhador em causa, concluindo, pois que, "[a]ssim, as reduções no preço dos transportes são recusadas a um trabalhador masculino que vive com uma pessoa do mesmo sexo, do mesmo modo que são recusadas a um trabalhador feminino se viver com uma pessoa do mesmo sexo" [21]. Esta linha de raciocínio conduz o Tribunal à conclusão inelutável que,

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[20] Acórdão do Tribunal de Justiça de 9 de Fevereiro de 1982, no proc. 12/81, *Garland,* Col. 1982, pág. 359, parágrafo 9.

[21] Parágrafo 27, *in fine.*

uma vez que a disposição do regulamento da empresa se aplica indistintamente aos trabalhadores do sexo masculino e aos trabalhadores do sexo feminino, não pode considerar-se estar no caso em apreço perante uma discriminação directamente baseada no sexo.

De seguida, o Tribunal de Justiça da Comunidade Europeia concentra-se na questão de saber se, para efeitos da aplicação de uma condição como a que está em causa no presente litígio, se pode considerar que as pessoas que mantêm uma relação estável com um parceiro do mesmo sexo se encontram na mesma situação ou numa situação comparável com pessoas casadas ou com pessoas que, não sendo casadas, têm uma relação estável com um parceiro de sexo diferente.

Se é verdade, neste contexto, que como o alega L. Grant, o direito dos Estados membros, da Comunidade Europeia e de outras organizações internacionais equiparam cada vez mais frequentemente as duas situações, "não deixa de ser verdade que a Comunidade não adoptou, até ao presente, normas que consubstanciem essa equiparação" [22]. Quanto à situação nos Estados membros, o Tribunal assinala que, embora nalguns deles exista algum grau de equiparação entre a comunidade de vida entre pessoas do mesmo sexo e o casamento, essa situação ou não é de todo reconhecida ou é-o relativamente a um número muito limitado de direitos.

No que respeita às normas de organizações internacionais sobre esta matéria, o Tribunal coloca em especial evidência o direito emanado das instituições da Convenção Europeia dos Direitos do Homem. Neste contexto, salienta que a jurisprudência do Tribunal de Estrasburgo e da Comissão Europeia dos Direitos do Homem não conferem qualquer protecção particular aos direitos dos homossexuais [23].

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[22] Parágrafo 31.

[23] O Tribunal de Justiça relembra que, de acordo com a Comissão Europeia dos Direitos do Homem, relações homossexuais duráveis não conferem direito ao respeito da vida privada, nos termos do artigo 8.° da Convenção (ver, a este respeito, nomeadamente, as decisões de 3 de Maio de 1983, *X. e Y. c. Reino Unido*, n.° 9369/81, DR 32, pág. 220; de 14 de Maio de 1986, *S. c. Reino Unido*, n.° 11 716/85, DR 47, pág. 274, § 2, e de 19 de Maio de 1992, *Kerkhoven e Hinke c. Países Baixos*, n.° 15 666/89, não publicada, n.° 1). Por outro lado, de acordo com a mesma instituição, não são contrárias ao artigo 14.° da Convenção (que proíbe nomeadamente as discriminações em razão do sexo) regulamentações nacionais que assegurem, para efeitos de protecção da família, um tratamento mais favorável às pessoas casadas e às pessoas de sexo diferente que coabitem como marido e mulher, do que às pessoas do mesmo sexo que demonstrem ter uma relação durável (ver decisões *S. c. Reino Unido*, acima referida, n.° 7; de 9 de Outubro de 1989, *C. e L. M. c. Reino Unido*, n.° 14 753/89, não publicada, n.° 2, e de 10 de Fevereiro de 1990, *B. c. Reino Unido*, n.° 16 106/90, DR 64, pág. 278, n.° 2). O TJCE acrescenta ainda que resulta com clareza da jurisprudência do

Todos estes factores, considerados em conjunto, levam o Tribunal à seguinte conclusão:

> "[N]o estado actual do direito no seio da Comunidade [24], as relações estáveis entre as pessoas do mesmo sexo não são equiparadas a relações entre pessoas casadas nem a relações estáveis entre pessoas de sexo diferente não casadas entre si. Por conseguinte, uma entidade patronal não é obrigada pelo direito comunitário a equiparar a situação de uma pessoa que tenha uma relação estável com um parceiro do mesmo sexo à de uma pessoa que é casada ou que tem uma relação estável sem casamento com um parceiro de sexo diferente" [25].

Dito isto, o Tribunal acrescenta que compete ao legislador comunitário adoptar, caso o venha a julgar necessário, medidas susceptíveis de se aplicarem à situação específica dos casais homossexuais.

Por último, o Tribunal de Justiça da Comunidade Europeia examina se uma situação de discriminação em razão da orientação sexual cabe no âmbito de aplicação do artigo 141.° do Tratado. De acordo com as observações de L. Grant tal conclusão impõe-se face à decisão do Tribunal no processo *P. c. S. e Cornwall County Council*, no qual a referida disposição foi objecto de uma interpretação consentânea com a afirmação de um princípio de igualdade substancial. O Tribunal de Justiça da Comunidade Europeia, porém, perfilha um entendimento diverso quanto a esta questão, considerando que o referido julgamento se refere apenas à situação muito particular das pessoas que mudaram de sexo, não se aplicando, portanto, às diferenças de tratamento baseadas na orientação sexual de uma pessoa.

Relativamente ao argumento de L. Grant baseado na interpretação que da noção de discriminação em razão do sexo contida no Pacto Internacional

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Tribunal Europeu dos Direitos do Homem que o artigo 12.° da Convenção se refere unicamente ao casamento tradicional entre duas pessoas de sexo biológico diferente, e não, por exemplo, a uma relação durável entre concubinos de sexo oposto (ver acórdãos do Tribunal Europeu dos Direitos do Homem de 17 de Outubro de 1986, *Rees*, Série A, n.° 106, pág. 19, n.° 49, e de 27 de Setembro de 1990, *Cossey*, Série A, n.° 184, pág. 17, n.° 43).

[24] Esta expressão deve ser interpretada em sentido amplo como compreendendo não apenas o direito emanado directamente das instituições da Comunidade Europeia, mas também, como decorre do artigo 6.°, n.° 2 (ex-artigo F, n.° 2) do TUE, os direitos fundamentais, tais como são garantidos pela Convenção Europeia dos Direitos do Homem e pelas tradições constitucionais comuns aos Estados membros.

[25] Parágrafo 35.

das Nações Unidas Relativo aos Direitos Civis e Políticos de 19 de Novembro de 1966 faz o Comité dos Direitos Humanos, instituído pelo artigo 28.° daquele Pacto, o Tribunal sublinha que, embora o respeito dos direitos fundamentais constitua uma condição de legalidade dos actos comunitários, tal situação não pode ter por efeito alargar o âmbito das disposições do Tratado para além das competências da Comunidade [26]. Além do mais, o Tribunal de Justiça da Comunidade Europeia considera que a uma simples comunicação do Comité dos Direitos Humanos não pode ser atribuído um valor decisivo, uma vez que este órgão não é uma instância jurisdicional e que as suas declarações são desprovidas de valor jurídico obrigatório.

Face a todos estes elementos, o Tribunal conclui que a recusa de uma entidade patronal de conceder uma redução no preço dos transportes a uma pessoa, do mesmo sexo, com a qual um trabalhador mantém uma relação estável, quando essa redução é concedida aos cônjuges dos trabalhadores ou às pessoas, de sexo diferente, com as quais estes mantêm uma relação estável sem casamento, não é proibida pelo artigo 141.° do Tratado nem pela Directiva n.° 75/117.

O Tribunal não deixa de salientar, porém, que o Tratado de Amesterdão, prevê a inclusão no Tratado CE de um artigo 13.° que, permitirá ao Conselho, mediante voto unânime, sob proposta da Comissão e após consulta do Parlamento Europeu, adoptar as medidas necessárias à eliminação de diferentes formas de discriminação existentes na Comunidade e nos Estados membros, nomeadamente as baseadas na orientação sexual.

III. Apreciação crítica

Até há bem pouco tempo, o direito comunitário em matéria de igualdade detinha-se dentro de fronteiras relativamente bem determinadas. Nos processos *P. c. S. e Cornwall County Council* e *Grant*, os limites tradicionais do princípio da igualdade de tratamento e a sua aplicação circunscrita a situações em que se estava perante a existência de uma discriminação contra uma pessoa em virtude da pertença desta a um sexo determinado, viriam porém a ser postos à prova.

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[26] Ver parecer n.° 2/94 do Tribunal de Justiça, de 28 de Março de 1996, Col. 1996, pág. I-1759, parágrafos 34 e 35.

1. O alargamento do âmbito do princípio da igualdade – O tratamento conferido aos transexuais: *P. c. S. e Cornwall County Council*

No caso *P. c. S.* estava em causa uma medida de despedimento baseada na mudança de sexo do trabalhador [27]. A questão prejudicial submetida ao Tribunal tinha por objecto saber se tal situação poderia ser considerada como uma "discriminação em razão do sexo" na acepção da Directiva n.º 76/207 [28].

Nas suas observações neste processo, o Governo do Reino Unido e a Comissão sustentaram que uma interpretação restritiva da Directiva, de acordo com a qual a mesma só proibia as discriminações com origem na pertença do assalariado em causa a um ou a outro sexo mas não as baseadas na mudança de sexo do assalariado.

O Advogado-Geral Tesauro exprimiu nas suas conclusões uma opinião bem diferente. Desde logo, empenhou-se numa análise sociológica e jurídica do transexualismo cujo rigor deve ser aplaudido. Concluiu que o mesmo constitui um fenómeno psicológico em que se verifica a falta de coincidência entre identidade biológica e identidade sexual do indivíduo, que o direito não pode pura e simplesmente ignorar [29]. Partindo desta ideia, o Advogado-Geral observou que, o conceito de "sexo" deveria ser interpretado como compreendendo todo um conjunto de características, comportamentos e papéis na vida social, não se reduzindo à simples dicotomia, em termos de sexo biológico, homem/ /mulher. No seu entender, aqueles que são vítimas de um tratamento discriminatório em razão dos supra-referidos factores, devem considerar-se vítimas de um tratamento discriminatório em razão do sexo, na acepção da Directiva [30].

O Tribunal, por seu turno, salientou que as disposições da Directiva que proíbem as discriminações entre homens e mulheres mais não são do que a expressão, no domínio limitado que lhe é próprio, do princípio da igualdade,

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[27] P., demandante no processo principal, trabalhava como gestor de um estabelecimento de ensino sob a tutela de Cornwall County Council. Foi despedida depois de ter notificado o director de estudos, S., da sua intenção de se submeter a uma operação, através da qual mudaria o seu sexo de masculino para feminino.

[28] O juiz de reenvio inquiria, designadamente se não deveria considerar-se que a directiva teria um âmbito de aplicação mais amplo do que o *Sex Discrimination Act* de 1975 (lei relativa às discriminações em razão do sexo), o qual abrangia apenas as discriminações baseadas na pertença do assalariado em causa a um ou a outro sexo.

[29] Ver parágrafos 16-19.

[30] Ver parágrafos 20-25.

que é um dos princípios fundamentais do direito comunitário. Concluiu, pois, seguindo o seu Advogado-Geral:

> "... Tais discriminações assentam essencialmente, senão exclusivamente, no sexo da [pessoa] interessada. Assim, quando uma pessoa é despedida porque tem a intenção de sofrer ou porque sofreu uma mudança de sexo, é objecto de um tratamento desfavorável relativamente às do sexo de que era considerada fazer parte antes dessa operação [31]".
>
> "Tolerar essa discriminação equivaleria a ignorar, em relação a essa pessoa, o respeito da dignidade e da liberdade a que tem direito e que o Tribunal deve proteger [32]".

Quanto a nós, o julgamento do Tribunal neste processo traduz uma adesão da parte deste à noção de sexo enquanto realidade social e não meramente enquanto identidade biológica [33]. Uma tal concepção, que poderia parecer dever aplicar-se também, por maioria de razão, a situações de discriminação em razão da orientação sexual [34], parece porém ter sido claramente rejeitada pelo Tribunal no acórdão *Grant*.

2. A recusa de um novo alargamento do âmbito do princípio da igualdade às situações de discriminação em razão da orientação sexual: *Grant c. South West Trains Ltd.*

   a) As dificuldades de transposição da jurisprudência *P. c. S.* para o plano da discriminação em razão da orientação sexual – a dimensão social do processo Grant,

No acórdão *P. c. S.* o critério determinante para estabelecer a existência de discriminação foi o da identidade sexual do trabalhador em questão. O Advogado-Geral e o Tribunal chegaram a essa conclusão uma vez feita a com-

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[31] Parágrafo 21

[32] Parágrafo 22.

[33] Reflexo deste aspecto é o facto de na versão inglesa das conclusões do Advogado-Geral a expressão escolhida ter sido "gender discrimination" e não "sex discrimination".

[34] Como o sublinham, Angus Campbell e Heather Lardy, *op. cit.*, na nota 6, nas págs. 417-418, *"if tolerating discrimination against a transsexual person would be a 'failure to respect the dignity and freedom to which he or she is entitled', then to permit discrimination against someone on the grounds that he or she is gay or lesbian must surely also represent such a failure to respect."*

paração entre o tratamento conferido pelo empregador a uma pessoa relativamente à qual se verificava uma situação de equivalência de sexo biológico e identidade sexual e aquele que era conferido a uma pessoa relativamente à qual não se verificava uma tal equivalência. A transposição de uma tal concepção de discriminação em razão do sexo, consentânea com uma ideia de sexo enquanto identidade sexual, às situações de discriminação em razão da orientação sexual encerra, no entanto, desde logo em virtude de factores de ordem social, sérias e evidentes dificuldades, que não terão deixado de condicionar o Tribunal no caso *Grant*. Neste contexto, o Tribunal de Justiça da Comunidade Europeia terá efectivamente tido em conta o potencial impacto social que uma protecção acrescida dos direitos dos cidadãos homossexuais, categoria infinitamente mais numerosa e ao mesmo tempo de menor visibilidade que a dos cidadãos transexuais, poderia ter nos diversos Estados membros [35]. Com efeito, enquanto estes últimos constituem um grupo bem definido e relativamente reduzido no conjunto dos países membros da União [36], já os homossexuais formam um grupo vasto e de identificação nem sempre evidente [37], o que obviamente teria por efeito potenciar exponencialmente as "ondas de choque" que um julgamento diferente poderia ter nas estruturas sociais e laborais dos Estados membros. Este argumento de ordem sociológica, que permite, em certa medida, fornecer uma primeira possível explicação para a inconsistência entre os acórdãos *P. c. S.* e *Grant*, parece, contudo, ao menos num plano de princípio, algo criticável, na medida em que a simples constatação da existência de um número considerável de cidadãos homossexuais no espaço comunitário não deveria sobrepor-se ao imperativo constitucional de protecção dos direitos fundamentais desses mesmos cidadãos [38].

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[35] Mark Bell, *ob. cit.* supra na nota 11, nas págs. 74-75.

[36] De acordo com as conclusões do Advogado-Geral Tesauro no acórdão *P. c. S.* (nota 6), estima-se que um em cada 30 000 homens e uma em cada 100 000 mulheres europeias sejam transexuais.

[37] Conforme indica o Advogado-Geral Elmer, nas suas conclusões no caso *Grant* (parágrafo 42), estima-se que a população homossexual da União Europeia ascenda pelo menos aos 35 milhões de pessoas.

[38] Por outro lado, parece-nos algo preocupante que o Tribunal não tenha tido em conta os efeitos perversos que o acórdão *Grant* gera no que respeita ao grau de protecção relativo que o direito comunitário oferece a homossexuais e a transexuais respectivamente. Efectivamente, raciocinando *ad absurdum*, se Lisa Grant se tivesse sujeitado (ou se manifestasse a intenção de se sujeitar) a uma operação de mudança de sexo, teria visto, em virtude do acórdão *P. c. S.*, ser-lhe reconhecido o direito às concessões que reclamava. O acórdão agora proferido resulta, pois, na situação perfeitamente caricata e altamente iníqua, em que um trabalhador tem, na realidade, mais hipóteses de receber protecção adequada, em termos de direito comunitário da igualdade, se se encontrar numa situação de discriminação fundada na circunstância de ser transexual do que se se encontrar numa situação de discriminação em razão da sua orientação sexual. Trata-se obviamente de um ponto a rever na jurisprudência do Tribunal.

Procuremos, porém, atentar um pouco mais em detalhe sobre os diversos passos do raciocínio do Tribunal.

b) O termo de comparação utilizado para estabelecer a existência de uma discriminação em razão da orientação sexual,

Desde logo, no que respeita à primeira questão em análise – a de saber se a exigência feita pelo regulamento da empresa South-West Trains, de que o parceiro do trabalhador seja de sexo diferente deste para que a redução no preço dos transportes possa ser concedida, constitui uma discriminação baseada directamente no sexo do trabalhador – nos parece que a abordagem do Tribunal peca por um formalismo excessivo. Tal formalismo conduz aliás o Tribunal a uma conclusão juridicamente incorrecta baseada num termo de comparação também ele incorrecto [39]. Com efeito, o Tribunal de Justiça da Comunidade Europeia conclui que o regulamento da empresa se aplica indistintamente a trabalhadores heterossexuais e homossexuais, na medida em que a única exigência que é feita é que o trabalhador em questão seja de sexo diferente do seu parceiro. Com o devido respeito, consideramos que este raciocínio assenta num pressuposto errado. O termo de comparação deveria, efectivamente, ter sido entre um trabalhador que tenha um parceiro de sexo diferente e um trabalhador que tenha um parceiro do mesmo sexo. Parece-nos que o factor decisivo, reside, como o assinalou o Advogado-Geral Elmer nas suas conclusões, na simples circunstância que, para efeitos da aplicação do artigo 8.° do regulamento da SWT, o que marca a diferença entre a situação de L. Grant e a situação dos outros trabalhadores da empresa é justamente a concepção de sexo adoptada por aquela entidade. Com efeito, a disposição em causa condiciona de maneira absoluta a concessão de reduções no preço das viagens ao sexo do trabalhador, na medida em que o mesmo tem de ser diferente do seu concubino. Nas circunstâncias específicas do caso *sub judice,* tais concessões apenas poderiam ter sido obtidas se o trabalhador em questão fosse de sexo masculino, ou, alternativamente, se o concubino fosse do sexo masculino.

c) As dimensões política e moral do processo Grant – o estádio incipiente da evolução do direito comunitário, do direito interna-

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[39] O Tribunal usa como termo de comparação, por um lado, a situação de um trabalhador do sexo masculino que tenha um parceiro do mesmo sexo e, por outro lado, a situação de uma trabalhadora do sexo feminino que tenha igualmente uma parceira do mesmo sexo. A este propósito, ver G. F. Mancini e S. O'Leary, "The new frontiers ...", cit. supra na nota 3, pág. 349.

cional e do direito nacional dos Estados membros em matéria de discriminação em razão da orientação sexual.

Na etapa seguinte do seu raciocínio o Tribunal concentra-se no problema de saber se as pessoas que mantêm uma relação estável com um parceiro do mesmo sexo se encontram na mesma situação ou numa situação comparável com a de pessoas casadas ou com a de pessoas que, não sendo casadas, têm uma relação estável com um parceiro de sexo diferente, afirmando que, na hipótese de, na realidade, elas serem julgadas comparáveis, haveria, de facto, discriminação em razão do sexo. A análise que o Tribunal faz do direito dos Estados membros, das normas emanadas das instituições comunitárias e dos instrumentos de direito internacional existentes em matéria de protecção dos homossexuais, leva-o à conclusão que, no presente estádio de evolução do direito no seio da Comunidade, relações estáveis entre pessoas do mesmo sexo não são ainda equiparáveis a relações entre pessoas casadas nem a relações estáveis entre pessoas de sexo diferente não casadas entre si. Cremos que este aspecto é fundamental e terá constituído mesmo um dos factores decisivos no julgamento do Tribunal. Duas ordens de argumentos terão sido importantes neste contexto. Assim, por um lado, como o Tribunal o indica, a jurisprudência das instituições da Convenção Europeia dos Direitos do Homem tem vindo, de uma maneira geral, a recusar, no contexto do direito ao respeito pela vida privada e do direito ao casamento, uma protecção idêntica a casais homossexuais relativamente aquela que é conferida a casais heterossexuais [40].

Se a homossexualidade não merece ainda praticamente qualquer reconhecimento jurídico no plano do direito internacional público, também as próprias ordens jurídicas nacionais dos vários Estados membros ou não o reconhecem de todo, ou o fazem apenas relativamente a um conjunto limitado de direitos [41]. Este último aspecto permite explicar a sensibilidade política dos problemas em discussão no caso *Grant* bem como a pouca receptividade por parte dos Estados membros que submeteram observações ao Tribunal relativamente a uma decisão favorável à requerente. Uma tal decisão teria aliás im-

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[40] Nesse sentido, ver a jurisprudência da Comissão e do Tribunal Europeu dos Direitos do Homem, cit. supra na nota 23. Num sentido diferente ver, porém, recentemente o acórdão de 21 de Dezembro de 1999 do Tribunal Europeu dos Direitos do Homem no processo *Salgueiro da Silva Mouta c. Portugal.*

[41] Para um panorama geral do estatuto dos casais homosexuais nas legislações nacionais, ver Benoît Guiget, "Le droit communauataire et la reconnaissance ...", cit. supra na nota 3, pág. 565 e segs.; G. F. Mancini e S. O'Leary, "The new frontiers ...", cit. supra na nota 3, pág. 349, nota 90.

plicado a necessidade para muitos Estados membros, se não a totalidade, de introduzirem modificações, mais ou menos profundas, nas suas legislações em matéria de emprego e de igualdade de tratamento, modificações que a maior parte desses Estados não estaria efectivamente preparada para fazer [42]. A isto acresce o facto de que o caso *Grant* poderia gerar um surto de processos de carácter similar, eles próprios altamente nefastos para as estruturas regulamentares dos Estados membros nesta área. De toda a evidência, a realidade política e o panorama legislativo nos diversos Estados forneciam um contexto francamente desfavorável a uma decisão diferente da parte do Tribunal.

O mesmo se diga, aliás, no que diz respeito à dimensão moral do processo em questão. Como o sublinhou o Governo do Reino Unido nas suas observações, "*rules relating to persons' sexual orientation raise ethical, religious, cultural and social questions, in relation to which the Court has accorded the Member States a wide discretion*". Uma decisão favorável a Lisa Grant teria certamente provocado a ira generalizada de determinados sectores da sociedade dos Estados membros, nomeadamente ao nível das organizações e empregadores animados por um espírito mais conservador [43]. Por outro lado, "*Community case law indicates that the Court will avoid making far-reaching decisions which challenge important institutions such as marriage and the family*" [44]. Os acórdãos *Quietlynn* [45] e principalmente *SPUC c. Grogan* [46], em que estavam em causa, respectivamente, a regulamentação da pornografia e do aborto num dos Estados membros comprovam inequivocamente o desejo de não envolvimento do Tribunal em questões em que a aplicação do direito comunitário suscita a necessidade de resolução de problemas éticos complexos e relativamente aos quais as legislações e as opiniões públicas dos diversos Estados membros divergem de maneira significativa.

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[42] Neste contexto, por exemplo, o Reino Unido apontava nas suas observações, que uma decisão favorável à pretensão de Lisa Grant poderia acarretar *"acute difficulties in relation to employment, pensions and social security"*, evidenciando uma clara oposição ao reconhecimento dos direitos invocados pela requerente.

[43] Mark Bell, ob. cit. supra, nota 11, págs. 76-77.

[44] Harrison, "Using EC law to challenge sexual orientation discrimination at work", in Hervey & O'Keeffe (eds.), *Sex Equality in the European Union*, 1996, London, Wiley, pág. 280.

[45] Acórdão de 11 de Julho de 1990, no proc. C-23/89, *Quietlynn Limited e. o. c. Southend Borough Council*, Col. 1990, pág. I-3059. Ver as anotações de E. Vallejo Lobete, *Gaceta Jurídica de la CEE – Boletín*, 1990, n.º 84, pág. 10; Claude J. Berr, *Journal du Droit International*, 1991, pág. 466.

[46] Acórdão de 4 de Outubro de 1991, no proc. C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. c. Stephen Grogan e. o.*, Col. 1991, pág. I-4685. Entre os muitos comentários a este julgamento, ver H. Gaudemet Tallon, *Revue Trimestrielle de Droit Européen*, 1992, pág. 167; S. O'Leary, (1992) *European Law Review*, 1992, pág. 138; Deirdre Curtin, (1992) *Common Market Law Review*, pág. 585.

Finalmente, parece-nos importante chamar a atenção para o próprio contexto político no plano da União Europeia vista no seu conjunto, o qual na época da decisão no caso *Grant* se encontrava profundamente marcado pela negociação e subsequente aprovação do Tratado de Amesterdão. Neste contexto, a inclusão que o mesmo veio operar no Tratado CE de um novo artigo 13.º que permitirá ao Conselho tomar, em certas condições (voto por unanimidade sob proposta da Comissão e após consulta do Parlamento Europeu), as medidas necessárias à eliminação de diferentes formas de discriminação, nomeadamente as baseadas na orientação sexual [47], terá desempenhado também um papel importante no raciocínio do Tribunal. Nesse raciocínio não terá deixado de estar subjacente a ideia de que uma nova cláusula permitindo a adopção de medidas no sentido da eliminação de formas de discriminação baseadas na orientação sexual só se poderia justificar na medida em que se partisse do pressuposto que a adopção de tais medidas não seria possível com base nos instrumentos normativos já existentes, designadamente o artigo 141.º do Tratado [48]. Demonstrando, pois, uma vez mais, a sua deferência para com o legislador comunitário e simultaneamente procurando não interferir com a vontade política dos Estados membros, o Tribunal optou por considerar que, face ao direito comunitário vigente, a discriminação em razão da orientação sexual não se encontrava coberta pelo direito comunitário, competindo às instituições políticas da Comunidade, nos termos do referido artigo 13.º do Tratado, aprovar no futuro os instrumentos normativos necessários a esse fim.

IV. Conclusões

Com base em considerações de ordem social e moral e tendo em especial linha de conta, o sentimento dominante nos Estados membros [49], bem como a política legislativa destes últimos e da própria União Europeia relativamente à discriminação em razão da orientação sexual, o Tribunal entendeu por bem rejeitar a pretensão de Lisa Grant no caso em apreço. A sua conclusão de que

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[47] Sobre o novo artigo 13.º do Tratado CE, ver Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra na nota 3, em especial nas págs. 322-323; Leo Flynn, "The implications of Article 13: after Amsterdam will some forms of discrimination be more equal than others?", (1999) *Common Market Law Review*, pág. 1127. Refira-se que a Comissão avançou recentemente, ao abrigo daquela disposição, com uma proposta de directiva visando a estabelecer um quadro geral de igualdade de tratamento no emprego e na actividade profissional (COM(99)0565 final).

[48] John Mcinnes, cit. supra na nota 11, pág. 1055.

[49] Na linha do activismo maioritário que tem caracterizado determinadas decisões do Tribunal. A este propósito, ver M. Poiares Maduro, *We the Court* ..., cit. supra na nota 10.

a mesma não pode considerar-se compreendida no âmbito do artigo 141.° do Tratado não deixa contudo de se revelar algo decepcionante e francamente ao arrepio dos objectivos daquela disposição e da legislação secundária existente em matéria de igualdade de tratamento, máxime a Directiva n.° 76/207 [50]. Não esqueçamos o que esta última dispõe no terceiro considerando da sua fundamentação:

> "A igualdade de tratamento entre os trabalhadores masculinos e os trabalhadores femininos constitui um dos objectivos da Comunidade, na medida em que se trata, nomeadamente, de promover a igualização no progresso das condições de vida e de trabalho da mão-de-obra."

Julgamos que tal objectivo tem uma vocação universal, implicando pois que todos aqueles que, num momento ou outro, sejam vítimas de um tratamento discriminatório em razão do sexo, tenham direito à protecção conferida pelo direito comunitário. Por outro lado, é evidente que as discriminações em razão da orientação sexual de um trabalhador são tão nocivas para a construção e o aperfeiçoamento do mercado interno e para a concretização plena da liberdade de circulação de pessoas como as tradicionais discriminações em razão do sexo [51]. A decisão do Tribunal apresenta-se, pois, como excessivamente formalista sobretudo se confrontada com a jurisprudência progressista pela qual aquela jurisdição tem sido responsável recentemente no domínio da igualdade de tratamento, designadamente em matéria de protecção da gravidez e discriminação positiva. Não podemos deixar de destacar neste contexto, duas importantes decisões do Tribunal. Assim, no que toca à protecção na gravidez, o Tribunal de Justiça da Comunidade Europeia teve a ocasião, no seu acórdão *Brown* [52], de julgar que o despedimento de uma trabalhadora em virtude de faltas ao emprego motivadas por doença devida ou provocada pela gravidez,

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[50] A mesma linha restritiva parece ter sido seguida no acórdão de 28 de Janeiro de 1999, no processo T-264/97, *D. c. Conselho,* Col. 1999, pág. FP-II-0001, em que o Tribunal de Primeira Instância considerou que determinados benefícios previstos pelo Estatuto dos Funcionários e Agentes das Comunidades Europeias não eram aplicáveis ao parceiro do sexo masculino de um funcionário do Conselho da União Europeia. Refira-se que tanto o requerente como o Governo sueco introduziram recurso deste julgamento perante o TJCE. Sobre este acórdão, ver Christine Denys (1999), *European Law Review,* pág. 419; Bruce Carolan (1999), *Gazette of the Incorporated Law Society of Ireland,* pág. 44.

[51] Ver A. Clapham e J. Weiler, "Human Dignity Shall Be Inviolable – The Human Rights of Lesbians and Gay Men in the European Community Legal Order", *Collected Courses of the Academy of European Law 1992 – The Protection of Human Rights in Europe,* Nijhoff-Kluwer, Florence, 1994, pág. 237.

[52] Acórdão de 30 de Junho de 1998, no proc. C-394/96, *Brown c. Rentokil,* Col. 1998, pág. I-4185.

constituía uma discriminação directa em razão do sexo, visto tratar-se de uma medida fundada na própria ocorrência da gravidez e dela indissociável, assim como, sobretudo, uma condição de verificação impossível num trabalhador do sexo masculino, relativamente ao qual um despedimento nos mesmos termos nunca poderia, portanto, ter lugar [53]. Em matéria de discriminação positiva, o Tribunal confrontou-se, no caso *Marschall* [54], com um litígio entre um cidadão alemão do sexo masculino, Helmut Marschall e o *Land Nordrhein-Westfalen* (Alemanha), relativo à interpretação de uma disposição do estatuto dos funcionários deste *Land* alemão, a qual permitia que, em determinadas circunstâncias, em caso de igualdade de qualificações entre homens e mulheres, a estas últimas fosse conferida prioridade na promoção. Perante uma oportunidade ideal para precisar os contornos da sua decisão *Kalanke* de 1995 [55], o Tribunal considerou que a regulamentação em causa era conforme ao direito comunitário desde que, em cada concreto, se encontrasse garantida uma apreciação objectiva de cada candidato individual, masculino ou feminino, não se excluindo, portanto, *a priori,* a promoção de um candidato masculino [56]. Em ambos os domínios, o Tribunal veio assegurar, através da consagração de um princípio de igualdade substancial, a necessária tutela judicial de direitos fundamentais dos cidadãos comunitários.

No mesmo plano pode situar-se a sua recente jurisprudência em matéria de livre circulação de cuidados médicos na União Europeia. A este respeito, o Tribunal teve a ocasião, nos seus acórdãos de 28 de Abril de 1998, *Decker* [57] e *Kohll* [58], de dar um passo significativo no sentido da construção de um verdadeiro espaço integrado nesta área. Através das suas decisões, as quais vêm permitir aos cidadãos comunitários deslocarem-se a um Estado membro dife-

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[53] A propósito deste julgamento, ver Christine Boch (1998), *European Law Review,* pág. 498; Pedro Cabral, *Revue du Marché Unique Européen,* 1998, n.º 4, pág. 156; *EU Focus - Essential Developments in EU Law and Policy,* 1998, n.º 18, pág. 2; Evelyn Ellis (1999), *Common Market Law Review,* pág. 625. Em matéria de protecção de gravidez, ver também os acórdãos de 19 de Novembro de 1998, no proc. C-66/96, *Hoj Pedersen,* Col. 1998, pág. I-7327 e de 14 de Setembro de 1999, no proc. C-249/97, *Gruber,* ainda não publicado na Colectânea.

[54] Acórdão de 11 de Novembro de 1997, no proc. C-409/95, *Helmut Marschall c. Land Nordhein-Westfalen,* Col. 1997, pág. I-6363.

[55] Acórdão de 17 de Outubro de 1995, no proc. C-450/93, *Kalanke c. Freie Hansestadt Bremen,* Col. 1995, pág. I-3051.

[56] Sobre o julgamento no caso *Marschall,* ver Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra na nota 3; Pedro Cabral, "A step closer to substantive equality" (1998), *European Law Review,* pág. 481. Novos desenvolvimentos jurisprudenciais nesta matéria são de esperar no contexto de dois reenvios prejudiciais actualmente pendentes no TJCE, nos processos C-158/97, *Badeck* e C-407/98, *Abrahamsson.*

[57] Proc. C-120/95, Col. 1998, pág. I-1831.

[58] Proc. C-158/96, Col. 1998, pág. I-1931.

rente daquele em que residem para aí obterem produtos médicos ou receberem cuidados dessa natureza tendo o direito de serem reembolsados de acordo com as tarifas em vigor no Estado membro em cujo sistema de segurança social estão inscritos, o Tribunal vem, com efeito, derrubar uma primeira mas importante barreira na estrutura complexa e profundamente compartimentada do sector da saúde na União Europeia, dando um decisivo passo no sentido da concretização de um mercado interno neste sector [59].

Paralelamente, o Tribunal tem evidenciado também uma crescente preocupação em proceder à densificação normativa das disposições do Tratado em matéria de cidadania europeia. Duas decisões recentes do Tribunal merecem, a nosso ver, particular destaque, neste contexto. Assim, em primeiro lugar, no seu acórdão de 12 de Maio de 1998, *Martínez Sala* [60], o Tribunal de Justiça da Comunidade Europeia deu um primeiro passo no sentido do reforço da protecção do cidadão europeu, independentemente do exercício por parte deste de uma actividade económica, ao reconhecer o direito de um nacional de um

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[59] Muitas são as questões que ficam ainda assim por responder nesta matéria. Para uma análise exaustiva destes dois julgamentos, ver Pedro Cabral, "Cross-border Medical Care in the European Union – Bringing Down a First Wall" (1999), *European Law Review*, pág. 387; A. P. Van der Mei, "Cross-Border Access to Medical Care within the European Union – Some Reflections on the Judgements in *Decker* and *Kohll*" (1998), *Maastricht Journal of European and Comparative Law*, pág. 277; Prodromos Mavridis, "La libéralisation des soins de santé en Europe: un premier diagnostic", *Revue du Marché Unique Européen*, 1998, n.º 3, pág. 145; Sean van Raepenbusch, "Le libre choix par les citoyens européens des produits médicaux et des prestations de soins, conséquence sociale du marché intérieur", *Cahiers de Droit Européen*, 1998, pág. 683. Neste contexto, os processos pendentes C-368/98, *Vanbraekel* e C-157/99, *Smits e Peerbooms* darão certamente ao Tribunal a oportunidade de clarificar a sua jurisprudência *Decker* e *Kohll*, designadamente no que conceme à sua aplicação a cuidados médicos prestados no âmbito de infra-estruturas hospitalares.

Outras decisões recentemente proferidas pelo Tribunal no tocante à livre circulação de pessoas merecem também uma referência especial. Assim, destacam-se, em matéria de integração na área do sector público, o acórdão de 15 de Janeiro de 1998, no proc. C-15/96, *Kalliope Schöning-Kougebetopoulou*, Col. 1998, pág. I-47 e o acórdão de 24 de Setembro de 1998, no proc. C-35/97, *Comissão c. França*, Col. 1998, pág. I-5325; em matéria de integração na área da segurança social, ver em particular o acórdão de 5 de Março de 1998, no proc. C-160/96, *Molenaar*, Col. 1998, pág. I-843; no que toca à articulação entre liberdade de circulação de pessoas e fiscalidade, ver principalmente os acórdãos de 28 de Abril de 1998, proc. C-118/96, *Safir*, Col. 1998, pág. I-1897, de 16 de Julho de 1998, no proc. C-264/98, *Imperial Chemical Industries*, Col. 1998, pág. I-465, de 29 de Abril de 1999, no proc. C-311/97, *Royal Bank of Scotland*, Col. 1999, pág. I-2655, de 8 de Julho de 1999, no proc. C-254/97, *Baxter*, ainda não publicado na Colectânea e de 14 de Setembro de 1999, no proc. C-391/97, *Gschwind*, ainda não publicado na Colectânea. Para uma visão de conjunto dos recentes desenvolvimentos no direito comunitátio em matéria de liberdade de circulação de pessoas e de serviços, ver S. O'Leary, "Free Movement of Persons and Services", *The Evolution of EU Law, Craig and De Búrca* (eds.), Oxford University Press, pág. 384.

[60] Proc. C-85/96, Col. 1999, pág. I-2691.

Estado membro de se basear nas normas do Tratado em matéria de cidadania europeia para se proteger de uma discriminação em razão da nacionalidade imposta por outro Estado membro [61]. Na mesma lógica de reforço do estatuto constitucional do cidadão europeu insere-se também o acórdão de 24 de Novembro de 1998, *Bickel* [62], no qual o Tribunal veio considerar que uma regulamentação de um Estado membro que confere o direito a uma minoria linguística estabelecida no seu território de utilizar a sua própria língua em procedimentos judiciais de carácter penal e que não reconhece esse mesmo direito aos nacionais de outros Estados membros que tenham essa mesma língua por língua materna, é incompatível com o Tratado CE [63].

Face aos avanços registados nas áreas acima apontadas, a decisão do Tribunal no caso *Grant* não pode deixar de constituir uma decepção Já o dissemos anteriormente em outra sede [64], mas não podemos deixar de o repetir. Num contexto tão importante como o da tutela jurisdicional dos direitos fundamentais do cidadão da União Europeia, a deferência devida aos Estados membros pelo Tribunal não pode ser incondicional [65]. Efectivamente, se aquela jurisdição pretende, continuar o seu esforço de edificação de uma ordem jurídica autónoma fundada no respeito do direito e na sua própria Carta Constitucional – o Tratado – [66], mantendo-se assim fiel ao tão eloquentemente proclamado objectivo de tutela dos direitos à dignidade e à liberdade da pessoa

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[61] Sobre este julgamento, ver S. O'Leary (1999), *European Law Review,* pág. 69; M. Luby, *Journal du Droit International,* 1999, pág. 557.

[62] Proc. C-274/96, Col., pág. I-7637.

[63] A propósito do acórdão *Bickel,* ver por todos, Mielle Bulterman (1999), *Common Market Law Review,* pág. 1325. Em matéria de cidadania europeia, ver ainda o recente acórdão de 21 de Setembro de 1999, no proc. C-378/97, *Wijsenbeek,* ainda não publicado na Colectânea, bem como as brilhantes conclusões apresentadas pelo Advogado-Geral Cosmas nesse mesmo processo.

[64] Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra na nota 3, nas págs. 326-327.

[65] Conforme já tivemos a ocasião de salientar anteriormente [Patrícia Cunha e Pedro Cabral, "O princípio da igualdade ...", cit. supra na nota 3, nas págs. 325-326], o Tribunal parece recentemente ter-se afastado do activismo que de certa forma marcou a sua jurisprudência dos anos oitenta e inícios dos anos noventa. De certa forma, a própria consagração do princípio da subsidariedade no Tratado de Maastricht e a nova lógica de repartição de competências entre a Comunidade e os Estados membros a ele subjacente vieram de algum modo condicionar os moldes de actuação do Tribunal, a partir de então especialmente prudente nos domínios em que a sua política judicial poderia de algum modo ir ao encontro das prioridades definidas pelo legislador comunitário e pelos próprios Estados membros. No mesmo sentido, ver John Mcinnes, ob. cit., supra na nota 11, págs. 1054-1055.

[66] Parecer 1/91, de 14 de Dezembro de 1991, Col. 1991, pág. I-6079. Ver a este propósito os interessantes comentários de J. L. Cruz Vilaça e Nuno Piçarra, *Cahiers de Droit Européen,* 1993, pág. 3 e de Henry Schermers (1992), *Common Market Law Review,* pág. 991.

humana [67], não pode, em processos como o presente, eximir-se da responsabilidade que lhe assiste de actuar como um verdadeiro Tribunal Constitucional da União Europeia, chamando a si a garantia de uma protecção judicial efectiva do cidadão [68].

Luxemburgo, 24 de Janeiro de 2000.

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[67] Ac. *P. c. S.*, cit. supra na nota 6, para. 22. No mesmo sentido, mas num contexto algo diferente, ver também as Conclusões do Advogado-Geral Jacobs, apresentadas em 9 de Dezembro de 1992, no processo C-168/91, *Konstantinidis* (Col. 1993, pág. I-1191), parágrafo 46.

[68] Ver John Mcinnes, ob. cit., supra nota 11, pág. 1055; J. Weiler e N. Lockhart, "Taking rights seriously' seriously: The European Court of Justice and its fundamental rights jurisprudence" (1995), *Common Market Law Review*, págs. 51 e 579, pág. 627.

ESTUDOS

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A PARTICIPAÇÃO DOS PORTUGUESES NÃO RESIDENTES E DOS ESTRANGEIROS RESIDENTES NAS ELEIÇÕES PORTUGUESAS

ÍNDICE

Abreviaturas:

CRP – Constituição da República Portuguesa

BDDC – *Boletim de Documentação e Direito Comparado*

BMJ – *Boletim do Ministério da Justiça*

ICQL – *The International and Comparative Law Quarterly*

LEAL – Lei Eleitoral das Autarquias Locais (Decreto-Lei n.º 701-B/76, de 29 de Setembro, alterado posteriormente por vários diplomas legais)

LEAR – Lei Eleitoral da Assembleia da República (Lei n.º 14/79, de 16 de Maio, alterado posteriormente por vários diplomas legais)

LEPE – Lei Eleitoral para o Parlamento Europeu (Lei n.º 14/87, de 29 de Abril, com as alterações introduzidas pela Lei n.º 4/94, de 9 de Março)

LRE – Lei do Recenseamento Eleitoral (Lei n.º 13/99, de 22 de Março)

RDI – *Rivista di Diritto Internazionale*

RDP – *Revue du Droit Public et de la Science Politique en France et à l'Étranger*

RFDA – *Revue française de droit administratif*

RFDC – *Revue française de droit constitutionnel*

RTDP – *Rivista trimestrale di diritto pubblico*

TCE – Tratado da Comunidade Europeia

I. Introdução

1. O objectivo deste trabalho é verificar se, em face das mudanças que têm ocorrido em termos mundiais, com um número crescente de pessoas a mudarem de residência, não só em procura de melhores condições de vida, mas também para satisfação das necessidades crescentes de mão-de-obra de alguns Estados, o actual sistema eleitoral português responde aos novos desafios que essa e/imigração coloca às sociedades modernas.

A análise irá repousar em dois grupos específicos:

- Os cidadãos de nacionalidade portuguesa residentes no estrangeiro, cuja participação nas eleições presidenciais portuguesas tem sido uma questão muito debatida, mas cuja consagração apenas ocorreu com a última revisão constitucional;
- Os cidadãos estrangeiros residentes em território nacional, cuja participação nas eleições presidenciais e legislativas (com excepção dos cidadãos brasileiros titulares do Estatuto especial de igualdade de direitos e deveres) não é permitida e, cuja participação nas eleições locais, está sujeita ao preenchimento de uma condição da reciprocidade.

A escolha do tratamento destes dois grupos, em simultâneo, repousa nos pontos em comum que os mesmos apresentam, dado que, apesar de terem nacionalidades diversas, estamos em ambas as situações perante emigrantes, num caso residentes fora de Portugal e noutro caso acolhidos em Portugal, em que os problemas de participação política nas sociedades de origem e acolhimento são cada vez mais prementes, resultado de um fenómeno global de aumento da duração de permanência dos imigrantes nas sociedades de acolhi-

mento, com todos os problemas e desafios que tal acarreta em termos de inserção social de grupos cada vez mais numerosos.

Começaremos este trabalho por uma análise do quadro legal internacional e nacional, com a finalidade de apurar em que termos os mesmos permitem fundamentar a participação daqueles dois grupos nas diferentes eleições portuguesas.

Depois procuraremos traçar, procedendo a uma análise das diferentes posições e propostas, um conjunto de pistas para reflexão sobre as alterações que consideramos desejáveis e necessárias introduzir no sistema eleitoral português.

II. Enquadramento legal

A) Internacional

2. A maior parte dos instrumentos internacionais que contêm disposições referentes a eleições surgiram num período em que o Estado-Nação ainda tinha um grande peso, pelo que não surpreende que "reservem" o direito de participação nas eleições aos nacionais. Aparecem-nos, assim, os direitos de cidadania estreitamente associados à titularidade de uma nacionalidade. Como consequência, o princípio internacional da admissão de limitações à participação política dos estrangeiros surge como incontestado e incontestável [1].

i. Declaração Universal dos Direitos do Homem (DUDH) [2]

A DUDH regula a matéria das eleições no seu artigo 21.º estabelecendo, nomeadamente, os seguintes princípios:

- Toda a pessoa tem o direito de participar nos negócios públicos do seu país (n.º 1);

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[1] Nesse sentido, cfr., Alfred Verdross, "Les règles internationales concernant le traitement des étrangers", in *Recueil des Cours*, tomo 37, pág. 379, Jorge Miranda, *Manual de Direito Constitucional*, tomo III, pág. 127, R. Plender, "Os Direitos do Homem dos estrangeiros na Europa", in BDDC, n.º 18, págs. 39-40, A. C. Evans, "The political status of aliens in international law, municipal law and european community law", in ICLQ, vol. 30, págs. 22-24, Maria Luísa Duarte, *A Liberdade de circulação das pessoas e a ordem pública no direito comunitário*, pág. 49.

[2] Aprovada pela Assembleia Geral das Nações Unidas em 10 de Dezembro de 1948; foi publicada, em Portugal, no *Diário da República*, I Série, de 9 de Março de 1978.

– A vontade do povo deve exprimir-se através de eleições realizadas periodicamente por sufrágio universal e igual (n.º 3).

Logo, não é prevista a participação política dos estrangeiros, dado que se restringe a participação ao "seu país".

ii. Convenção Europeia de Salvaguarda dos Direitos do Homem e das Liberdades Fundamentais (CEDH) [3]

O seu artigo 16.º permite que os Estados-Parte possam impor restrições à actividade política dos estrangeiros, limitando, nomeadamente, os seus direitos de liberdade de expressão (artigo 10.º da CEDH) e liberdade de reunião e associação (artigo 11.º da CEDH). Estas limitações, desde que incidam sobre a participação política, são legítimas e não violam o artigo 14.º da CEDH, que estabelece um princípio geral de proibição de discriminação no gozo de direitos e liberdades previstos na CEDH [4].

O artigo 3.º do Protocolo n.º 1 [5] estabelece a obrigação dos Estados-Parte de organizarem, regularmente, eleições livres, por escrutínio secreto, para eleição do órgão legislativo.

Dado que a CEDH e os seus Protocolos Adicionais formam um todo [6], fica claro que os estrangeiros poderão ser excluídos da participação nos actos eleitorais.

Por outro lado, a Comissão Europeia dos Direitos do Homem pronunciando-se sobre a exclusão do direito de voto dos cidadãos nacionais residentes

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[3] Assinada, em Roma, em 4 de Novembro de 1950; foi aprovada, por Portugal, através da Lei n.º 65/78, de 13 de Outubro (nos termos da Declaração de Rectificação publicada no *Diário da República*, I Série, de 14 de Novembro de 1978).

[4] Pietro Mascagni ("Le restrizioni alle attivitá politiche degli stranieri consentite dalla Convenzione Europea dei Diritti dell'Uomo", in RDI, vol. LX, pp. 527-531) chamando a atenção para a particularidade da redacção do artigo 16.º, por comparação com as restantes normas da CEDH que permitem restrições de direitos, considera, no entanto, que esta norma não permite a privação de toda e qualquer liberdade política dos estrangeiros, admitindo-se apenas restrições a alguns desses direitos ou liberdades, estando a margem de discricionariedade dos Estados limitada pela sua necessidade num ordenamento democrático. Defendendo a reapreciação do critério do artigo 16.º, por admitir restrições demasiado largas, cfr., Luís Silveira, "O Acolhimento e Estadia do Estrangeiro", in BDDC, n.º 18, pág. 223, e Ireneu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem*, págs. 232-233.

[5] Assinado, em Paris, em 20 de Março de 1952; publicado, em Portugal, conjuntamente com a CEDH, na Lei n.º 65/78, de 13 de Outubro

[6] Nesse sentido, cfr. a jurisprudência do TEDH, nomeadamente, o acórdão Handyside, de 7 de Dezembro de 1976, Série A: *Arrêts et décisions*, vol. 24, pág. 20, § 41.

no estrangeiro, considerou na sua Decisão de 21 de Maio de 1997, que a mesma poderá ser aceitável com a seguinte argumentação, citada por Ireneu Cabral Barreto [7]:

- Um cidadão não residente poderá ser menos afectado pelos problemas do seu país e não ter deles um conhecimento perfeito;
- Pode ser difícil a apresentação das várias opções de escolha eleitoral;
- A pouca influência do cidadão não residente na selecção dos candidatos e na elaboração dos programas eleitorais.

iii. Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial (CEDR) [8]

O artigo 1.º, n.º 1, da CEDR qualifica como "discriminação racial" toda a distinção, exclusão, restrição ou preferência fundada na origem nacional que destrua ou comprometa o reconhecimento, o gozo ou o exercício, em condições de igualdade, dos direitos e liberdades no domínio político. Este, nos termos do artigo 5.º, abrange o direito de participar nas eleições (votar e ser eleito) por sufrágio universal e igual, e o direito de tomar parte no governo e na direcção dos assuntos públicos.

No entanto, o n.º 2 do artigo 1.º exclui do âmbito da aplicação da CEDR as diferenciações, exclusões, restrições ou preferências estabelecidas pelos Estados-Parte entre súbditos e não súbditos.

Nestes termos, e em face da CEDR, é admissível aos Estados limitarem a participação nas eleições apenas aos respectivos nacionais.

iv. Pacto Internacional sobre os Direitos Civis e Políticos (PIDCP) [9]

Esta matéria está prevista no artigo 25.º do PIDCP, que estabelece que todo o cidadão pode:

- Participar na direcção dos negócios públicos;

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[7] *Op. cit.*, págs. 338-339.

[8] Adoptada pela Assembleia Geral das Nações Unidas em 21 de Dezembro de 1965; aprovada, por Portugal, através da Lei n.º 7/82, de 29 de Abril.

[9] Adoptado pela Assembleia Geral das Nações Unidas, em 16 de Dezembro de 1966; foi aprovado, por Portugal, através da Lei n.º 29/78, de 12 de Junho.

– Votar e ser eleito, através de eleições periódicas, por sufrágio universal e igual e por escrutínio secreto.

A referência ao "cidadão" tem como consequência a atribuição desses direitos apenas aos nacionais do Estado, pelo que as limitações dos direitos dos estrangeiros são legítimas em face deste instrumento internacional.

v. Tratado da Comunidade Europeia (TCE) [10]

O artigo 17.º do TCE procedeu à institucionalização da cidadania europeia, sendo considerado como cidadão da União Europeia, qualquer pessoa que tenha a nacionalidade de um Estado Membro.

Nos termos do artigo 190.º, os cidadãos europeus participam na eleição dos seus representantes ao Parlamento Europeu, através de sufrágio universal directo. De acordo com o n.º 2 do artigo 19.º, os cidadãos europeus podem exercer o seu direito de eleger e serem eleitos, no Estado Membro da residência, nas mesmas condições em que o fazem os nacionais desse Estado.

O n.º 1 do artigo 19.º atribui a qualquer cidadão da União Europeia residente num outro Estado Membro que não o da sua nacionalidade, o direito de eleger e ser eleito para as eleições municipais do Estado Membro da residência.

Nenhuma disposição comunitária permite a participação dos cidadãos não-comunitários, quer nas eleições para o Parlamento Europeu, quer nas eleições municipais (embora, neste último caso, seja compreensível que o não faça, dado que se trata de matéria interna dos Estados Membros).

3. Em face do quadro apresentado, verificamos que o direito internacional é incapaz de fundamentar o direito dos estrangeiros a participarem nas eleições das sociedades da residência.

Isto é assim, porque o indivíduo aparece como alguém estreitamente ligado ao Estado de que é nacional, só estando sujeito ao poder de outro Estado transitoriamente, logo o direito internacional limita-se a garantir os direitos que os cidadãos podem invocar perante os Estados, atenta a sua condição

[10] Aprovado, em Roma, em 25 de Março de 1957, e alterado, no Luxemburgo, em 28 de Fevereiro de 1986, em Maastricht em 7 de Fevereiro de 1992 e, em Amesterdão, em 2 de Outubro de 1997; aprovado, por Portugal, através da Resolução da Assembleia da República n.º 22/85, de 18 de Setembro, com as alterações introduzidas pela Resolução da Assembleia da República n.º 32/86, de 26 de Dezembro, pela Resolução da Assembleia da República n.º 40/92, de 30 de Dezembro e pela Resolução da Assembleia da República, n.º 7/99, de 19 de Fevereiro.

jurídica, pelo que aos estrangeiros apenas são atribuídos os direitos mínimos compatíveis com a sua dignidade humana e com a sua suposta permanência transitória na sociedade de acolhimento, na qual, fruto da ideia da homogeneidade étnica, cultural e social da Nação, aparecem sempre como um corpo estranho e um potencial inimigo.

A única excepção, o Tratado da Comunidade Europeia, é o resultado do aprofundamento de um processo regional de integração económica e política, sendo a atribuição do direito de participar nas eleições municipais e para o Parlamento Europeu limitada, no entanto, aos nacionais dos Estados membros, pelo que os cidadãos não-comunitários continuam excluídos do gozo desses direitos.

B) Nacional

4. A legislação portuguesa permite, com diferente amplitude, a participação dos nacionais portugueses residentes no estrangeiro, e dos nacionais estrangeiros residentes em Portugal, nas eleições portuguesas.

Para uma melhor compreensão dos diferentes níveis de participação admitidos, iremos traçar um breve quadro exemplificativo, procedendo a uma divisão nas seguintes categorias:

i. Portugueses residentes no estrangeiro;
ii. Cidadãos comunitários;
iii. Nacionais dos países de língua oficial portuguesa;
iv. Brasileiros titulares do Estatuto especial de igualdade;
v. Outros estrangeiros.

i. Portugueses residentes no estrangeiro

Nos termos do artigo 14.º da Constituição da República (CRP) os cidadãos portugueses que se encontrem ou residam no estrangeiro gozam dos direitos e estão sujeitos aos deveres que não sejam incompatíveis com a sua ausência do país.

No que respeita à eleição do Presidente da República, o artigo 121.º da CRP veio permitir a participação dos portugueses residentes no estrangeiro, em consequência da alteração verificada na última revisão constitucional, dado que até essa altura na eleição presidencial apenas participavam os cidadãos portugueses "recenseados no território nacional" e o direito de voto era "exercido presencialmente no território nacional" (anterior artigo 124.º).

A CRP estabelece no artigo 121.º que a regulamentação do exercício do direito de voto [11] deverá ter em conta, na definição dos cidadãos eleitores, a existência de laços de efectiva ligação à comunidade nacional. No entanto, o artigo 297.º dispensa desta exigência todos aqueles "que se encontrem inscritos nos cadernos eleitorais para a Assembleia da República em 31 de Dezembro de 1996, dependendo as inscrições posteriores" da lei que regula o exercício do seu direito de voto.

A Lei Orgânica n.º 3/2000, de 24 de Agosto, que procedeu a alterações ao regime jurídico da eleição do Presidente da República, modificou o artigo 1.º, passando a nova redacção a ser a seguinte:

> "São eleitores do Presidente da República os cidadãos portugueses recenseados no território nacional e os cidadãos portugueses residentes no estrangeiro que se encontrem inscritos nos cadernos eleitorais para a eleição da Assembleia da República à data da publicação da presente lei."

Ou seja, alargou-se o corpo eleitoral para a eleição do Presidente da República, relativamente ao previsto na CRP, sem recorrer ao critério material da "existência de laços de efectiva ligação à comunidade nacional" que, aliás, não é referido, em nenhum momento, pela Lei Orgânica n.º 3/2000.

Nas eleições para a Assembleia da República, a participação dos portugueses residentes no estrangeiro também é admitida, dado que aquela "é a assembleia representativa de todos os cidadãos portugueses" (artigo 147.º/ /CRP) [12].

Nos termos do artigo 3.º da Lei Eleitoral da Assembleia da República (LEAR), os portugueses inscritos nos postos de recenseamento no estrangeiro são considerados como eleitores para a Assembleia da República, sendo também elegíveis (artigo 4.º). Estes eleitores estão agrupados em dois círculos eleitorais (artigo 12.º, n.º 4/LEAR): o círculo da Europa e o círculo de fora da Europa. Cada um destes círculos eleitorais elege dois deputados (artigo 13.º, n.º 3/LEAR).

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[11] Nos termos do artigo 168.º, n.º 6, a lei que regula o exercício deste direito terá de ser aprovada "por maioria de dois terços dos deputados presentes, desde que superior à maioria absoluta dos deputados em efectividade de funções".

[12] O que de acordo com o princípio democrático implica que na sua eleição possam participar todos os cidadãos, cfr. nesse sentido Gomes Canotilho e Vital Moreira, *Constituição da República Portuguesa – Anotada*, pág. 619.

Já no que respeita às eleições locais (artigo 239.°, n.° 2/CRP) e regionais, a participação dos nacionais residentes no estrangeiro não é permitida, dado que as eleições para as assembleias municipais e para as assembleias regionais estão limitadas aos cidadãos recenseados na respectiva área territorial, uma vez que, em ambos os casos, estamos perante entes territoriais infra-estaduais, que exercem as suas competências apenas no âmbito desse território [13].

Quanto às eleições para o Parlamento Europeu, dos cidadãos portugueses residentes no estrangeiro, apenas poderão participar aqueles que tenham a sua residência noutro Estado membro [14], votando nas eleições portuguesas, ou nas do Estado membro da residência, nos termos do artigo 19.°, n.° 2, do TCE.

Dado que, nos termos do artigo 2.° da Lei Eleitoral para o Parlamento Europeu (LEPE), existe um círculo eleitoral único, estes portugueses, se optarem por exercer o seu direito de voto nas eleições realizadas em território nacional, só podem fazê-lo votando por correspondência (artigo 3.°, n.° 2/LEPE).

O recenseamento eleitoral é voluntário para os portugueses residentes no estrangeiro (artigo 4.°, alínea *a)*, da Lei do Recenseamento Eleitoral – LRE), devendo ser efectuado, quando o pretendam fazer, na embaixada ou posto consular da área da residência (artigo 8.°, *b)*/LRE). No caso das inscrições efectuadas até 31 de Dezembro de 1996, devem ser, nos termos do artigo 42.°/ /LRE, anotadas no caderno de recenseamento a menção "eleitor do Presidente da República".

Por outro lado, os portugueses que promovam a sua inscrição num posto de recenseamento situado num Estado membro da União Europeia, deverão fazer uma declaração formal em que manifestem a vontade de, nas eleições para o Parlamento Europeu, votarem nos deputados do país da residência ou nos deputados portugueses.

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[13] Nesse sentido, cfr. Gomes Canotilho e Vital Moreira, *op. cit.*, págs. 873 e 892, Jorge Miranda, "O Direito Eleitoral na Constituição", in *Estudos de Direito Eleitoral*, pág. 84, João Caupers, *Breves Reflexões Sobre o Estatuto Eleitoral dos Emigrantes*, pág. 10.

[14] Quando o Tribunal Constitucional foi chamado a pronunciar-se sobre a possibilidade de os portugueses residentes no estrangeiro em países não-comunitários participarem nas eleições europeias, considerou, no acórdão n.° 320/89, de 20 de Março de 1989, publicado no BMJ, n.° 385 (1989), que "não é conforme à Constituição a atribuição de capacidade eleitoral activa, nas eleições para o Parlamento Europeu, a todos os nacionais não residentes em termos indiscriminados e além disso sem garantia de respeito pelas regras constitucionais em matéria de exercício de direito de voto (e noutras)" (pág. 250). Está bom de ver que a argumentação não é muito feliz, como aliás chamam a atenção, em declaração de voto, os juízes conselheiros Raul Mateus (especialmente págs. 260-261) e Messias Bento (especialmente págs. 262-263).

ii. Cidadãos comunitários

O artigo 15.º, n.º 5/CRP, atribui aos cidadãos dos Estados membros da União Europeia o direito de, em condições de reciprocidade, votarem e serem eleitos para deputados ao Parlamento Europeu. O n.º 4 do referido artigo que, evidentemente, também abrange os cidadãos comunitários, permite que estes possam, em condições de reciprocidade, votar e ser eleitos para titulares de órgãos de autarquias locais.

O artigo 19.º, n.os 1 e 2/TC consagra também o direito dos cidadãos comunitários elegerem e serem eleitos para as eleições municipais do Estado membro da residência, bem como, o direito de eleger e de serem eleitos nas eleições para o Parlamento Europeu no Estado membro da residência. Em qualquer uma das situações, o TCE prevê a possibilidade de disposições derrogatórias a que os Estados membros podem recorrer para fazer face a problemas específicos que as justifiquem.

Nos termos dos artigos 1.º e 2.º da Lei Eleitoral para as Autarquias Locais (LEAL), têm capacidade eleitoral activa e passiva os cidadãos comunitários não-nacionais recenseados na área da respectiva autarquia, desde que o mesmo direito seja concedido aos portugueses residentes no respectivo Estado de origem.

O artigo 18.º-A/LEAL especifica que, para além do preenchimento dos requisitos formais de apresentação das respectivas candidaturas, os cidadãos comunitários não-nacionais deverão apresentar uma declaração formal na qual especifiquem: a sua nacionalidade, a residência habitual no território português, a última residência no Estado de origem e que não está privado do direito de ser eleito no Estado de origem. As autoridades portuguesas podem exigir a apresentação de um atestado comprovativo emitido pelas autoridades competentes do Estado de origem. A privação do exercício do direito de voto no país de origem implica a sua inelegibilidade para as eleições autárquicas portuguesas (artigo 4.º, n.º 1, alínea *g)*/LEAL).

As assembleias de voto não podem ser compostas exclusivamente por cidadãos estrangeiros (artigo 30.º, n.º 5/LEAL).

Os artigos 3.º, n.º 1, alínea *c),* e 4.º/LEPE atribuem capacidade eleitoral activa e passiva, nas eleições para o Parlamento Europeu, aos cidadãos comunitários não-nacionais recenseados em Portugal.

Na apresentação da sua candidatura, tem de juntar, nos termos do artigo 9.º-A/LEPE, uma declaração formal na qual especifique a sua nacionalidade, a sua residência em território português, que não é simultaneamente candidato noutro Estado membro e a indicação da sua última inscrição nos cadernos eleitorais da autarquia ou círculo eleitoral do Estado de origem.

Deverá fazer acompanhar esta declaração de um atestado comprovativo de não estar privado da capacidade eleitoral passiva no Estado de origem, ou de que as autoridades deste último Estado não têm conhecimento de qualquer incapacidade.

Por outro lado, o artigo 9.°-B/LEPE interdita a composição de secções de voto exclusivamente por eleitores estrangeiros.

De acordo com o artigo 113.°, n.° 2/CRP e o artigo 4.°, alínea *b)*/LRE o recenseamento é voluntário para os cidadãos comunitários não-nacionais residentes em Portugal. Quando pretendam proceder ao seu recenseamento, deverão fazê-lo no local de funcionamento da entidade recenseadora correspondente ao domicílio indicado no título de residência (artigo 9.°, n.° 1, e 27.°, n.° 3/LRE), devendo apresentar, para o efeito, o respectivo passaporte e preencher o correspondente verbete de inscrição (artigo 34.°, n.° 2/LRE), que deverá ser acompanhado de uma declaração formal na qual manifestem a sua opção de exercer em Portugal o direito de voto nas eleições para o Parlamento Europeu e que não se encontram privados desse direito no Estado membro de origem (artigo 37.°, n.° 5/LRE).

As inscrições dos cidadãos eleitores estrangeiros que deixem de residir em Portugal ou que o solicitem, por escrito, devem ser oficiosamente eliminadas (artigo 49.°, n.° 1, alínea *e)*/LRE).

iii. Nacionais dos Países de Língua Oficial Portuguesa

Nos termos do artigo 15.°, n.° 3/CRP, podem ser atribuídos aos nacionais dos países de língua oficial portuguesa, direitos que não sejam conferidos a outros estrangeiros, desde que essa atribuição se faça através de convenção internacional e por reciprocidade. Estão, no entanto, excluídos a titularidade dos órgãos de soberania e dos órgãos de governo próprio das regiões autónomas, o serviço nas forças armadas e a carreira diplomática.

O n.° 4 do mesmo artigo permite a atribuição de capacidade eleitoral activa e passiva para a eleição dos titulares dos órgãos das autarquias locais, em condições de reciprocidade. Salvo melhor opinião, defendemos que esta norma também se aplica aos nacionais dos países de língua oficial portuguesa, pois se estes têm um tratamento constitucional privilegiado [15], em face do n.° 3,

[15] Francisco Lucas Pires defende que os nacionais dos países de língua oficial portuguesa gozam, a par dos cidadãos comunitários, do "estatuto de estrangeiros privilegiados", cfr. Schengen e a Comunidade de Países Lusófonos, pág. 42. Para Jorge Miranda (Manual ..., pág. 144) este tratamento justifica-se em face do artigo 7.°, n.° 3, da CRP e na relevância da língua portuguesa como factor de independência nacional.

não se compreende que este direito não lhes fosse atribuído nos casos em que, apesar de não existir uma convenção internacional, está preenchida a condição da reciprocidade [16].

Os nacionais dos países de língua oficial portuguesa dispõem de capacidade eleitoral activa para as autarquias locais, desde que residam legalmente em Portugal há mais de dois anos (artigo 1.º, alínea *c)*/LEAL), sendo elegíveis aqueles que residam legalmente em Portugal há mais de quatro anos, desde que não estejam privados do exercício do direito de voto no país de origem (artigo 4.º, n.º 1, alínea *g)*/LEAL).

Nos termos do artigo 18.º-A/LEAL, no acto de apresentação da sua candidatura, o interessado deverá entregar uma declaração formal na qual especifique a sua nacionalidade, o local da residência habitual em Portugal, a sua última residência no país de origem e de que neste não está privado do direito de ser eleito. Deve fazer acompanhar esta declaração de um documento emitido pelo Serviço de Estrangeiros e Fronteiras comprovativo do período de residência em Portugal.

O artigo 30.º, n.º 5/LEAL não permite a constituição de assembleias de voto compostas exclusivamente por eleitores não nacionais.

Nos termos do artigo 113.º, n.º 2/CRP e do artigo 4.º, alínea *c)*/LRE, o recenseamento eleitoral é voluntário, devendo o interessado inscrever-se na entidade recenseadora cujo local de funcionamento corresponda ao domicílio indicado no respectivo título de residência (artigo 27.º, n.º 3/LRE). No acto da inscrição, o interessado deve apresentar uma declaração na qual conste a sua nacionalidade, endereço da sua residência em território nacional, o caderno eleitoral do círculo ou autarquia local do Estado de origem em que tenha estado inscrito em último lugar e de que não se encontra privado do direito de voto no Estado de origem (artigo 37.º, n.º 4/LRE).

Com excepção dos brasileiros titulares do estatuto especial de igualdade, que veremos de seguida, a participação dos nacionais de língua oficial portuguesa apenas se verifica nas eleições para as autarquias locais, encontrando-se preenchida a condição da reciprocidade somente no caso dos nacionais cabo-verdianos [17, 18].

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[16] Por contraposição com o n.º 3 do artigo 15.º, somos de opinião que a exigência de reciprocidade que aqui é feita, basta-se com a consagração desse direito na legislação do outro Estado, desde que abranja os portugueses.

[17] Cfr. Declaração n.º 2-A/97, de 11 de Abril, dos Ministérios dos Negócios Estrangeiros e da Administração Interna.

[18] Cfr. artigo 23.º, n.os 3 e 4, da Lei Constitucional da República de Cabo Verde (Lei n.º 12/III/92, de 25 de Setembro): "3 – Poderão ser atribuídos aos cidadãos dos países de língua oficial portuguesa

iv. Brasileiros titulares do Estatuto especial de igualdade

Por força da Convenção sobre Igualdade de Direitos e Deveres entre Brasileiros e Portugueses [19], os cidadãos brasileiros residentes legal e permanentemente em Portugal há mais de cinco anos, podem ser titulares de direitos políticos (estatuto especial de igualdade), desde que não estejam privados desses direitos no Brasil (artigos 4.º e 7.º). Para obterem este estatuto, os interessados deverão já ter pedido o estatuto geral de igualdade ou, então, deverão pedi-lo simultaneamente, nos termos do artigo 2.º do Decreto-Lei n.º 126/72, de 22 de Abril [20].

O estatuto especial de igualdade extingue-se pela cessação da autorização de residência, pela perda da nacionalidade brasileira ou pela privação dos direitos políticos no Brasil. Podendo, ainda, suspender-se com a suspensão destes mesmos direitos no Brasil (artigo 13.º do Decreto-Lei n.º 126/72).

De acordo com o artigo 20.º do Decreto-Lei n.º 126/72, os brasileiros titulares do estatuto especial poderão exercer funções públicas nos mesmos termos que os portugueses, incluindo funções de carácter governativo, com excepção das seguintes (artigo 21.º do Decreto-Lei n.º 126/72): Presidente da República, Conselheiro de Estado, Deputado, membro do Governo, Juiz dos tribunais supremos, Procurador-Geral da República, agente diplomático e oficial general das forças armadas, bem como a titularidade dos órgãos de governo próprio das regiões autónomas (artigo 15.º, n.º 3/CRP).

Dado que não é admitido o gozo de direitos políticos em simultâneo no país de origem e em Portugal, o seu gozo em território nacional implicará a suspensão do seu exercício no Brasil (artigo 22.º do Decreto-Lei n.º 126/72).

O registo da atribuição e da extinção do estatuto especial de igualdade, a realizar na Conservatória dos Registos Centrais, é comunicado à autoridade administrativa local para que esta promova a inscrição oficiosa do interessado

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direitos não conferidos aos estrangeiros e apátridas, excepto o acesso à titularidade dos órgãos de soberania, o serviço nas Forças Armadas e a carreira diplomática. 4 – Aos estrangeiros e apátridas residentes no território nacional poderá ser atribuída por lei capacidade eleitoral activa e passiva para eleição dos titulares dos órgãos das autarquias locais.", e o artigo 3.º da Lei eleitoral para os órgãos dos municípios (Lei n.º 118/IV/94, de 30 de Dezembro): "1 – São igualmente eleitores os estrangeiros e apátridas com residência habitual em Cabo Verde há mais de três anos. 2 – São ainda elegíveis os estrangeiros e apátridas com residência habitual em Cabo Verde há mais de cinco anos".

[19] Assinada pelo Brasil e por Portugal, em Brasília, em 7 de Setembro de 1971, tendo sido aprovada, por Portugal, através da Resolução da Assembleia Nacional n.º 29, de 20 de Dezembro de 1971.

[20] Este decreto-lei regula a execução da Convenção sobre Igualdade de Direitos e Deveres entre Brasileiros e Portugueses.

nos cadernos eleitorais ou o seu cancelamento, respectivamente (artigo 43.º do Decreto-Lei n.º 126/72).

A titularidade do estatuto especial ou do estatuto geral de igualdade não implica a perda da nacionalidade de origem, continuando o seu detentor no exercício de todos os direitos e deveres inerentes à respectiva nacionalidade, desde que não ofendam a soberania nacional e a ordem pública do Estado da residência (artigos 2.º e 3.º da Convenção).

Do que fica dito, resulta que os brasileiros residentes em Portugal titulares do estatuto especial de direitos dispõem de capacidade eleitoral activa para as eleições autárquicas, regionais e legislativas. Dispõem, ainda, de capacidade eleitoral passiva nas eleições autárquicas. Em face do artigo 121, n.º 1/CRP, não dispõem de capacidade eleitoral activa nas eleições presidenciais, dado que este restringe o corpo eleitoral aos "cidadãos portugueses eleitores", nem de capacidade eleitoral passiva, dado que o artigo 122.º apenas considera elegíveis os "portugueses de origem".

No que respeita ao recenseamento eleitoral, deverá considerar-se que, em face do artigo 43.º do Decreto-Lei n.º 126/72, o qual manda proceder à inscrição oficiosa nos cadernos eleitorais dos titulares do estatuto especial de igualdade, o recenseamento é obrigatório, até porque o artigo 113.º, n.º 2/CRP e o artigo 1.º/LRE apenas excluem dessa obrigatoriedade, as situações previstas no artigo 15.º, n.os 4 e 5/CRP e no artigo 121.º, n.º 2/CRP.

Questão que tem merecido alguma discussão, respeita à capacidade eleitoral dos brasileiros titulares do estatuto especial de igualdade nas eleições europeias. No entanto, parece-nos que em face do Tratado da Comunidade Europeia, muito dificilmente é defensável a capacidade eleitoral activa e passiva dos brasileiros, dado que o artigo 17.º é muito claro ao ligar a titularidade da cidadania europeia à posse da nacionalidade de um Estado membro, e o artigo 19.º, n.º 2, atribui o direito de eleger e ser eleito aos cidadãos da União Europeia. Ora, como já se referiu, a titularidade do estatuto especial de igualdade não tem qualquer implicação em termos de nacionalidade, dado que o seu titular mantém a nacionalidade de origem [21].

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[21] No mesmo sentido se pronunciam Francisco Lucas Pires, *op. cit.*, pág. 44, e Maria Luísa Duarte, *op. cit.*, págs. 144-145, que chama a atenção para o facto da própria Convenção não garantir o direito de entrada e permanência em território nacional aos brasileiros, os quais estão, à semelhança dos outros estrangeiros, obrigados à obtenção de uma autorização de residência. Por seu lado, Gilles Sébastien, "La citoyenneté de l'Union européenne", in RDP, n.º 5-1993, págs. 1271-1272, chama a atenção para o facto de a cidadania europeia criar uma nova distinção no seio das populações dos Estados membros entre "não europeus" e "europeus".

v. Outros estrangeiros

Todos os outros estrangeiros apenas têm capacidade eleitoral activa e passiva para a eleição dos órgãos das autarquias locais, em condições de reciprocidade, e desde que tenham residência em território nacional (artigo 15.º, n.º 4/CRP).

Nos termos do artigo 1.º, alínea d)/LEAL podem ser eleitores aqueles que residam legalmente há mais de três anos em Portugal, sendo exigível uma permanência superior a cinco anos para poderem ser eleitos para os órgãos das autarquias locais (artigo 2.º, alínea d)/LEAL).

As matérias das ineligibilidades, composição das mesas de voto, requisitos especiais de apresentação de candidaturas e recenseamento (o qual é voluntário nos termos do artigo 4.º, alínea d)/LRE) são idênticas às já referidas a propósito dos nacionais de países de língua oficial portuguesa.

Nos termos do artigo 15.º, n.º 4/CRP, e conforme a Declaração n.º 2-A/97, de 11 de Abril, dos Ministérios dos Negócios Estrangeiros e da Administração Interna, dispõem de capacidade eleitoral activa e passiva os nacionais do Peru e do Uruguai. Dispõem, apenas, de capacidade eleitoral activa os nacionais da Argentina, Israel e Noruega.

III – Análise do quadro legal

a) Participação política dos portugueses não residentes

5. Como vimos a participação eleitoral dos portugueses residentes no estrangeiro é permitida nas eleições para a Assembleia da República e nas eleições para o Presidente da República.

Para justificar a sua participação nas eleições portuguesas podem ser avançados vários argumentos:

- A titularidade da nacionalidade portuguesa;
- a ligação à comunidade nacional;
- a participação na tomada de decisões que os podem afectar;
- a defesa dos seus interesses.

Se estes são, a nosso ver, os pontos delimitadores da discussão, verificamos, no entanto, que a mesma tem subjacente em Portugal, pelo menos no plano político, considerações oportunísticas, de que são exemplo, as especula-

ções sobre a orientação política deste segmento do eleitorado, em termos dos ganhos/perdas que podem trazer para certas forças partidárias.

6. Mas dado que a possibilidade dos portugueses residentes no estrangeiro votarem nas eleições presidenciais só foi, como atrás referido, permitido pela última revisão constitucional, vejamos quais os argumentos que eram (são) invocados para justificar essa impossibilidade:

- O desconhecimento por esses portugueses da situação política do país;
- A falta de condições adequadas para o exercício desse direito, em termos de igualdade de condições para todas as candidaturas, nomeadamente, de apresentação e discussão das suas propostas;
- A possibilidade de fraude através do voto por correspondência, nomeadamente, a possibilidade do voto ser exercido por outra pessoa que não o titular do direito;
- A possibilidade de, em função do seu número, terem um peso decisivo nos resultados finais;
- O princípio da independência nacional [22];
- A especificidade do cargo de Presidente da República [23].

Logo à primeira vista, com excepção deste último, vemos que os mesmos argumentos podem ser também invocados para defender a não participação destes portugueses nas eleições legislativas. E logo esta constatação coloca um problema sério de coerência argumentativa, dado que não podemos recusar a participação eleitoral nas presidenciais com base em certas asserções e, depois, ignorá-las quando nos referimos às eleições legislativas [24].

7. Mas vejamos a validade de cada um dos argumentos utilizados.

Desde logo, o desconhecimento da situação política do país, não nos parece que possa assumir uma importância decisiva, dado que, como muito bem nota Manuel Filipe Correia de Jesus [25], uma vez que o recenseamento eleitoral é facultativo, o facto de alguém se recensear é indicativo de que a mesma se

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[22] Cfr. Jorge Miranda, *Manual ...*, pág. 123.

[23] Vital Moreira, citado por João Caupers, *op. cit.*, pág. 15, invoca as condições particulares de elegibilidade do Presidente da República, como a nacionalidade de origem e a idade, como podendo fundamentar exigências especiais de participação como eleitor.

[24] João Caupers defende que dificilmente se pode justificar a exclusão de participação nas eleições presidenciais, sem colocar em causa o voto dos emigrantes nas eleições legislativas, *op. cit.*, pág. 24.

[25] Cfr. Presidenciais: o voto dos portugueses residentes no estrangeiro, pág. 22.

pretende manter ligada politicamente a Portugal. Por outro lado, existe um conjunto alargado de fontes de informação (televisão por cabo e satélite, *internet,* jornais ...) que permitem um acompanhamento próximo da evolução política, económica, cultural e social do país. Não podemos, no entanto, ignorar que a ligação aos problemas concretos do dia-a-dia é, naturalmente, percepcionado de uma forma diferente por quem está sempre em contacto com eles e os vive experiencialmente e por quem tem deles um conhecimento mediatizado (indirecto).

A falta de condições para o exercício do direito de sufrágio, em termos de igualdade das candidaturas, não nos parece que deva ser aqui invocada, dado que se elas não existem, então devem ser criadas, uma vez que a resolução desse problema não pode passar por "tirar" o direito de participar nas eleições, para esconder debilidades do sistema. E, como já foi referido, não só existem, neste momento, mais e melhores meios de transmissão de informação e contacto directo com os eleitores, como também meios de transporte, cada vez mais rápidos e baratos, que facilitam os contactos pessoais.

O elevado número de portugueses residentes no estrangeiro, que correspondem a cerca de metade da população portuguesa, é um argumento importante a ter em conta no equacionar da sua participação eleitoral nas eleições presidenciais, uma vez que, tratando-se de uma eleição unipessoal, realizada num único círculo eleitoral [26], a possibilidade hipotética dos resultados eleitorais reflectirem uma menos correcta percepção dos problemas fundamentais do país é bastante maior [27]. No entanto, o peso deste argumento aparece diminuído quando verificamos que apenas um número reduzido de portugueses residentes no estrangeiro está efectivamente recenseado e um número ainda menor participa nas eleições.

A invocação do princípio da independência nacional parece-nos aqui um pouco deslocado, desde logo, porque estamos perante indivíduos titulares da nacionalidade portuguesa, logo com um vínculo jurídico especial com o país, depois porque, sendo certo que o essencial da sua vivência ocorre no país da residência, resultante do próprio facto de terem aí estabelecida a sua vida privada e profissional, o que poderá condicionar a sua percepção dos problemas e ter reflexos na sua opção eleitoral, não se pode ignorar que para colocarem em

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[26] Cfr. artigo 7.º da Lei Eleitoral do Presidente da República (Decreto-Lei n.º 319-A/76, de 3 de Maio, alterado posteriormente por vários diplomas).

[27] Gomes Canotilho e Vital Moreira, *op. cit.*, pág. 559, invocam também as perturbações que um grande número de eleitores residentes no estrangeiro, sem um conhecimento directo dos problemas, podem introduzir na eleição do Presidente da República, embora pareçam justificar esta restrição sobretudo pela defesa da independência e unidade do Estado.

causa a independência nacional, não só teriam de estabelecer uma grande concertação entre todos, como necessitavam da "conivência" activa dos portugueses residentes em território nacional.

Por fim, os requisitos estabelecidos para a apresentação da candidatura para Presidente da República, justificam-se em função da responsabilidade do cargo e da necessidade de encontrar alguém com capacidade e experiência para o seu exercício, pelo que não nos parece que devam servir para fundamentar a exclusão de determinados indivíduos da participação na escolha do melhor candidato, que reúna os requisitos exigidos.

8. Na nossa opinião, verdadeiramente essencial é a participação dos portugueses residentes no estrangeiro nas eleições legislativas, dado que é através delas que estes têm a possibilidade de eleger os representantes que, tendo um melhor conhecimento da sua situação e dos problemas concretos com que se defrontam, podem defender os seus interesses e expectativas. Logo, e nestes termos, as eleições presidenciais aparecem-nos como eleições "menos importantes" para estes portugueses [28], dado que, sendo verdade que o Presidente da República é o órgão de soberania supremo no ordenamento jurídico português [29], ele é, sobretudo, um órgão que, não estando empenhado necessariamente na luta política diária, assegura que o sistema funcione normalmente.

No entanto, e tendo o legislador constitucional optado por permitir a sua participação nas eleições presidenciais, parece-nos acertado o critério constitucional da "existência de laços de efectiva ligação à comunidade nacional" [30, 31] como critério delimitador destes eleitores, apesar de todas as dificuldades na concretização daquele critério, pois, desta forma, assegura-se que só sejam eleitores aqueles que mantêm um relacionamento de tal forma estreito com o país, que a sua participação é, não só importante, mas também essencial para as opções a serem tomadas, e não apenas uma mera consequência da titularidade formal da nacionalidade portuguesa.

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[28] Em sentido contrário, cfr. Manuel Filipe Correia de Jesus, *op. cit.*, págs. 11-12, que defende a prevalência da eleição presidencial sobre as eleições legislativas.

[29] Artigo 120.º/CRP: "O Presidente da República representa a República Portuguesa, garante a independência nacional, a unidade do Estado e o regular funcionamento das instituições democráticas e é, por inerência, Comandante Supremo das Forças Armadas".

[30] Artigo 121.º, n.º 2.

[31] O artigo 297.º/CRP introduz, desde logo, um desvio a este critério ao considerar que todos aqueles que estavam inscritos nos cadernos eleitorais para a Assembleia da República em 31 de Dezembro de 1996, se consideram inscritos no recenseamento eleitoral para a eleição do Presidente da República.

Parece-nos que vários elementos poderão permitir, isolada ou conjuntamente, concretizar esta "efectiva ligação":

- O período de ausência do país (ex. aqueles que tiverem saído de Portugal há menos de 6 anos, poderiam, desde logo, participar nas eleições presidenciais, dado que se presumia a efectiva ligação à comunidade nacional);
- a frequência de contactos que mantêm com o país; ou,
- a participação eleitoral em anteriores eleições.

9. Por outro lado, atenta a situação particular destes portugueses, o Estado português deverá garantir, pelos meios ao seu alcance, nomeadamente diplomáticos, as condições que permitam a sua participação nas eleições dos países da residência, quer através da celebração de convenções bilaterais ou multilaterais, quer através da sensibilização dos portugueses para as vantagens dessa participação, nos países em que essa possibilidade já é reconhecida.

b) Participação política dos estrangeiros residentes

10. No que respeita à participação política, os conceitos de cidadania e nacionalidade têm andado estreitamente associados, de tal forma que, muitas vezes, são utilizados como sinónimos. Esta situação decorre do facto de, tradicionalmente, os direitos políticos, nomeadamente os eleitorais, serem atribuídos exclusivamente aos nacionais.

No entanto, estamos perante realidades diversas, traduzindo-se a cidadania num vínculo jurídico-político, caracterizado por um conjunto de direitos e deveres que um determinado indivíduo pode exercer perante um Estado, e a nacionalidade num vínculo jurídico que liga um indivíduo a uma determinada entidade política estadual [32], fruto do seu nascimento no território desse Estado ou da descendência de nacionais seus, permitindo delimitar o conjunto de indivíduos que, integrando o conceito de povo [33], são um dos alicerces do Estado.

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[32] Jorge Miranda defende que, neste domínio, a palavra nacionalidade deve ser afastada, dado que revela a pertença a uma nação e não a um Estado, embora reconheça que a sua utilização está associada à ideia do Estado-Nação, *Manual* ..., pág. 88.

[33] Do "povo" deve distinguir-se a "população" de um Estado, a qual engloba quer os nacionais, quer os estrangeiros.

Ora, como afirma Kelsen [34], é possível a existência de um Estado sem que existam cidadãos, dado que aquele apenas depende da existência de indivíduos que sejam, simultaneamente, o fundamento e os destinatários do ordenamento jurídico estadual [35].

A justificação da associação entre a cidadania e a nacionalidade está no facto da soberania residir na nação, logo, o cidadão detém uma parcela dessa soberania e tem o direito de participar na formação da vontade geral. Como tal, reconhecer ao estrangeiro a qualidade de eleitor significa reconhecer-lhe a qualidade de representante da nação; no entanto, pela sua própria condição, o estrangeiro não pode falar em nome da nação, dado que não consegue sentir e não tende ao bem comum desta, o que está apenas ao alcance do nacional [36].

A reserva da cidadania para os nacionais decorre, como nota Michel Miaille [37], da lógica da formação e defesa do Estado-Nação, ou seja, apenas os nacionais têm a correcta percepção dos problemas e estão interessados na subsistência do respectivo Estado, enquanto os estrangeiros, apenas transitoriamente aí a residir, são encarados como uma potencial ameaça à unidade nacional e ao próprio Estado, dado que mantêm a sua fidelidade a um outro Estado, nomeadamente, porque têm a respectiva nacionalidade.

11. Mas os argumentos avançados contra a participação eleitoral dos estrangeiros têm sido muitos e variados:

- Os estrangeiros têm um conhecimento distorcido da realidade nacional por não conhecerem suficientemente a língua do país, a sua cultura e aspirações;
- Serem originários de países com regimes políticos não democráticos, pelo que não têm experiência de participação democrática;
- O perigo de intervenção de Estados estrangeiros na política nacional;
- Em função do seu número, podem decidir uma eleição;
- Residem temporariamente no país de acolhimento, pelo que o seu interesse pelos respectivos problemas e o seu grau de responsabilidade é menor.

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[34] Em *Teoria generale del diritto e dello stato,* pág. 246, citado por Andrea Piraino, "Appunto sulla condizione giuridica degli 'stranieri'...", RTDP, n.º 3, 1984, pág. 994, nota 6.

[35] Segundo Jorge Xifra Heras, "Ciudadano", NEJ, tomo IV, pág. 164, apenas faz sentido falar em cidadãos no Estado de Direito pois, apenas neste, os indivíduos gozam de liberdade política e podem participar no poder.

[36] Cfr. Éric Peuchot, "Droit de vote et condition de nationalité", in RDP, n.º 2, 1991, págs. 493-496.

[37] "Droit et politique à propos des immigrés", in *Le Droit et les Immigrés,* pag. 120.

Se bem repararmos, estes argumentos têm como ponto de partida a ideia do estrangeiro como um corpo estranho à comunidade nacional, como uma ameaça potencial aos interesses e à independência nacional. Ou seja, a não atribuição de direitos de participação política aos estrangeiros é uma atitude preventiva de defesa contra possíveis ingerências e ameaças de outros Estados, encontrando-se plenamente justificada pela sobrevivência e manutenção da comunidade nacional [38].

12. Se esta construção teórica negadora da participação eleitoral dos não-nacionais, pode aparecer como historicamente justificada, por estar estreitamente associada à afirmação do Estado-Nação, em que a nação aparece como um grupo homogéneo de indivíduos com características culturais, religiosas e sociais próprias que a distinguem doutra nação e, portanto, de outro Estado-Nação, actualmente não nos parece que deva continuar a ser defendida, fundamentalmente, pelas seguintes razões:

- Uma maior estabilidade e afirmação dos Estados, dentro de fronteiras claramente definidas;
- Uma melhor convivência interestadual, em que o outro deixa de ser um potencial inimigo para ser um potencial parceiro;
- Uma maior circulação das pessoas entre os Estados, o que permite um melhor conhecimento mútuo e a eliminação ou atenuação dos receios de potenciais ameaças;
- O aumento do período de permanência dos estrangeiros nos estados de acolhimento, com tendência a tornar-se definitiva e envolvendo os vários elementos do agregado familiar, alguns deles já nascidos no estado da residência.

Estes factores justificam, a nosso ver, a atribuição de uma nova dimensão à cidadania, pelo que não podemos deixar de concordar com Catherine Withol de Wenden [39], quando esta autora defende a substituição de um conceito de

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[38] Catherine Withol de Wenden ("Les conditions posées à l'exercice des droits politiques des étrangers", in *Le Droit et les Immigrés*, p. 49) salienta o facto de se colocarem aos imigrantes um conjunto de questões que não se colocam ao nacional como, por exemplo, se residem há tempo suficiente no seu país, se estão suficientemente formados, se merecem esse direito. E, por exemplo, não se questiona a participação dos nacionais nas eleições locais com base numa sua possível permanência transitória, sendo certo que, como refere Marcos Francisco Massó Garrote (Los derechos políticos de los extranjeros en el estado nacional, págs. 95-96), é mais fácil ao nacional mudar de município do que ao estrangeiro regressar ao seu próprio país.

[39] *Op. cit.*, pág. 47.

cidadania afectivo, sentimental e voluntarista de ligação ao Estado-Nação, por um sentido mais funcional, que deverá fundar-se, nomeadamente, na residência e no papel económico do cidadão, visto como alguém que está numa situação em que dá e pede algo ao Estado-Nação. E, no caso concreto, os imigrantes cumprem um conjunto de deveres como, por exemplo, o pagamento de impostos, sem que tenham a correspondente contrapartida, em termos de participação política na tomada de decisões. Evidentemente, que este argumento não pretende ressuscitar ideias de sufrágio censitário [40], mas apenas mostrar que aos deveres exigidos aos estrangeiros e ao efectivo papel que desempenham no desenvolvimento dos estados de acolhimento, não correspondem direitos elementares de participação na vida desses estados [41].

13. É de notar que a associação estreita entre nacionalidade e cidadania, tem vindo progressivamente a ser posta em causa pelos próprios Estados, segundo várias modalidades:

- O aprofundamento de processos de integração política e económica regional, como é o caso da União Europeia, com a consagração de uma cidadania europeia, que se traduz, nomeadamente, no direito de qualquer cidadão de um Estado Membro poder votar e ser eleito para as eleições municipais do Estado Membro da residência;
- A consagração de cláusulas de reciprocidade [42], que se traduzem na possibilidade de reconhecer direitos alargados aos estrangeiros resi-

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[40] Como afirma Francis Delpérée, *Les droits politiques des étrangers*, pág. 13.

[41] Juan Rodríguez-Drincourt Alvarez (*Los derechos politicos de los extranjeros*, págs. 110-111) chama a atenção para a importância que o argumento "função" desempenhou no debate sobre a participação eleitoral das mulheres, dado que foi o papel desempenhado por estas na Primeira Guerra Mundial que acelerou, na Grã-Bretanha, o reconhecimento dos seus direitos de participação, pelo que do mesmo modo, a contribuição bem visível dos imigrantes para o desenvolvimento das sociedades de acolhimento, deverá levar à substituição do cidadão-nacional pelo cidadão-trabalhador, como fundamento da participação política no constitucionalismo moderno.

[42] A exigência de reciprocidade tem implícita, antes de mais, uma ideia de protecção dos nacionais, pelo que sendo um caminho para a atribuição de direitos políticos aos estrangeiros não nos parece o mais desejável, dado que muitos dos Estados de origem dos estrangeiros não reconhecem direitos políticos aos seus próprios cidadãos, pelo que o não irão reconhecer aos estrangeiros aí residentes, o que cria sérios problemas de igualdade de direitos entre os estrangeiros no Estado de acolhimento com alguns a gozarem de direitos políticos e outros não. Como nota Moura Ramos, através da reciprocidade procura-se um equilíbrio entre os Estados, mais do que a tutela de valores considerados universais, pelo que em matéria de direitos do Homem não faz sentido falar em reciprocidade ("A Convenção Europeia dos Direitos do Homem – sua posição face ao ordenamento jurídico português", in BDDC n.º 5, 1981, pp. 146-147, nota 103). Evidentemente que não se pretende,

dentes, se os mesmos direitos forem atribuídos aos nacionais que residam nos países donde esses estrangeiros são originários, como é o caso do artigo 15.º, n.os 3 e 4, da CRP;

- O reconhecimento do direito dos estrangeiros votarem e serem eleitos para as eleições locais [43], independentemente de uma cláusula de reciprocidade;
- A atribuição de um estatuto especial a certos estrangeiros, como é o caso dos brasileiros que em Portugal sejam titulares do estatuto especial de igualdade [44].

Todas estas mudanças estão na base do surgimento de novos conceitos, que pretendem incluir e justificar novas dimensões de participação política: cidadania de geometria variável (Stefano Rodota, Juan Rodríguez-Drincourt Alvarez), cidadania multidimensional, multicidadania e nova cidadania (Francis Delpérée), cidadania múltipla (Francisco Lucas Pires) ou comunidade inclusiva (Gomes Canotilho).

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com o que fica dito, ignorar a importância da reciprocidade como instrumento de "pressão" sobre os outros Estados, embora se reconheça também que a reciprocidade prevista no artigo 15.º, n.º 4, da CRP não produziu até hoje grandes resultados na atribuição de direitos eleitorais aos portugueses residentes no estrangeiro.

[43] Aliás, a participação dos estrangeiros nas eleições locais tem servido para mostrar as debilidades das teorias que pretendem estabelecer uma ligação estreita entre a cidadania e a nacionalidade, ao obrigar os defensores desta a estabelecer uma distinção entre eleições locais e eleições gerais (legislativas), em que as primeiras aparecem como eleições administrativas e as segundas como eleições políticas, parecendo ignorar esses autores as funções crescentes que são atribuídas às entidades locais, que assumem um cada vez maior protagonismo político, que será tanto mais relevante, quanto maior for o aprofundamento dos processos de integração supranacional. Como refere Michel Miaille, *op. cit.*, págs. 123-124, se é verdade que as colectividades locais não participam em sentido estrito em matérias de soberania, como a segurança, a justiça, a diplomacia, não deixa de ser também verdade que a repartição de competências associa-as directamente a matérias relevantes para a comunidade. Referência merecem também duas decisões do Tribunal Constitucional alemão, de 31 de Outubro de 1990, em que este declarou insconstitucionais duas leis eleitorais que permitiam a participação dos estrangeiros nas eleições municipais de Hamburgo e de Schleswing-Holstein, argumentado com a identidade de legitimidade democrática entre os poderes estaduais e municipais e com a identidade dos dois poderes, dado que ambos exercem poderes públicos, cfr. Olivier Beaud, "Le droit de vote des étrangers: l'apport de la jurisprudence constitucionnelle allemande à une théorie du droit de suffrage", in RFDA, 8 (3), Maio-Junho 1992, págs. 409 e seguintes e Albrecht Weber, "Jurisprudence constitutionnelle étrangère Allemagne: Le droit de vote communal des étrangers", in RFDC, n.º 7, 1991, pág. 553 e seguintes.

[44] Isto mesmo reconhece José Francisco Resek ("Aspectos elementares do estatuto da igualdade", in BMJ, n.º 277, Junho-1978, pág. 5) ao afirmar que a convenção celebrada entre Portugal e o Brasil altera a "clássica noção da nacionalidade como pressuposto necessário da cidadania".

14. Os argumentos a favor da participação dos estrangeiros na vida política são também vários, uns mais relevantes do que outros, como é evidente:

- A contribuição dos imigrantes para o desenvolvimento dos países de acolhimento;
- A promoção da integração social de grupos cada vez mais numerosos de indivíduos pondo fim à sua exclusão na sociedade de acolhimento;
- A pressão sobre os partidos de modo a terem em conta os problemas específicos que se colocam aos estrangeiros, quer nos seus programas eleitorais, quer na adopção de medidas concretas que os permitam resolver;
- O princípio "no taxation without representation" [45];
- O país de origem não lhes permitir, em alguns casos, participar nas eleições nacionais por residirem no estrangeiro, com o que ficam privados do direito de participar em qualquer acto eleitoral.

15. Em nossa opinião, a exclusão de um número crescente de pessoas que participam activamente no desenvolvimento económico, mas também, deve dizer-se, cultural e social das sociedades de residência, afigura-se como algo que deve ser combatido por, a médio e longo prazo, poder ter sérias consequências em termos de coesão e unidade societária, sendo desejável que indivíduos que se estabelecem, muitas vezes definitivamente, noutro país que não o da sua nacionalidade, possam sentir uma ligação estreita e intensa com este, sendo vistos no país de acolhimento como iguais e não como inimigos, dos quais se desconfia e se marginaliza.

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[45] A ideia subjacente a este argumento é que o estrangeiro ao pagar impostos está a cumprir um dos tradicionais deveres de cidadania, pelo que é da mais elementar justiça que tenha também direitos de cidadania, nos quais, o direito de participar na formação e tomada das decisões que o afectam, apresenta uma importância fundamental. Éric Peuchot, *op. cit.*, págs. 505 e 506, contesta esta ideia invocando que o referido princípio foi formulado, não para responder ao problema do direito de voto dos estrangeiros, mas sim para permitir a participação dos súbditos do rei na tomada de decisões (com o que manifestamente revela não perceber o argumento utilizado), considerando ainda que o dever de pagar impostos se impõe a todos os membros da sociedade como uma contrapartida pelo direito à protecção do Estado, de que os estrangeiros beneficiam do mesmo modo que todos os outros membros da população (o que parece revelar o desconhecimento da situação dos estrangeiros nas sociedades de acolhimento). Com mais relevância para a discussão, Giuseppe Biscottini ("Cittadinanza", in *Enciclopedia del Diritto*, vol. VII, pág. 159) chama a atenção para o facto da qualidade de sujeito tributário se adquirir com base num pressuposto diverso do da cidadania, ou seja, a residência, o lugar da situação do bem ou o lugar da produção dos rendimentos.

Deste modo, como nota Gomes Canotilho, o princípio da universalidade do sufrágio deverá hoje ter em atenção a "construção de comunidades inclusivas, onde as comunidades migrantes dispõem de direitos políticos" [46]. Com efeito, para Juan Rodríguez-Drincourt Alvarez, um "demos inclusivo" impõe a participação política de todos os seus membros adultos, dado que a experiência demonstra que a defesa dos interesses dos grupos excluídos fica necessariamente debilitada, pelo que na opinião deste autor se justifica a superação da nacionalidade como fundamento da participação, substituída pelo conceito do interesse [47].

16. Alguns autores, reconhecendo a importância da integração social dos estrangeiros, apontam como alternativa ao reconhecimento de direitos políticos, a aquisição da nacionalidade do Estado de residência, que deverá mesmo ser facilitada [48]. Isto porque a manutenção da nacionalidade de origem, significa que o estrangeiro se mantém fiel ao Estado de nascimento, sendo paradoxal atribuir direitos a quem recusa a assimilação, não adoptando a nacionalidade do Estado de residência [49].

Não podemos deixar de expressar as nossas reticências perante esta solução. Em primeiro lugar, esquece a importância da manutenção da sua nacionalidade originária para muitos estrangeiros, em termos identitários, parecendo ignorar que muitos Estados "punem" a aquisição de outra nacionalidade, com a perda automática da sua nacionalidade. Em segundo lugar, parece desvalorizar o próprio conceito de nacionalidade, sendo desejável salientar que a nacionalidade é uma realidade que vai muito além dos direitos políticos, atribuindo ao nacional um estatuto especial de que fazem parte muitos outros direitos, nomeadamente, o direito a protecção diplomática e consular, o direito de entrada no país, o direito a não ser expulso do país, o direito a não ser extraditado e deveres como a prestação do serviço militar.

17. Com algum relevo para a apreciação da questão da participação dos estrangeiros nas eleições dos Estados de residência, podemos indicar as se-

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[46] *Direito Constitucional e Teoria da Constituição*, pág. 295.

[47] *Op. cit.*, págs. 70-71, de acordo com o autor, a participação política só não deverá ser permitida aos incapazes e aos residentes temporários.

[48] Um exemplo desta defesa é feito por Dominique Turpin, "Les solutions françaises: rapport général", in *Immigrés et réfugiés dans les démocraties occidentales*, págs. 46-47.

[49] Dominique Turpin, *op. cit.*, pág. 46-47.

guintes conclusões a que chegou Dominique Breillat [50], ao proceder à análise da participação dos estrangeiros nas eleições locais em alguns Estados da Europa do Norte (Dinamarca, Finlândia, Noruega, Países Baixos, Suécia):

- A taxa de participação dos imigrantes é menor do que a dos nacionais;
- O número de estrangeiros eleitos é pequeno;
- O número de candidatos que se apresentam às eleições foram aumentando com a realização de eleições, especialmente entre os imigrantes residentes há mais tempo no país;
- As listas compostas exclusivamente por estrangeiros tiveram pouco sucesso;
- Quanto maior é a duração da permanência no país, maior é a taxa de participação dos estrangeiros, aproximando-se das taxas de participação da população local.

Em função destes dados, parece-nos que alguns dos receios manifestados quanto ao direito de voto dos estrangeiros podem ser já afastados, tornando-se claro, desde logo, que a respectiva participação está muito associada à ligação efectiva que o estrangeiro tem com a sociedade de acolhimento, ao conhecimento e à identificação que ele consegue ter com os seus anseios e as suas aspirações, pelo que a sua participação tem por finalidade não apenas a defesa dos seus interesses, e muito menos a defesa dos interesses de outras potências estaduais, mas antes a defesa dos interesses gerais da colectividade, com os quais se identifica e sente como seus.

18. Pelo que fica dito, somos defensores do direito dos estrangeiros participarem nas eleições locais, parlamentares e presidenciais do Estado da residência, estando perfeitamente conscientes, como lembra Michel Miaille [51], que essa defesa vem colocar em causa as noções e as soluções adoptadas e que pareciam ser definitivas e, como tal, desestabilizar o consenso político alcançado. Mas, como refere Gomes Canotilho [52], "a função integradora da constituição carece hoje de uma profunda revisão originada pelos fenómenos do pluralismo jurídico e do multiculturalismo social".

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[50] "Le vote des étrangers en Europe du Nord", in *Immigrés et réfugiés dans les démocraties occidentales*, pág. 137 e seguintes.

[51] *Op. cit.*, págs. 116-117.

[52] *Op. cit.*, pág. 1346.

Essa concessão do direito de voto, em Portugal, deverá ter em atenção, a nosso ver, algumas exigências relativas aos estrangeiros, tais como:

- Um período mínimo de residência [53], variável conforme a eleição em causa [54];
- O conhecimento da língua portuguesa;
- A existência de uma ligação efectiva à comunidade nacional;
- A cessação dos direitos políticos com a cessação da autorização de residência e, consequente, saída do país;
- A privação dos direitos políticos em certas circunstâncias como, por exemplo, condenações por crimes de terrorismo, contra a independência e a integridade nacional ou o exercício de funções públicas para outro Estado.

IV – Conclusões gerais

1 – O sistema político, em geral, e o sistema eleitoral, em especial, têm de ser capazes de responder aos novos desafios que são colocados às sociedades contemporâneas, fruto do aumento da mobilidade dos indivíduos e do aumento do período de residência dos estrangeiros nelas estabelecidos, tendo em vista a promoção da sua integração social.

2 – Estas novas exigências impõem a reformulação de conceitos jurídico-constitucionais e jurídico-políticos dados como definitivamente consagrados, bem como a criação de novos conceitos.

3 – Algumas destas mudanças impõem uma revisão das normas constitucionais e outra legislação relevante.

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[53] Esta exigência justifica-se por supor da parte do estrangeiro um mínimo conhecimento do sistema político-administrativo do país e uma plena inserção social; neste sentido, cfr. Michel Miaille, *op. cit.*, pág. 126.

[54] Por exemplo:
– Dois anos, para votar, e quatro anos, para ser eleito, para as eleições locais (conforme o regime actual para os nacionais dos países de língua oficial portuguesa);
– Seis anos (período mínimo de residência para a aquisição da nacionalidade por naturalização para os nacionais dos países de língua oficial portuguesa) para votar, e oito anos, para ser eleito, para as eleições legislativas;
– Dez anos (período mínimo de residência para a concessão de uma autorização de residência permanente) para votar nas eleições presidenciais.

4 – O critério da nacionalidade deverá ser substituído, tendencialmente, pelo critério da residência na definição dos titulares dos direitos de participação eleitoral.

5 – Tendencialmente, as exigências de reciprocidade deverão ser eliminadas, embora se reconheça a sua importância na obtenção de idênticas contrapartidas para os portugueses residentes no estrangeiro.

6 – Apesar da adopção do critério da residência, os portugueses residentes no estrangeiro deverão participar nas eleições legislativas, nos mesmos termos actualmente previstos, e tendo em vista a defesa dos seus interesses.

7 – Os portugueses residentes no estrangeiro deverão poder votar nas eleições presidenciais se, preenchidas determinadas condições comprovativas de uma efectiva ligação a Portugal, exercerem presencialmente o seu direito de voto.

8 – Os estrangeiros residentes em Portugal deverão poder participar nas eleições locais, legislativas e presidenciais portuguesas, verificados determinados requisitos, nomeadamente, períodos mínimos de residência e efectiva ligação a Portugal.

9 – Portugal deverá celebrar convenções multilaterais e bilaterais (especialmente com os países de destino da emigração portuguesa) que garantam aos portugueses o direito de voto nas eleições locais, legislativas e presidenciais dos estados de residência.

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LEGISLAÇÃO PORTUGUESA

ENFORCEMENT OF MEASURES INVOLVING DEPRIVATION OF LIBERTY

(Decree-Law No 265/79, of 1 August)

Decree-Law No 265/79 of 1 August [1]

Enforcement of measures involving deprivation of liberty

PART I

Scope

Article 1
Scope

This law applies to prisons that are under the Ministry of Justice.

PART II

General principles

Article 2
Aims of the enforcement

1. The enforcement of measures involving deprivation of liberty should aim at reintegrating the inmate into society and preparing him to conduct his life in a social responsible way, without practising crime.

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[1] Hereinafter "this law".

2. The enforcement of measures involving deprivation of liberty should also serve the purpose of defending society by preventing the practice of other criminal acts.

Article 3
Models for enforcement

1. Measures involving deprivation of liberty should be enforced in such a way as to ensure respect for the personality of the inmate and such of his rights and legal interests that are not affected by the sentence.

2. The enforcement of measures involving deprivation of liberty should, as far as possible, follow the conditions that are those of a free life, and negatives consequences of deprivation of liberty should be avoided.

3. In enforcing measures involving deprivation of liberty, situation should not be created that involve serious dangers to the defence of society or to prison community.

4. The enforcement of measures involving deprivation of liberty should, as far as possible, stimulate the participation of the inmate in his own social reintegration, especially in setting up his individual plan, as well as the co-operation of society in achieving such aims.

5. Measures involving deprivation of liberty should be enforced with absolute impartiality, without discrimination based in particular on birth, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation or social condition.

N.B: It is not correct for prison staff to address inmates by "tu" (see Circular Nº 61/77, of 13 December)

Article 4
Situation of inmates

1. Inmates enjoy fundamental human rights, save any limitations that result from the sentence or are imposed for the sake of order and security on prison.

2. Inmates should enjoy the right to paid work, to the benefits of social security as well as, if possible, to access, to culture and to the full development of their personality.

N.B: Seeking to reconcile fundamental Human Rights with the requirements of order and security in prison, it was decided that cells and dormitories may be opened during the night only on an exceptional basis and subject to certain formalities, e.g. written record (see Circular Nº 6/GDG/97, of 4 August).

N.B: An authorisation is not required for inmates to get married (see Circular Nº 74/81, of 18 December).

N.B: Seeking to reconcile the fundamental rights to private life and to confidentiality of relations with doctors with the requirements of order and security in prison, special procedures are in force for prison staff who escort inmates to medical examinations outside the prison (see Circular-letter Nº 21/89, of 22 May).

N.B: Procedures allowing inmates to exercise their right to vote are laid down in Circular-letter Nº 1/DEP/95, of 12 May).

Article 5
Co-responsibility of inmates

The sense of co-responsibility between inmates should be promoted with respect to matters of general interests to them [...]

Article 6
Arrival at prison

1. The procedure of internment should not, as far as possible, be carried out in the presence of other inmates, especially when such is necessary for the protection of their private lives.
2. Inmates should be informed of any legal and other provisions that may apply to their behaviour, in particular the internal rules of the prison in question.
3. Immediately after arrival, the inmate should be granted the right to inform his family or any person who legally represents him, about his situation; where the inmate cannot so inform, the directors of the prison should do it for him.
4. Inmates should, as soon as possible, be brought to the director; within 72 hours they should be submitted to a medical examination for the purpose of diagnosing any physical or mental abnormality that require special or immediate measures.
5. Upon being interned, inmates should, as far as possible, be assisted in solving their personal urgent problems.
6. In each prison, there shall be a book [...]; with respects to each inmate and in the order of their arrival, the following shall be registered in that book:

a) Full name, name of parents, date and place of birth, civil status, address, instruction, profession and any other information relating to his identification;
b) Day and hour of entry;
c) Who ordered the internment;
d) Reasons for the internment;

e) Person who accompanied the inmate to prison;
f) List of belongings that where apprehended

N.B: In order to implement a policy designed to reduce risks in prison, all inmates when entering prison will be given, amongst other cleaning products, two condoms and a small bottle with bleach, which will remain available throughout all the period of imprisonment (see Circular Nº 9/DSS/97, of 6 November).

N.B: Inmates with certain professions (*e.g.* police officers, prison staff, etc...) should serve their sentences separated from other inmates (see Circular Nº 3/GA/97, of 11 November).

N.B: Special procedures are laid down for the transfer of foreign inmates to their countries of origin. The request for transfer should be forwarded to the public prosecutor attached to the court that sentenced the person. The re-education services are under a duty to divulge the text of the Convention on the Transfer of Sentenced Persons (see Circular Nº 1/94-DCSDEPMS of 21 June and Circular Nº 39/93 of 27 August).

N.B: Upon being admitted to prison, foreign inmates must be informed of their right, either to request from the prison director to transmit without delay the news of the imprisonment to the competent consular office, or to proceed themselves to such communication. Rules also exist on the right of consular agents to visit inmates of their nationality (see Circular Nº 6/83/DCSDEPMS-4, of 22 February).

N.B: Procedures are laid out for the execution of sentences by way of imprisonment during non-working days (see Circular Nº 5/83/DCSDEPMS-3, of 25 February).

N.B: Inmates who have bruises or injuries at the time of admittance should be examined by a doctor and should be heard on the reasons therefor a record shall be kept in writing (see Circular-letter Nº 10/92, of 14 May).

Article 7
Internment

1. Internment shall not take place unless:

a) Upon a written order issued either by a judge, a public prosecutor or the "Polícia Judiciária [2]", according to the procedural law;

b) The person voluntarily shows up for that purpose;
c) The person is transferred upon an order issued by the "Direcção-Geral dos Serviços Prisionais [3]";
d) The person is in transit between one prison and another;
e) The person is recaptured.

2. Orders mentioned in sub-paragraph a) above must bear the date, must be signed, must include the identification of the person concemed, must state the reasons for the intemment and must be delivered in three copies, one of which must be filed in the prison.

3. Where intemment takes place upon an order issued either by a public prosecutor or the "Polícia Judiciária" and the person concemed is not brought before a judge within the time period fixed in the law, the govemor of the prison shall release the inmate; the order for the release must be in writing; copies must be forwarded to the public prosecutor attached to the "Relação [4]" and to the "Direcção-Geral dos Serviços Prisionais".

4. Where a person voluntarily shows up and declares either that he committed an offence or that a warrant of arrest has been issued against him, that person shall be kept under arrest; a record shall be taken before two witnesses.

Where the case is one of pre-trial detention, the person shall be brought before a judge within a period of 24 hours; where the case is one involving a previous conviction, the "Direcção-Geral dos Serviços Prisionais" must be immediately informed.

5. Intemment following transfer require an order to that effect, done in two copies and duly authenticated.

Article 8
Observing with a view to providing treatment

1. Upon admittance, where the part of the sentence that remains to be served is over six months or where the person was sentenced for an undetermined period, the person's personality as well as his social, economic and family milieu must be subject to scrutiny.

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[2] Judicial police.
[3] Directorate General of Prison Services.
[4] Tribunal da Relação, i.e. a court of appeal.

2. The purpose of that scrutiny shall be to find out all the circumstances and all the factors that are relevant in order to plan the person's treatment in prison and his social rehabilitation once he is released.

3. The sentencing court must forward a copy of the judgement to the governor of the prison where the person is. The governor may request that the court file be transmitted to him.

Article 9

Plan for the rehabilitation of inmates

1. On the basis of the results of the observing exercise mentioned in Article 8, a plan for the rehabilitation of the inmate shall be prepared.

2. The following, at least, must be included in such a plan:

a) Internment under an open or a closed regime;
b) Placement in an establishment or a section within an establishment;
c) Work, training and improvement in professional skills;
d) Schooling;
e) Participation in formative activities;
f) Leisure activities;
g) Special measures for assistance or treatment;
h) Measures aiming at flexibility in the execution;
i) Measures for preparing release.

3. In the course of the execution of the sentence, the plan for the rehabilitation must be modified so as to adapt to the progress observed in the inmate and other relevant circumstances.

4. For the purposes of § 3, the plan, if possible, shall provide for adequate time schedules.

5. The inmates shall always be kept informed of the plan and changes thereto.

N.B: An individual re-adaptation plan must be made with respect to all inmates sentenced to a relatively undetermined sanction (see Circular N° 13/ /84/DCSDEPMS-10, of 9 April).

N.B: A mandatory model for the record of visiting inmates was decided upon (see Circular-letter N° 1.5/508-733, of 28 November).

N.B: Procedures are laid down aimed at insuring that the information made available to the President of the Republic, for purposes of pardon and commutation, is updated (see Circular N° 5/GDG/98).

Article 10
Provisional distribution of the inmates

1. While the plan is not defined, the inmates shall provisionally be distributed among different establishments, account being taken of their sex, age, physical and mental health, life experience and situation.

2. Where the inmate is not declared incapable but he manifestly shows that, because of the mental handicap affecting him, the regime in a common prison might entail damage to him, or else he might disrupt such a regime, the court may order the internment of that person in an establishment designed for incapacitated persons and that for as long as the execution of the sentence lasts.

3. Internment as mentioned in § 2 may only take place upon the consent of the person concerned.

4. Inmates shall be placed back into a common prison, as soon as the circumstances described in the preceding paragraphs cease to exist.

5. In the cases mentioned in §§ 2 and 3 above, the regime should as far as possible follows the pattern of the regime for other inmates with the limitations imposed by placement in such establishments.

Article 11
Criteria for placement

1. The placement of inmates in the different prisons should take into account the sex, the age, the legal situation (remand, sentenced, first-timer, recidivists), the length of sentence yet to be served, physical and mental health, special treatment requirements, location of family residence, security, as well as reasons pertaining to education or work that might be relevant for his social re-integration.

2. The placement of inmates in the different prisons should also take into account the possibility of carrying out a program for common treatment, as well as the need to avoid negative influences.

Article 12

1. Total separation of inmates should be promoted, according to sex, age and legal situation, in different prisons or, where that is not possible, in different sections of the same prison.

2. Separation between first-timers and recidivists should be promoted.

3. For the purposes of § 2, recidivist means any inmate who has previously served a sentence involving deprivation of liberty.

4. Exceptions to the provisions of the preceding paragraphs will be admissible for the purpose of making it possible to the inmate to participate in a treatment considered indispensable for his social re-integration.

Article 13
Transfers

1. Inmates may be transferred to a prison other than the prison scheduled in the individual plan of re-integration if that may assist in treatment or may favour social re-integration or for reasons relating to the organisation of enforcement or else when major reasons so justify.

2. Where there is no individual plan of re-integration, inmates may be transferred to an appropriate prison [...]

3. The "Direcção-Geral dos Serviços Prisionais" shall be empowered to decide on transfers, as mentioned in §§ 1 and 2; reasons for the decisions shall be given; the decisions shall be carried out with discretion.

N.B: Inmates should remain at least one year in the prison where they were placed (see Circular-letter N° 17 9111-25/84, of 7 December).

Article 14
Opened and closed prisons

1. Inmates who do not meet the requirements mentioned in § 2 ahead shall be placed in a closed prison.

2. Subject to their consent, inmates may be placed in an opened prison or in an open section of a prison where there are no reasons to fear that he will either abscond or commit crimes.

3. Inmates may also be placed in a closed prison or be transferred back to a closed prison when such is necessary to their treatment or when their behaviour shows that they cannot meet the requirements of an open prison.

4. Internment in a closed prison is enforced in safety conditions that prevent inmates from absconding.

5. Internment in an open prison is enforced in such a way that measures aimed at preventing inmates from absconding are either totally or partially non-existent.

Article 15
Preparation for release

1. In order to prepare the release of inmates:
   a) Inmates may be transferred to an open prison or an open section of a prison;

b) The measures provided for in Article 58 may be applied;
c) Inmates may be authorised to leave, unattended, the prison for a maximum period of 8 days during the 3 last months of the sentence;
d) Inmates who work or attend classes outside the prison, may be authorised to leave, unattended, the prison for a maximum period of 6 days (continuously or not) per month during the 9 last months of the sentence.

2. Inmates sentenced to more than 6 years who have not yet being conditionally released shall be granted the privilege mentioned in § 1 d) as soon as they will have served 5/6 of their sentence

Article 16
Time of release

1. Inmates should always be released in the morning of the last day of their sentence.

2. Where the last day of their sentence is either a Saturday, a Sunday or a public holiday, the inmate should be released in the working day immediately before, when the length of the sentence so justifies and where reasons of assistance do not call for a different solution.

3. When the reasons mentioned in § 2 so allow and when the national holiday in question is the 25th of December, the inmate should be released in the morning of the 23rd of December.

4. The time of released may be advanced up to a maximum of 2 days when serious reasons relating to the social re-integration of the inmate so required.

5. The provisions of the previous §§ that go against substantive law shall enter into force only when such law so permits.

PART III

Accommodation, clothing and food

CHAPTER I

Accommodation

Article 17
Place of work and leisure

1. Leisure activities, work activities, training activities, as well as ergotherapy activities are carried out in common.

2. Restrictions to carrying out in common the activities mentioned in § 1 may however be imposed:

a) If there is a risk of them having a negative influence;
b) During the period in which the personality of the inmate is being observed, as mentioned in Article 8;
c) If order and security in prison so obliged;
d) If the inmate consents.

3. The director of the prison may issue specific instructions concerning the participation in collective activities having regard to the dimension, the organisation and the staff of the prison.

4. The limits mentioned in § 2*b)* may not exceed a period of 2 months.

Article 18
Lodging

1. Inmates are lodged in individual rooms.

2. Each prison should have premises for restricted groups of inmates to be used when the needs relating to observing inmates so required or when the physical or mental state of any inmate so requires because of any danger to his life or else when any occasional over crowding so requires.

3. In open prisons common lodging is allowed subject to the consents of the inmate and if there is no risk of negative influence; common lodging may never be restricted to only inmates.

4. In close prisons, beyond the cases mentioned in § 2 above, common lodging may only be authorised on a temporary basis and for serious reasons.

N.B: Cf. notes to Articles 4 and 6.

Article 19
Decoration of the rooms and personal belongings

1. Inmates may decorate their rooms with personal objects, within reasonable limits.

2. For the purposes of § 1 above, photographs of the spouse and members of the family as well as personal souvenirs will be authorised, without prejudicing the provisions of Article 119 § 3.

3. Any machines or objects that hinder or avoid the visibility into the room or that otherwise endanger the safety or the security of the prison, may be withdrawn.

CHAPTER II

Clothing and personal care

Article 20
Clothing

1. The inmate must wear the uniform of the prison; special clothes may be provided to the inmates for their free time.

2. The uniform of the prison must not, in any way, have a degrading or humiliating nature.

3. Clothes should be kept in good care and clean; they should be changed and washed regularly in order to meet the requirements of hygiene and life in general.

4. Clothes provided to inmates should be adapted to the seasons and to their activities.

5. When for reasons of hygiene it is necessary to destroy the inmates clothes at the time of his internment, the fact must be registered.

Article 21
Clothes belonging to the inmate

1. The director of the prison may authorise the inmates to wear their own clothes provided that they bear the expenses of up-keeping and cleaning.

2. The director of the prison should authorise the inmates to wear their own clothes during their outings, unless there is a risk of absconding.

Article 22
Bedding

Each inmate has the right to an individual bed as well as bedding equipment, kept and changed as necessary in order to meet the requirements of hygiene and life in general.

Article 23
Personal hygiene

1. Inmates must have access to proper and sufficient use of toilets and bathing facilities, as well as any accessories necessary for their personal hygiene, without prejudice to the provisions of Article 119 § 3.

2. Each prison must provide periodical facilities for cutting hairs and shaving.

3. Only for reasons of hygiene may the inmates be compelled to have their hair cut and to shave.

4. In special cases, inmates may be authorised to use a personal electric shaver.

5. For the purposes of § 1 above, prisons must be equipped with toilets as well as bathing facilities with hot and cold water.

N.B: Cf. notes to Article 6.

N.B: Prizes may be given to inmates as a reward for the state of their rooms (see Circular Nº 12/84/DEE-1, of 27 January).

CHAPTER III

Food

Article 24
Food

1. The "Direcção-Geral dos Serviços Prisionais" must provide the inmates, at proper hours, with meals properly prepared and presented in accordance with the rules of modern dietetics and hygiene, both with respect to quantity and quality, having into consideration the age and the nature of the work produced by the inmates, the season of the year and the climate.

2. The ingredients and the nutritional value of the meals will be controlled.

3. Special food must be provided when medical reasons so require.

4. As far as possible, rules relating to food that are imposed by the philosophical or religious beliefs of the inmates will be respected.

5. Each inmate must at any time have access to drinking water.

Article 25

Preparation of food

Food may either be prepared in prison or be acquired to any other public or private entity, in accordance with the law.

Article 26

Food prepared out of prison

1. As a general rule, inmates may not receive food prepared out of prison.

2. The provisions of § 1 do not apply to fruit, cakes, and other small gifts, provided that the internal prison rules are respected.

3. The director of the prison may authorise the inmates to receive food prepared out of prison when it is not possible to conform both the provisions of Article 24 § 4.

4. The packets arriving at the prison that contain food authorised to enter the prison must be opened either in the presence of the inmate or in that of the carrier; in case any food should be rejected, the latter should decide on what to do with it.

Article 27

Authorised acquisition of food and products for hygiene

1. Inmates may acquire in reasonable quantities both food and products necessary for their hygiene, paying with their pocket money or, where authorised, with money from the fund.

2. For the purposes of the § 1, if possible, each prison should be equipped with a canteen offering what adequately responds to the needs and wishes of the inmates.

3. The object mentioned in § 1 may be withdrawn if they endanger the security or the order of the prison.

4. Upon medical advice, the acquisition of certain kinds of food may be prohibited, totally or partially, to certain inmates if they constitute a serious menace to their health.

5. The acquisition of certain kinds of food may be prohibited or limited with general effects in prison hospitals or in section of prisons used for sick inmates.

Article 28
Prohibition of alcoholic beverages

Inmates may not use alcoholic beverages except wine and beer, the consumption of which may be authorised in quantities and according to the prison's internal rules.

PART IV

Visits and mail

CHAPTER I

Visits

Article 29
Main principle

1. Inmates have the right to contact persons outside the prison, in accordance with the law.

2. The contact of inmates with persons outside the prison, in particular the spouse and members of the family, should be promoted.

Article 30
Right to receive visitors

1. Inmates may regularly receive visitors; duration of authorised visits must be in excess of one hour per week.

2. Visits that assist in the inmate's treatment or in his social re-integration, or that are necessary to solve personal matters, legal or economic that may not be solved by letter or by third parties, or may not be adjourned until release, should be authorised.

3. Visitors may be searched for safety reasons.

4. The prison's internal rules will include detailed norms on these matters.

5. Persons not yet having attained the age of 16 may not visit inmates save if they are their children or grand-children or brothers or sisters, or upon special leave.

N.B: Searches in respect of visits will mainly be made on the inmates, not so much on the visitors (see Circular-letter Nº 36/90, of 21 December).

Article 31
Prohibition to receive visitors

Prison directors may prohibit visits by persons who might endanger the security and order of the prison, or have a negative influence on the inmate, or hinder his social re-integration.

Article 32
Visits by advocates and notaries

1. Visits by defence counsels, notaries and other lawyers aimed at taking care of legal business of the inmates', will be authorised.

2. In exceptional circumstances, when there are grounded reasons to think such persons intend to hand over to the inmate objects that he must not receive, having into consideration his particular dangerousness, the visits of such persons might be subject to a search.

3. The contents of written texts and other documents that the defence counsel carries with him will not be controlled.

Article 33
Visits in non-statutory days and hours

When the visits by advocates and other persons are considered of an urgent and legitimate interests, the prison director may authorise them during non-statutory days and hours.

Article 34
Supervision of visits

1. Visits may be supervised for reasons pertaining to the inmate's treatment or to the security and order of the prison.

2. Control of the conversation may only be made when justified by the reasons mentioned in § 1.

Article 35
Supervision of visits by advocates and notaries

Visits of lawyers and notaries, as mentioned in Article 32, as well as visits by other persons wishing to deal with confidential matters in particular the matters mentioned in Article 30 § 2, should take place in premises earmarked for that purpose and in such a way that they cannot be overheard by the supervisor.

Article 36
Discontinuation of visits

1. Visits may be discontinued where either the visitor or the inmate, notwithstanding previous warning, infringes the provisions of this law, or the internal rules, or instructions given.

2. There will be no warning where it is indispensable immediately to discontinue the visit.

3. The supervisor who discontinues a visit according to the provisions of § 1, must immediately inform the director who is empowered to confirm or not his decision.

Article 37
Handing over of objects during visits

1. Handing over of objects during visits shall not be possible unless in exceptional cases duly authorised.

2. The provisions of § 1 shall not apply to visits by the defence counsel in respect of written material and other documents that he carries with him; they shall neither apply to visits by lawyers and notaries in respect of written material and documents that it is necessary to hand over to the inmate for reasons relating to matters of a legal nature.

Article 38
Visits to foreign inmates

Upon previous authorisation from the Ministry of Justice, foreign and stateless inmates may receive visits by diplomatic or consular authorities or any other national or foreign authorities whose mission it is to protect their interests.

N.B: The rules that apply to visits by lawyers, in particular concerning time schedule, searches and place of visit, will equally apply to visits by diplomatic officials (see Circular N° 27/88/DCSDEPMS-19, of 12 September).

N.B: Great understanding is recommended in respect of visits by foreign communities to their compatriots (see Circular N° 23/86/ DCSDEPMS-16, of 30 October, which also deals with mail written in unknown languages).

N.B: Visits by consular officials to foreign inmates do not require previous authorisation by a higher authority; the prison director should inform the consular authorities about the conditions under which they may visit inmates; foreign inmates are informed about the practical possibilities of communicating their situation to their consulates (see Circular N° 6/83/DCSDEPMS-4, of 22 February).

Article 39
Especially authorised visits

1. The following may visit any prison:

   a) The President of the Republic, ministers and persons who accompany them;
   b) Lecturers of criminal law;
   c) High officials of the institutes of criminology;
   d) Persons especially authorised by the Minister of Justice or by the Director General of the prison services.

2. Prison directors may exceptionally authorise visits for humanitarian or scientific reasons when the urgency of the matter did not allow a previous request to the Minister of Justice or the Director General of the prison services.

3. The persons mentioned in § 1b) may be accompanied by their pupils; however in such cases the date and time of the visit must be fixed in agreement with the prison director.

CHAPTER II

Mail

Article 40
Right to receive and send out mail

1. Inmates shall be entitled to receive and send out mail, in conformity with the provisions of the following Articles.

2. Prison directors may prevent an inmate from corresponding with a given person where such correspondence might endanger the order or the security of the prison or where it might have a negative influence on the inmate or hinder his social rehabilitation.

3. The prison services should do their best to make stationary available to inmates.

N.B: All the provisions of chapter II that concern mail should be read in the light of Circular Nº 3/94/DEP/1, of 11 November, which aims both at the uniformisation of procedures and the harmonisation of the provisions of this law with the constitutional provisions on fundamental rights. It provides, concerning control and retention of mail, the following:

a) Control for the purpose of detecting illegal objects is done by way of the mail being opened by the Supervision Service in the presence of the inmate;

b) Mail may only be read where there is suspicion of an offence or justified reasons of order and security; the director may then decide that the mail should be read; the decision is notified to the inmate; the mail is read by the Education Service; a written record will be kept; the text of the mail may not be crossed out, erased or deleted; in respect of mail written in unknown languages see Circular Nº 23/86/DCSDEPMS-16, of 30 October;

c) Mail between the inmate and his lawyer as well as identified public authorities such as the Ombudsman, the European Court of Human Rights, the President of the Assembly of the Republic, the Prime Minister, consular and diplomatic authorities, the judge of the court of execution of sentences, the Director General of the "Direcção-Geral dos Serviços Prisionais", is not subject to any control.

N.B: For instructions on how to proceed in situations where the inmate refuses to receive the mail and where the mail must be forwarded, see Circular Nº 5/GDG/96, of 6 December.

Article 41
Illiterate inmates' mail

Mail concerning illiterate inmates or inmates who cannot read or write may, at their request be written and/or read by members of the prison staff or volunteers appointed by the prison director.

Article 42
Supervision of mail

Mail written by or addressed to inmates must be duly supervised and censored by a member of the staff appointed by the prison director.

Article 43
Retention of mail

1. Prison directors may retain mail written by or addressed to inmates where such mail:

a) Endangers the purposes of the execution of the sentence, or the order or the security of the prison;
b) Contains deliberately incorrect reports or reports substantially different of the reality, concerning the conditions in the prison;
c) Endangers the social rehabilitation of any other inmate;
d) Is written in coded form, is unreadable, is incomprehensible, is written in an unknown foreign language, without reason.

2. Where an inmate insists in sending out mail covered by the description in § 1b), an attachment may be joined.

3. Inmates must always be informed of any retention of mail concerning them.

4. Retained incoming mail may be returned to sender or, should that not be possible or practicable, it shall be filed with the inmate's personal file.

5. Retained outgoing mail shall be filed with the inmate's personal file.

6. Written material the supervision of which is not authorised by the law, must not be retained.

7. The provisions of Articles 138 to 151 shall apply to the cases covered by this Article.

Article 44
Dispatch and reception of mail

1. The inmates' mail shall be dispatched and received through the prison, unless otherwise established.

2. Mail received at or dispatched from prisons must be routed without delay.

3. Costs of dispatching mail should be borne by the inmates.

Article 45
Use of information

1. Any person who, in conformity with the law, has access to any inmate's mail shall be under a duty to keep that information secret.

2. Information obtained during the supervision of visits and mail shall not be used unless:

a) It is strictly necessary in order to safeguard the order and security of the prison, or to prevent the commission of offences;

b) It is necessary for reasons pertaining to the inmate's treatment, after him having been heard.

3. The information mentioned in § 2 shall neither be transmitted to staff involved in the execution of the sentence, nor to the courts, nor to the competent authorities, unless in order to prevent or to hinder the commission of offences.

Article 46
Mail submitted to authorities

Any Court in which proceedings are pending against an inmate, the judge or the authority in charge of the investigation as well as the public prosecutor may require that the inmate's incoming and outgoing mail be submitted to them.

Article 47
Violation of the rules concerning mail

Where an inmate those not comply with the rules concerning mail, he is liable to disciplinary responsibility without prejudice to criminal responsibility, in which case the original shall be forwarded to the public prosecutor.

Article 48
Telephone and telegram

1. Inmates may be authorise to make telephone calls and dispatch telegrams, at their own expense, especially when the purpose is to contact the family.

2. The provisions concerning visits and mail apply, mutatis mutandis, to telephone calls and telegrams.

PART V

Prison leave

CHAPTER I

Common principles

Article 49
Powers to authorise leave

1. The judge of the court of execution of sentences shall be empowered to grant and withdraw authorisation for leave of long duration.

2. Granting of authorisation for leave of long duration may be made subject to consultation with authorities other than prison authorities.

3. The "Direcção-Geral dos Serviços Prisionais" and prison directors shall be empowered to grant any other authorisation for leave.

Article 50
Requests for prison leave

1. Prison leave does not constitute a right of inmates. When deciding on requests for prison leave, the following shall be taken into consideration:

a) The nature and seriousness of the offence;
b) Length of the sentence;
c) Eventual danger for society in case of lack of success;
d) Family situation of the inmate and social atmosphere;
e) Evolution of the personality of the inmate throughout the execution of the sentence.

2. Authorisation for leave shall only be granted with the inmate's consent, save the cases mentioned in Articles 62 and 62-A.

3. Inmates on prison leave must carry information concerning their situation.

4. Authorisation for leave may be conditional on a case by case basis.

Article 51

Alternatives for prison leave

Where the atmosphere in the inmate's family is not suitable for the latter's leave, the prison administration may authorise the inmate's sojourn in a private or official home; it may also develop other alternatives for such situations.

Article 52

Refusal of authorisation for long prison leave

Authorisation for long prison leave shall be refused to:

a) Remand inmates;
b) Inmates serving sentences of less than six months;
c) Inmates on semi-detention;
d) Inmates placed in centres for accelerated vocational training;
e) Inmates placed in high security prisons.

Article 53

Withdrawal of authorisation for long prison leave

1. Where the inmate does not return to the prison within the time given to him and is unable to justify the situation, the authorisation for leave shall be withdrawn.

2. Where the conditions attached to the authorisation are not complied with, authorisation may be withdrawn or otherwise the inmate may receive a warning.

3. Withdrawal of the authorisation does not preclude the inmate's criminal responsibility.

4. Once the authorisation for long prison leave is withdrawn, the time spent by the inmate out of prison is not taken into consideration for purposes of the calculation of the time spent in prison; no other prison leave may be authorised within the next year.

Article 54
Calculation of time

1. The time spent by the inmate out of prison during long prison leave shall be taken into consideration for purposes of calculation of time spent in prison, save the provisions of § 4 of Article 53.

2. The time spent by the inmate out of prison during short prison leave shall be taken into consideration for purposes of calculation of time spent in prison, save if the inmate does not return in time.

Article 55
Refusal

1. Refusal to authorise leave must in no case be assimilated to a disciplinary measure.

2. As far as possible, inmates should be given reasons for the refusal of authorisation for leave.

Article 56
Costs

1. Costs deriving from prison leave shall be borne by the inmates. To that effect the available fund, the reserve fund as well as any other adequate fund may be used.

2. When the inmate can not bear with the costs, the prison administration may participate totally or parochially in the travelling expenses.

Article 57
Collaboration of society and evaluation of results

1. In matters pertaining to prison leave, co-operation of social organisation should be sought.

2. Authorisations for prison leave as well as their results should, as far as possible, be made public trough the media in order to prepare public opinion for accepting such methods.

3. The results mentioned in § 2 should be the subject of criminological and penological studies.

4. As far as possible, authorisations for prison leave should be part of a global plan.

CHAPTER II

Prison leave from open prisons and open sections

Article 58
Flexibility

1. In order to render more flexible the execution of sentences involving deprivation of liberty, in particular with respect to re-establishing relations with society in a general and progressive way, inmates in open prisons and open sections may be authorised, by the "Direcção-Geral dos Serviços Prisionais" and upon the prison director's proposal, to:

a) Leave the prison, with or without escort, in order to work or to go to a school or to a training centre;

b) Leave the prison during certain hours of the day with or without escort.

2. Flexibility measures may only be authorised where there is no risk that the inmate may abscond or offend, and there is no serious risk for public order and security, and there is no danger for the goals of general and special prevention that a proper to the execution of prison sentences.

N.B: Circular Nº 8/98 of 31 December clarifies matters relating to leave.

Article 59
Long prison leave

1. Long prison leave may be authorised for a maximum of 16 days per year, to inmates placed in open prisons and open sections as soon as they will have served six months or one quarter of the sentence, whichever is shorter.

2. First-timers may be granted long prison leave as soon as they will have served two months.

Article 60
Short prison leave

Inmates placed in open prisons and open sections may be authorised by the prison director to leave the prison once every three month, for a maximum period of 48 hours.

CHAPTER III

Prison leave from closed prisons and closed sections

Article 61
Long prison leave

1. Long prison leave may be authorised for a maximum of 8 days, to inmates placed in closed prisons or closed sections serving a prison sentence of at least 6 months, as soon as they will have served one quarter of the sentence.

2. The provisions of § 1 shall apply to inmates placed in closed prisons or closed sections serving a sentence that imposes a measure of at least 6 months, as soon as they will have served 6 months.

3. For the purposes of § 1, where the duration of the sentence is relatively undetermined, one quarter of the sentence will be measured against the sentence applied to the most severely punished offence.

4. The authorisations mentioned in this Article may be cancelled every 6 months.

CHAPTER IV

Prison leave for special reasons and prison leave in anticipation of release

Article 62
Prison leave for special reasons

1. Regardless of whether the inmate consents or not, the "Direcção-Geral dos Serviços Prisionais" may decide that the inmate must temporarily leave the prison, under escort, when such is necessary for special reasons, in particular when the inmate should receive medical care that is not available in prison and when the inmate must absolutely execute an act which cannot be executed in prison.

2. Where the decision mentioned in § 1 represents an inadmissible violation of the inmate's legal sphere, it cannot be taken without the inmate's consent.

3. Such a decision can neither be taken when it would manifestly imply an abuse of power.

Article 62-A
Appearance in court

The "Direcção-Geral dos Serviços Prisionais" may authorise inmates to leave the prison, under escort, for not more than 12 hours, when they must appear in court or for any other justified reason, in particular serious family or professional reasons that are not incompatible with public security and order.

N.B: Prison directors are empowered to decide on requests to leave prison, except with respect to particularly dangerous inmates (see Circular Nº 5/94/ /DCSDEPMS/4, of 21 November).

N.B: It is possible for staff escorting inmates to funerals not to use uniforms (see Circular Nº 28/88/DCSDEPMS-21, of 11 October and Circular Nº 5/94/ /DCSDEPMS/4, of 21 November).

Article 62-B

Upon the prison director's proposal, the "Direcção-Geral dos Serviços Prisionais" may authorise inmates to leave the prison in anticipation of release, in conformity with the provisions of Article 15, sub-paragraphs b), c) and d).

PART VI

Work, education and training

CHAPTER I

Work

Article 63
General principles

1. Work, education and training, as well as ergotherapic activities in prison, mainly aim at creating, keeping and developing in inmates the ability to carry out an activity that allows them to earn their normal living after release, facilitating their social rehabilitation.

2. Work shall not be of a degrading nature and inmates shall not be allocated tasks that are either dangerous or unhealthy.

3. As far as possible, inmates shall be provided with work that is economically productive.

4. Inmates who have aptitude to work and who so consent, should be given the possibility to attend training and instruction courses, to change profession and to participate in other forms of instructional and training.

5. Inmates who have aptitude to work, where it is not possible to provide them with an economically productive activity and when his participation in the activities mentioned in § 4 is also not possible, should always be given an occupation adapted to his situation.

6. Inmates to whom it is not possible to provide an economically productive activity or any other useful activity, should be given an ergotherapic activity.

7. Within limits compatible with a rational occupational selection and without prejudice to the security and order of the prison, the choice of the work should take in consideration:

- The physical and intellectual ability of the inmate;
- The occupational ability of the inmate;
- The wishes of the inmate;
- The duration of the sentence;
- The activities previously exercised by the inmate;
- The activities that the inmate is liable to exercise after release;
- The influence that the work might have on he inmate's social rehabilitation.

Article 64
Duty to work

1. Inmates are under the duty to perform the work and other activities adapted to their situation, as assigned to them, having into consideration their physical and mental state checked by a doctor, as well as their learning needs at the different levels.

2. Inmates may be obliged to perform ancillary services in prison up to 3 months per year or, upon their consent, for a larger period.

3. Inmates over 65 years of age as well as pregnant women and women having recently given birth, may be exempted from work in accordance with the law concerning work in general.

4. Work for private entities is subject to the consent of the inmate.

Article 65

Similarity with work outside the prison

1. In order to prepare inmates for normal working conditions in free society, the organisation and the methods of work in prison should be as close as possible with those of similar work performed outside the prison.

2. In order to encourage inmates to work, their participation in the organisation and methods of work in prison should be stimulated.

3. Work, education and training should not be tributary to the aim of obtaining an economic gain.

Article 66

Free work and self employment

1. Without prejudice to the provisions of Article 50 § 1, inmates placed in open prisons or open sections should be authorised to work or to follow education or training courses outside the prison, as free workers, where, having into consideration the individual rehabilitation plan, that is likely to contribute to creating, keeping or developing in the inmate the ability to perform an activity to earn a normal living after release.

2. The authorisation mentioned in § 1 may be withdrawn where the inmate does not comply with the instructions given to him or where he abuses or where new circumstances so require.

3. Inmates may be authorised to engage in self employment.

4. Authorisations as mentioned in §§ 1 and 3 above may only be granted when not prevented by priority reasons relating to the execution of the sentence.

5. The prison administration should receive directly the inmate's salary and deposit it in his account.

Article 67

Organisation of work

1. Inmates are ensured work at the prison's workshops and farms, where necessary work can be ensured with the assistance of public or private enterprises or organisations.

2. Inmates who work for public or private enterprises or organisations remain under the control of the "Direcção-Geral dos Serviços Prisionais".

3. Inmates who work for public or private enterprises or organisations should be paid a normal salary according to the nature and efficiency of the work performed.

4. Inmates who voluntarily work for a private entity shall be entitled to the same salary as that of a free worker; they shall follow the general regime of social security.

5. Supervision is ensured by the staff in charge of the execution of sentences involving deprivation of liberty.

Article 68
Conditions of work

1. Security and hygiene in work must be organised according to the same conditions as those granted to a free worker.

2. With respect to accidents and sickness relating to work, inmates must be entitled to such rights as those of a free worker.

3. Duration of work must be such as that defined for free workers or, if justified, as defined according to local uses and customs.

4. Weekly rest and holidays, as well as the time needed for education and for activities aimed at the inmate's social rehabilitation must all be respected.

N.B: The application to inmates who suffer accidents at work of the general rules concerning accidents at work is dealt with in Circular Nº 20/85/ /DSET/1, of 11 March).

Article 69
Exemption of the duty to work

1. Inmates who have performed over a period of at least 1 year any of the activities mentioned in Article 63 may request to be exempted from the duty to work for a period of 20 working days while keeping their right to the salary at the level of their last pay.

2. If, during a year, the inmate, for reasons of health duly substantiated, could not work during any period or periods of 30 days, he shall not for that reason lose the right to the salary.

3. The duration of prison leave shall be deducted from the period of exemption of the duty to work unless the prison leave was authorised for the reasons mentioned in Article 62.

Article 70
Co-operation of society

1. The authority in charge of execution, in co-operation with associations and centres of free economic and work life, should seek to obtain that each

inmate able to work may carry out an economically productive activity; they should see to it that the inmate is advised through such associations and centres.

2. For the purposes of § 1, and in order to find a job for the inmates after their release, assistants may also be sought from the ministries of education, scientific research and work.

CHAPTER II

Remuneration

Article 71
Remuneration

1. Inmates must be paid a fair remuneration for their work.

2. The Ministry of Justice, upon advice of the "Direcção-Geral dos Serviços Prisionais", is entitled to fix the amount of the remuneration of inmates; that amount will be calculated on the bases of the salaries of free workers, on the nature of the work and on the professional qualification and will have into account the costs of internment.

3. By costs of internment it is meant the expenses concerning the premises, the food, the clothes and the services.

4. Remuneration may be reduced as much as 75% when the output of the inmate's work is below normal levels.

5. The Ministry of Justice, upon advice of the "Direcção-Geral dos Serviços Prisionais", is entitled to fix the amount of the remuneration of inmates for the exercises of ergotherapic activities; that amount will be calculated according to the nature of such activities.

6. Inmates must be informed in writing of the remuneration attributed to them; when the inmates cannot read the communication or do not wish to read it, it should be read out to them.

Article 72
Partition of remuneration

1. Where the inmate does not have a family entitled to maintenance and is not under any financial duty deriving from the sentence, his remuneration is apportioned in equal parts to a reserve fund and to an available fund.

2. Where the inmate has a family entitled to maintenance and is not under any financial duty deriving from the sentence, half of his remuneration is apportioned to his family and the other half is apportioned in equal parts to a reserve fund and to an available fund.

3. Where the inmate does not have a family entitled to maintenance but is under a financial duty deriving from the sentence, half of his remuneration is apportioned to the payment of such financial duties and the other half is apportioned in equal parts to a reserve fund and to an available fund; amongst financial duties deriving from the sentence, compensation of the victim takes precedence over the payment of fines and the payment of fines takes precedence over the payment of court costs.

4. Where the inmate has a family entitled to maintenance and is under a financial duty deriving from the sentence, half of his remuneration is apportioned to his family; one quarter of his remuneration is apportioned to the available fund; one eighth of his remuneration is apportioned to the reserve fund; one eighth of his remuneration is apportioned to the other duties.

5. Compensation of the victim shall only be deducted from the remuneration at the victim's request.

6. Inmates may be authorised to spend the money in the available fund on the acquisition of personal belongings, with their family or with other permitted purposes.

Article 73

Alternative apportionment

The Ministry of Justice may fix a minimum level for the reserve fund and the available fund; it may also authorise in exceptional and well founded cases an apportionment other than that mentioned in Article 72.

Article 74

Available fund

1. Yield of the capital obtained by way of compensation for accidents at work in prison will be credited in the available fund.

2. The prison director may decide on the use of the available fund as he deems fit.

Article 75

Remuneration not to be taken as security

1. The inmate's remuneration as well as any allowances paid to him for purposes of education or training may not be taken as security; they may however

be taken for the payment of compensation for acts committed wilfully or for the payment of compensation to the State, the prison staff or any other inmate.

2. Any amounts that are necessary in order to meet payments as mentioned in § 1 may only be taken from the available fund.

Article 76
Pocket money

1. Inmates who do not work because of their age or handicap will receive a fixed amount of money for miscellaneous expenses.

2. The provisions of § 1 shall apply when it is not possible to remunerate ergotherapic activities.

Article 77
Money for the period of transition

1. The reserve fund should serve the purpose of facilitating the social rehabilitation of the inmate; it is handed over to the inmate at the time of his release.

2. The prison administration may authorise that the reserve fund be used with expenses useful for the social rehabilitation of the inmate; at the inmate's request, the prison administration may authorise that the reserve fund be used for the purpose of meeting urgent needs of the inmate's or his family's.

Article 78
(Repealed: cf. Article 4 of Decree-law No 49/80 of 22 March)

CHAPTER III

Vocational training

Article 79
Vocational training

1. Courses should be organised aimed at offering vocational training to the inmates, either to improve their skills or to create new skills; such courses should aim in particular at inmates aged 25 or below.

2. Co-operation of the ministries of education, scientific research and work may be sought for the organisation of the courses mentioned in § 1.

3. Participation in the courses mentioned in § 1 may be assimilated to working hours.

4. Inmates who do not work and who participate in the courses mentioned in § 1 will be entitled to an allowance, save where they already receive other allowances or grants for the same purpose; the amount will be fixed by the Ministry of Justice.

PART VII

Education

Article 80
Mandatory schooling

1. Courses should be organised aimed at ensuring mandatory schooling to inmates who have not obtained their certificate and who have the necessary aptitude.

2. Inmates aged 25 or below who cannot correctly read, write or count will be provided with education as necessary in order to cope with such difficulties.

3. Special courses will also be organised for illiterate inmates.

4. As far as possible, access of inmates to education courses provided by mail, radio or television, will be facilitated.

Article 81
Allowances for purposes of education

1. Attendance of courses mentioned in Article 80 may be assimilated to working hours.

2. Inmates who do not work and who participate in the courses mentioned in Article 80 will be entitled to an allowance, save where they already receive other allowances or grants for the same purpose; the amount will be fixed by the Ministry of Justice.

N.B: The joint decision Nº 451/99 of the Minister of Justice and the Minister of Education concerning elementary and secondary education in prisons is divulged in Circular-letter Nº 1.5/102-978 of DEEASC, of 6 August).

Article 82
Certificates

Any certificates obtained upon attendance of the courses mentioned in Articles 79 and 80 must not mention the circumstance that the beneficiary is an inmate.

PART VIII

Free time

Article 83
Occupation of free time

1. Cultural, recreational and sport events should be organised in prisons with a view to ensuring the physical and mental well-being of inmates and developing their capacities, thus contributing to their social rehabilitation.

2. Inmates may participate in the activities mentioned in § 1; they may also organise themselves their own free time.

3. Active participation of inmates in the organisation of cultural, recreational and sport events should be promoted, without prejudice to order, security and discipline.

4. A committee should be set up to guide the activities mentioned in § 1; membership of the committee will be approved by the prison director.

Article 84
Library

1. All prisons shall be equipped with a library for the use of the inmates.

2. The library must include enough books, magazines and newspapers to meet the requirements of the inmates' right of choice.

3. Access of inmates to the library must be promoted.

4. The committee mentioned in § 4 of Article 83 will select the publications to be included in the library upon the following criteria: bringing up the level of knowledge of the inmates, developing their ability to have a critical approach to things, as well as the recreation of inmates.

5. Inmates may be authorised to participate in the management and daily life of the library, if that does not go against the purposes of the execution of the sentence.

Article 85
Newspapers and magazines

1. Within reasonable limits, inmates may keep newspapers and magazines on sale to the public.

2. Publications may be withdrawn from the inmates, on whole or in part, when they create a serious risk to the purposes of the execution of the sentence or to the security and order in prison.

3. Measures must be taken in order to ensure that the inmates are informed of major events of public life.

Article 86
Radio and television

1. Inmates must be allowed access to radio and television unless that creates a serious risk to the purposes of the execution of the sentence or to the security and order in prison.

2. Selection of programmes should take care of the inmates' preferences and needs as well as their education and recreation.

3. Access to radio and television may be temporarily barred to a given inmate or a group of inmates where that is indispensable for order and security in prison.

N.B: Circular Nº 4/GDG/99, of 6 June deals with taxes due for the use of television and other electrical appliances.

Article 87
Objects used during free time

Inmates may keep books, radios and other objects, within reasonable quantities, for their edification and for occupying their free time, unless that creates a serious risk to the purposes of the execution of the sentence or to the security and order in prison.

Article 88
Voluntary manual work

Inmates should be encouraged voluntarily to execute manual work in their free time; any benefit therefrom shall revert to the available fund.

PART IX

Moral and spiritual assistance

Article 89
Freedom of religion and worship

1. Inmates shall be free to follow the religious belief of their choice, to learn from the books of such religion and to worship accordingly.

2. Inmates must not be obliged to participate in any religious ceremony, nor to receive the visit of any minister of any confession.

3. Authorities in charge of execution of sentences must ensure that the needs resulting from the inmates' religious, spiritual and moral life are satisfied; as far as possible, the means necessary to that effect shall be provided to the inmates.

Article 90
Religious ceremonies

1. Inmates shall be allowed to participate freely in acts of worship and other acts proper to their religion.

2. Inmates may be authorised to participate in acts of worship and other acts belonging to a religion other than theirs if the minister of that other religion so authorises.

3. Participation of inmates as mentioned in §§ 1 and 2 may be excluded when that is indispensable in order to ensure security and order in prison; the minister of the religion involved must be previously heard.

Article 91
Spiritual assistance

1. Spiritual assistance from a minister of the inmate's religion, where that is possible, may not be denied.

2. Inmates should be assisted for the purpose of contacting a minister of their religion.

3. Where an inmate falls seriously ill, the minister of his religion must be informed without delay.

4. In the cases mentioned in § 3, the minister may visit the inmate upon the latter's consent, beyond the statutory time schedule, for as long as he deems necessary.

Article 92
Objects of worship

1. Inmates may keep the fundamental books of their religion as well as objects of worship.

2. Any inmate may display in his room or in the space allotted to him in the dormitory, any images or symbols of his religion.

3. The texts and objects mentioned in §§ 1 and 2 may not be withdrawn unless in case of manifest abuse.

Article 93
Religious services

The internal rules of prisons should cover the subject of the visitors of ministers and, upon the latter being heard, the organisation and the schedule of worship, as well as the requirements for practice of worship, all with a view to safeguarding order and discipline in prison.

Article 94
Co-operation in moral and spiritual assistance

1. Ministers of religions not attached to the prison, volunteer visitors and volunteer social workers, if authorised by the Minister of Justice upon a proposal from the "Direcção-Geral dos Serviços Prisionais", may co-operate in the moral and spiritual assistance to inmates.

2. The visits and the behaviour of the persons mentioned in § 1 must conform to the provisions of the internal rules of the prison, in co-operation with the religious assistants and staff mentioned in Article 192.

3. The authorisation mentioned in § 1 is valid only with respect to the prison for which it was granted.

PART X

Medical assistance

Article 95
Medical services in prison

1. As far as possible, each prison must be equipped with a medical service, nursing service and pharmacy service, as it is necessary in order to cope with the needs relating to the health of the inmates.

2. In prisons, the medical doctors' and the nurses' activities may be provided by way of a medical act or a nursing act respectively.

N.B: Circular Nº 6/DSS/98, of 7 June clarifies the way in which prisons should co-operate with the pharmaceutical services of the prison hospital.

N.B: Transportation of inmates in bad health should be carefully done in special vehicles (see Circular Nº 7/95, of 14 August).

N.B: With respect to the transportation of pharmaceutical products deemed indispensable to inmates transferred from prison hospitals to ordinary prisons, see Circular Nº 3/95-DVDIP-1, of 12 May.

N.B: Inmates transported to a prison hospital for consultations or exams will be accompanied by extracts taken from their medical file, as well as other pertinent elements, in a closed envelope; urgencies will be routed to central or district hospitals because the prison hospital is not equipped with an urgency service (see Circular Nº 24/86/DCSDEPMS-17, of 31 October).

N.B: Seeking to reconcile the fundamental rights to private life and to confidentiality of relations with doctors with the requirements of security, special procedures are in force for prison staff who escort inmates to medical examinations outside the prison (see Circular Nº 72/80, of 26 November).

N.B: The geographical areas of influence of prisons equipped with a clinic are dealt with in Circular-letters Nºs 1/98, 2/98 and 3/98, of 15 June, as well as Circular-letters Nºs 4/99, 5/99, 6/99 and 7/99, of 14 January of DSS).

Article 96
Health assistance

1. As far as possible, inmates shall frequently and periodically be submitted to exams for the early detection of physical and mental illness upon which

adequate measures should be taken; inmates may request further exams at their own expense.

2. Inmates with respect to whom there is a suspicion or a certitude that they carry a contagious disease must be immediately placed in isolation.

3. For the advantage of their health, inmates may benefit at their expense from the following measures:

a) Women aged 35 or more: an annual exam for the detection of cancer;
b) Wen aged 45 or more: an annual exam for the detection of cancer.

4. Upon advise from the prison doctor, inmates may benefit at their expense of medical assistance since the beginning of their disease of:

a) Supplementary means of diagnosis, such as tests, X-ray, electrocardiograms, electroencephalograms, etc.
b) Medical and dental care;
c) Medicine, curative substances, lenses, etc.
d) Dental apparatus;
e) Tests for work resistance and work therapy when not excluded by the ends of execution;
f) Blood transfusions;
g) Surgery.

5. Inmates shall not be submitted to any medical or scientific experiments without their consent according to the law.

6. Where the inmate cannot bear the expenses of any of the activities mentioned in this Article and the doctor deems such activity necessary, the prison director may authorise the payment of such activity, on the whole or in part.

Article 97
Medical assistance in prisons for women

1. Prisons for women must be equipped with medical assistance specialised in assisting pregnant women, women who have recently delivered and women who recently suffered abortion or miscarriage.

2. Women inmates are assisted during pregnancy and after delivery by doctors specialised in obstetrics and gynaecology and paramedical specialised in obstetrics.

3. Medical assistance to children that women inmates keep in prison must be entrusted to persons specialised in paediatrics.

4. When children over three years of age must be taken from their mothers and no one can take care of the child, the prison management must so inform the authorities in charge of assisting young people; the prison management must see to it that mother and child keep close contacts between themselves.

5. Children are entitled to exams, performed as frequently as possible, for quick diagnoses of illness that may endanger their normal physical and intellectual development.

Article 98

Medical assistance during prison leave

Inmates on prison leave may use the prison's medical facilities, according to the provisions of this law.

Article 99

Medical assistance for social rehabilitation

1. Authorities in charge of execution should, with the consent of the inmate, take initiatives designed to ensure that medical treatment likely to contribute to the social rehabilitation of the inmate is carried out, in particular the placement of prosthesis.

2. For the purposes of § 1, the inmates should contribute to the costs, having in view both their economical situation and the aims of the treatment.

Article 100

Organisation of medical assistance

For purposes of the organisation of medical assistance, the "Direcção-Geral dos Serviços Prisionais" may seek the co-operation of local and national health services, including hospital and non-hospital services, according to the instructions given by the Ministry of Social Affairs.

Article 101

Duties of doctors

1. It is the prison doctor's duty, in general, to supervise the physical and mental health of inmates and, in particular, to:

a) Visit daily inmates who are sick and all those who need his assistance

b) Signal immediately any sickness requiring special care;
c) Supervise periodically the inmates' physical and mental ability to perform their work;
d) Prescribe how often should bedding and clothes be changed having in mind the particular needs of each inmate.

2. Prison doctors should also inspect the prison regularly and advise the director as to:

a) The quantity, quality, preparation and handing out of food;
b) Hygiene and cleanness of the prison and the inmates;
c) Sanitation, heating, lighting and ventilation of prison;
d) Compliance with the provisions concerning sport where sport is not organised by specialised staff.

3. Doctors must submit a report to the prison director each time that they consider that the physical and mental health of an inmate was or might be affected by prolonged internment or certain ways of internment.

4. Prison directors should take into consideration the report mentioned in § 3 and the advice mentioned in § 2; they should either act accordingly or forward them to the "Direcção-Geral dos Serviços Prisionais" with their written opinion.

Article 102
Prostheses

1. Upon advice from the prison doctor, inmates may request prostheses, orthopaedic apparatus and other ancillary means necessary to prevent any imminent failure, to ensure the success of a treatment or to correct any physical handicap.

2. The provisions of § 1 also apply to any changes of prostheses, installing and acquiring spare parts.

3. The costs resulting from the application of the provisions of §§ 1 and 2, where they cannot be borne by the inmate, may be borne by the prison services, in accordance with the general provisions concerning social security and within the budgetary appropriations of the "Direcção-Geral dos Serviços Prisionais".

Article 103
Transfer of inmates for medical treatment

1. Sick inmates are treated in the internment room when possible and, where appropriate, in the prison's clinic or psychiatric annex.

2. Where the prison is not equipped with a clinic or a psychiatric annex or when such premises are not equipped with the necessary means, the "Direcção-Geral dos Serviços Prisionais", upon grounded proposal by the prison director, must order the inmate's internment, as the case may be, either in the clinic or the psychiatric annex of another prison, or in a prison hospital, a prison psychiatric hospital or an establishment for inmates subjected to ergotherapy activities.

Article 104
Internment in a non-prison hospital

1. In exceptional cases, when absolutely necessary, the Minister of Justice may authorise inmates to be placed in any hospital, upon grounded proposal from the prison director accompanied by the opinion of the prison doctor.

2. The prison doctor's opinion must state the nature of the illness, the reason why the inmate cannot be treated in a prison, as well as the expected length of the internment.

3. In case of urgency and when there is imminent danger for the inmate's health, the prison director may take such measures as he deems necessary, in particular the measure mentioned in § 1; he will immediately inform the "Direcção-Geral dos Serviços Prisionais" that will decide to confirm or not such measures.

4. The prison director must inform the court.

5. Inmates must return to prison as soon as the reasons for leaving are no longer valid.

6. When there is evidence that the internment was based on simulation, its duration shall not be taken into consideration for purposes of computing the time served in prison.

7. The Minister of Justice may delegate, totally or partially, the powers conferred upon him by this Article on the director general of the "Direcção-Geral dos Serviços Prisionais", for renewable periods of no more that 3 years.

Article 105
Inmate's private doctor

1. Inmates may ask to be examined by their private doctor, at their own expense.

2. Medical treatment as well as surgery carried out by the inmate's private doctor within the premises of the prison, at the inmate's own expense, may be authorised.

3. The prison doctor may in special cases suggest to the prison director that an inmates be examined and assisted by a specialist or by another doctor.

4. The prison director is empowered to authorise the action mentioned in §§ 1, 2 and 3, upon the advice of the prison doctor.

Article 106
Staying outdoors

1. Inmates who do not work outdoors are authorised to stay outdoors at least 2 hours per day.

2. Only in exceptional case may the period mentioned in § 1 be reduced; it shall never be reduced to less that 1 hour per day.

3. The time spent outdoors shall as far as possible be used for physical exercise and for sports culture and recreation; it can be used as part as the free time.

4. The areas designed for inmates staying outdoors should offer protection against bad climatic conditions; they should be equipped for the activities mentioned in § 3.

Article 107
Notification in case of illness or death

1. In case of the inmate's death or serious physical or mental illness, the following must be notified in due time and in that order: the spouse, the parents, the legal representative and, if applicable, the person indicated by the inmate.

2. The notifications mentioned in § 1 should be sent out by telegram or by telephone, by the prison management at the expense of the "Direcção-Geral dos Serviços Prisionais".

3. In case of illness, upon the inmate's grounded request, the prison management shall abstain from sending out the notifications mentioned in § 1.

4. When the prison management is informed of a serious physical or mental illness or the death of any of the persons mentioned in § 1, it must immediately inform the inmate.

5. Death must also be notified by the prison management to:

a) The official responsible for the registry of persons;
b) The sentencing court or the authority that ordered the internment;
c) The "Direcção-Geral dos Serviços Prisionais".

6. Where the inmate does not have a spouse and his parents are unknown, his death is notified to the administrative authority of his last residence; notification must be accompanied by a list of his belongings for purposes of heritage.

7. Where the inmate is a foreigner or a stateless person, his death is notified to the appropriate diplomatic or consular representative as well as the director of the foreigners' bureau of the Ministry of Internal Administration.

PART XI

Security and order

Article 108
Principles

1. The inmates' sense of responsibility must be promoted, as a fundamental factor of the good order and discipline in prison.

2. Order and discipline must be maintained firmly, in the interest of security and the interest of an organised life in community, to the extent that they are an indispensable requirement of a proper treatment.

3. Limitations imposed to inmates in the name of order and discipline must be commensurate with the aims proposed and should not last longer than necessary.

Article 109
(Repealed: cf. Article 6 of Decree-law No 49/80 of 22 March)

Article 110
Rules of conduct

1. Inmates must follow the provisions that rule life in prison; they must obey to the prison staff who have powers of authority and must follow their instructions, without prejudice to their right of complaint.

2. Inmates must in no case bare any powers of authority or any disciplinary powers over other inmates.

3. Inmates must behave correctly towards the staff in charge of execution, the other inmates and any persons who visit the prison, so as not to disturb social order.

4. Inmates must submit to the prison's timetable; they must keep their room in order; they must take care of any property at their disposal.

5. Inmates must notify as soon as possible of any circumstance which might endanger his life or other people's health.

6. Inmates must in no case have with them any kind of medicine or substance that may represent a danger for life or health.

Article 111
Special security measures

1. Special security measures may be imposed on inmates when, because of their behaviour or their mental state, there is a serious danger of escape or of acts of violence against himself, against others or against property.

2. The following special security measures are authorised:

a) Prohibition to use certain objects and retaining such objects;
b) Observation of the inmates during the night;
c) Isolation of the inmate from the rest of the prison population;
d) Deprivation or limitation of the right to stay outdoors;
e) Use of handcuffs;
f) Internment of the inmate in a special security cell.

3. Measures mentioned in § 2 are authorised only when it is otherwise not possible to avoid or to eliminate the dangers in question or when there is considerable perturbation in the order or security of prison.

4. Special security measures will last for as long as lasts the danger for which they were imposed.

5. The measures mentioned in § 2 must not be used by way of disciplinary measures.

N.B: Cf. notes to Article 106.

Article 112
Handcuffs

1. Handcuffs may only be used when other measures prove to be inoperative or inadequate.

2. Handcuffs may only be used on hands; the inmates' interests must be taken into consideration with respect to the way in which handcuffs are used.

3. Handcuffs must only be used under medical supervision.

4. Handcuffs must be withdrawn when the inmate appears before the court, unless necessary.

N.B: Seeking to reconcile the fundamental rights with the requirements of order and security, special procedures are in force for the use of handcuffs outside the prison (see Circular-letter Nº 26/90, of 18 October).

Article 113
Isolation in a special security cell

1. Isolation of an inmate in a special security cell may only take place for reasons pertaining to the inmate and when other special security measures prove inoperative or inadequate on the face of the seriousness of the situation.

2. Isolation of an inmate in a special security cell without interruption aims exclusively at re-establishing a normal situation; in no case may it last more than one month.

3. Where, after the period mentioned in § 2, the reasons for isolation of the inmate remain valid, the inmate should be moved to a security prison or a security section.

4. Isolation of an inmate in a special security cell may only last for more than 15 days on a row upon an authorisation from the "Direcção-Geral dos Serviços Prisionais".

5. The periods of time mentioned in the preceding §§ are not interrupted when the inmate participates in religious ceremonies or in recreation.

6. Inmates placed in a special security cell must be visited as urgently as possible by the prison doctor; they must be visited frequently by the prison doctor while there situation lasts; the prison doctor must inform the prison director about the physical and mental health of the inmates and, where appropriate, advise on the need to apply different measures.

7. In special security cells there must not be any dangerous objects; otherwise such cells should have the same particularities as the other prison cells, except as far as security is concerned.

Article 114
Medical supervision

1. Prison directors are empowered to apply the special security measures mentioned in Article 111.

2. In case of imminent danger, such measures may be provisionally applied by the person who replaces the prison director; the latter's confirmation of the measure must be sought without delay.

3. Measures provided for in Article 111, §§ d), e) and f), may only be applied to inmates under medical observation or medical treatment or to inmates whose mental state originates the measure, or pregnant women, or women having recently delivered or women having recently interrupted pregnancy, upon advice from the prison doctor, save where there is imminent danger in which case the doctor's advice must be sought without delay.

4. The prison doctor's advice must be sought regularly while the inmate is deprived from staying outdoors.

Article 115
Transfer for special security reasons

Where there is grounded danger of escape or where the inmate's behaviour or his state constitute a danger for the order or the security of the prison, the inmate may be transferred to another prison where he can more appropriately be kept in security.

Article 116
Search

1. The inmate, his property and his room might be searched in the cases and under the safeguards and with the periodicity that the internal rules of the prison provide, and when necessary for reasons of security and order.

2. Personal search of the inmate shall not be done without absolutely respecting his personality and sense of decency.

3. Persons of a different sex may not be present when a personal search on an inmate takes place.

4. Personal search of the inmates may not take place when other means of detection are available.

5. Personal search implying the nakedness of the inmate may not take place unless in the cases and under the conditions provided in the internal rules of the prison and when authorised by the prison director in relation to a concrete situation of imminent danger.

6. For the purposes of § 5, search may only take place in between closed doors and in the absence of other inmates.

7. Search of the inmate's room must not take place with disrespect towards the inmate's property.

Article 117
Identification

1. For the purposes of execution of sentences involving deprivation of liberty, the following are the authorised means of identification, without prejudice of any other means necessary to identify with precision any inmate:

a) Fingerprints and hand-prints;
b) Photographs;
c) The description of the particularities, features and external physical marks;
d) Antropometric indications.

2. The identification indications mentioned in § 1 should be included in the inmates individual file; at the inmate's request they shall be destroyed upon his final release.

3. Inmates must be informed of the right mentioned in § 2.

Article 118
Capture

Inmates who have escaped or who are found out of prison without authorisation may be captured by the authority in charge of execution and brought back to prison.

Article 119
Property

1. Inmates may not keep with them objects other than those authorised by the law, the internal rules of the prison or the authority in charge of the execution.

2. Inmates may accept from other inmates objects of small value, except where the internal rules of the prison so prohibits or the authority in charge of the execution subjects that to it's consent.

3. Inmates may keep with them objects of moral or sentimental value to them provided that they are not economically valuable; inmates may keep with them objects which are necessary to the care and hygiene of themselves, in quantities commensurate to there needs.

4. Non-authorised objects that entered into prison, objects handed in by the inmates upon their admission to prison, as well as any objects found in the inmates' possession, shall be deposited in their respective name, subject to their size and nature so permitting, to be handed back upon release.

5. Inmates may forward to any person of their choice any objects belonging to them that they don't need neither in prison nor upon release.

6. Objects mentioned in § 4 that cannot be deposited because of their nature or size, will be sold to the inmate's benefit or forwarded, at the inmate's expenses, to a person designated by him.

7. Any notes, written material and other objects that include information on the prison's security may be seized or destroyed, as the case may be, by the authority in charge of execution.

8. An inventory of the items mentioned in § 4 must be made and read out to the inmate who should sign it; the prison management shall take all necessary measures in order to keep such objects in good conditions.

Article 120

Own money

1. Inmates may not carry money with them unless authorised by the internal prison rules.

2. Any money that the inmate carries with him when being admitted to prison must be deposited in his name, unless he decides otherwise.

Article 121

Compensation for expenses and damages

1. Inmates must pay back to the authority in charge of the execution any expenses resulting from intentional or guilty self mutilation, or injury on other inmates.

2. The prison administration may abstain from enforcing their rights under § 1 if enforcing such rights would put at risk the inmate's treatment or his social rehabilitation.

PART XII

Coercive means

Article 122
General principles

1. The prison staff as well as the staff of any other agencies operating within prisons may use physical force against inmates only where proportional, where other measures are not available and where it is a case of legitimate self defence, an attempt to escape or an active or passive resistance to a legitimate command.

2. Physical force may be used against persons other than inmates only where such persons attempt to free any inmate, enter illegally into prison or remain in prison without authorisation.

3. Staff who use physical force should limit it in time to what is strictly necessary; they should immediately inform the prison director; the latter must without delay order any medical exams and other investigations as necessary.

4. Prison guards should have the physical aptitude to master violent inmates if necessary.

5. A written enquiry must always be ordered in cases of use of physical force.

Article 123
Physical force

1. For the purposes of this Part physical force means any actions exercised on persons through the use of corporal force, ancillary means or weapons.

2. Handcuffs may exceptionally be used as ancillary means of physical force.

3. Authorised firearms as well as tear gas are deemed to be weapons for the purposes of the § 1.

4. Ancillary means of physical force, as well as weapons, should be previously approved by the "Direcção-Geral dos Serviços Prisionais".

N.B: Cf. notes to Article 112.

Article 124
Principle of proportionality

1. When different measures of physical force are adequate and possible, those that presumably cause less harm should be used instead of the others.

2. Physical force must not be used where the eventual harm resulting from it is not proportional to the aim sought.

Article 125
Intimidation

Before using physical force, an intimidating warning must always be used safe in case of imminent or current aggression.

Article 126
General rules on the use of weapons

1. The prison staff as well as the staff of any other agencies operating within prisons may use their weapons only in case of absolute need, direct action and legitimate defence, especially in the following cases:

a) Against inmates on mutiny, in a menacing attitude, who refuse to submit;
b) Against imminent or current aggression when, under the circumstances, such means prove to be necessary to avoid or to stop the aggression;
c) Against inmates who escaped and who refuse to obey orders not to proceed with their intend;
d) Against any persons who enter or attempt to enter with violence into prison, with subversive purposes, to liberate inmates or to exercise violence upon them;
e) Against any inmate who creates the danger of insubordination because of his attitude inciting violence.

2. The measures mentioned in § 1 may only be used when indispensable against the lack of efficiency of less violent means.
3. Firearms must not be used before a warning shot is fired towards the sky, save in case of imminent or current aggression.

Article 127
Physical force relating to health care

1. Medical examination, treatment and food may be forcefully imposed on inmates only in case of danger to their lives or in case of serious danger to their health.

2. Physical force must not carry serious danger to the life or health of the inmate.

3. The means mentioned in this Article may only be decided upon and used under medical supervision, without prejudice to first help being given where a doctor cannot be found and there is danger to the life of the inmate.

4. Physical force may only be used once reasonable efforts to obtain the inmate's consent have been used.

PART XIII

Disciplinary measures

Article 128
Requirements

1. Where inmates willingly fail to accomplish what is asked of them or violate duties imposed on them by the law, disciplinary measures may be imposed on them.

2. Where a warning is deemed fit, no disciplinary measure will be applied.

3. Where the fault constitutes a criminal offence, the prison director shall register all the circumstances of the case and, if criminal proceedings do not require a private complaint, forward it to the public prosecutor.

Article 129
Execution of disciplinary measures

Disciplinary measures must in principle be executed immediately.

N.B: Disciplinary measures applied to inmates who are transferred before having executed the measures, must be executed in the new prison, without prejudice to the right of appeal to the court of execution of sentences (see Circular N° 15/84/DCSDEPMS-11).

Article 130
Principle of proportionality

1. Disciplinary measures should be applied taking into account the seriousness of the fault, the conduct and the personality of the inmate.

2. Disciplinary measures should never be applied in such a way as to put at risk the inmate's health.

Article 131
Procedure

1. Disciplinary measures may not be applied without the inmate concerned being previously informed of the fault for which he is accused.

2. Before applying any disciplinary rneasure, the prison director must hear the inmate in writing.

3. In case of more serious faults, the director should hear the persons who are involved in the inmate's treatment.

4. When he deems fit, the prison director may hear the technical council and order an enquiry.

5. Any decision applying a disciplinary measure must be cornrnunicated orally to the inmate by the prison director and must be put into writing as well as reasons thereto.

Article 132
Disciplinary offences

Without prejudice to the provisions of Article 128, disciplinary measures are applied to any inmate whose behaviour goes against the order and the discipline in the prison or the ends of the execution, as well as to any inrnate responsible notably for:

a) Negligence in cleaning and keeping in good order himself or his room;
b) Abandoning the place reserved for him;
c) Voluntarily not abiding by labour duties;
d) Harmful attitude towards fellow inmates;
e) Offending language;
f) Games or similar activities not allowed by the internal rules or not allowed to the inmate;
g) Simulating illness;
h) Carrying or trafficking in money or forbidden objects;
i) Non-authorised communication with the outside world or, in case of isolation, with the world inside the prison;
j) Obscene acts or equivalent;

k) Intimidation or serious abuse of fellow inmates;
l) Misappropriation of or damage to property belonging to the Administration;
m) Offensive attitude towards the prison director, the prison staff or other persons who enter the prison;
n) Non-compliance with orders received or unjustified delay in executing such orders;
o) Incitement or participation in disorder or mutiny;
p) Contracts with others inmates, with staff or with outsiders where such contracts are not authorised by the prison director;
q) Escape from prison;
r) Criminal acts.

Article 133
Typology of disciplinary measures

1. The following disciplinary measures are available:

a) Reprimand;
b) Total or partial loss of benefits;
c) Ban on recreation and spectacles for up to two months;
d) Ban on wine or beer for up to three months;
e) Ban on access to the available fund for up to three months;
f) Transfer of the available fund to the reserve fund for up to three months;
g) Loss of property or money held against the rules;
h) Internment in an individual room for up to one month;
i) Internment in an individual cell for up to one month.

2. The money and property mentioned in § 1g) are not lost for the inmate when he shows that it has a legitimate origin and is not to be used for any illegal purpose and thus holding it is no more than a formal offence.

3. Any inmates to whom the disciplinary measures mentioned in §§ 1h) and i) are applied, may complain in writing.

4. Collective sanctions shall not be imposed; however the prison director may change the regime in prison when the persons responsible for disciplinary offences that create a risk for the order and discipline of a group of inmates, are not identified.

N.B: Cf. notes to Article 106.

N.B: There is no legal basis for staying the execution of disciplinary measures (see Circular Nº 35/91/GA-2, of 11 June).

Article 134
Disciplinary cell

1. Disciplinary cells must meet requirements supervised by the prison's medical services as to the furniture, the volume of the space, the ventilation and the light, in particular so as to allow inmates to read.

2. Inmates placed in disciplinary cells should receive normal clothes and bedding equipment and should have access to normal hygiene facilities.

3. For reasons relating to the safety or the health of the inmates, special measures may be taken in particular as to clothes, furniture and hygiene.

Article 135
Power to advise

The provisions of Article 133 § 1 do not prevent any member of the prison staff to advise inmates with a view to their social rehabilitation.

Article 136
Disciplinary powers

The prison director is empowered to apply disciplinary measures

Article 137
Medical assistance and other visits

1. Before executing a disciplinary measure and where the nature of the measure so justifies, the inmate must be examined by a doctor.

2. Inmates who are serving any of the disciplinary measures mentioned in Article 133, §§ *h)* and *i)*, remain under rigorous medical control and should be examined daily by the doctor when the latter deems that fit.

3. When the doctor finds that there is a danger for the health or for the physical or mental integrity of the inmate, he may propose to the prison director in a reasoned report that the disciplinary measures be discontinued or replaced by other measures.

4. The doctor must always be heard when the inmates is under treatment at the time when the disciplinary measure is applied; the same applies to pregnant

women, women who recently gave birth and women who recently suffered abortion or miscarriage.

5. Inmates who are serving any of the disciplinary measure mentioned in § 2 may receive the visit of prison staff, in particular educators and social assistants, as often as the prison director finds it necessary.

6. Upon authorisation of the prison director, inmates who are serving any of the disciplinary measure mentioned in § 2 may receive the visit of their family, their lawyer and the minister of their religion.

PART XIV

Right to make submissions, right to complain and right to appeal

Article 138
Right to make submissions and right to complain

1. Inmates may address the following in order to make submissions or to complain against any illegal order:

a) The prison director;
b) The prison staff;
c) The inspectors of the prison services.

2. The internal rules of each prison should fix the conditions under which inmates may address the prison staff, as mentioned in § 1*b)*.

3. Inmates may freely address the inspectors of the prison services when visiting the prison; the prison inspectors may impose the conditions under which they may be addressed.

N.B: Complaints by inmates that are intentionally ill-founded may give rise to disciplinary or criminal consequences (see Circular Nº 2/GDG/96, of 8 November).

N.B: The "Direcção-Geral dos Serviços Prisionais" is available to examine attentively any query or request made by any inmate; however hunger-strikes are not an acceptable means of transmitting requests, especially when such requests have not been previously expressed. Books for complaints and suggestions are available in all prisons (see Circular Nº 2/94/GA-1, of 24 June).

Article 139
Right to make submissions to the judges of the court of execution of sentences

1. During the visits that the judges of the doubt of execution of sentences, according to Article 23 of the Decree-Law 783/76, of 29 April, must at least monthly pay to the prison, inmates may present their submissions, provided they registered in a book that must be available for that purpose.

2. The judges, in agreement with the prison director, must seek to solve the problems mentioned in the submissions.

3. When there is no agreement between the judge and the prison director, the matter is brought to the attention of the prison's technical council that will take a decision on a majority vote.

4. The technical council mentioned in § 3 is chaired by the judge of the court of execution of sentences, whose is entitled to exercise a casting vote only.

5. Any member of the technical council may appeal to the Minister of Justice of any decision of that council; the appeal stays the execution of the decision.

6. Any intention to lodge an appeal must be voiced immediately and is registered in the minutes.

7. The appeal is processed with all the necessary elements; the judge is empowered to deal with it.

Article 140
Hearing of third persons

1. The technical council mentioned in Article 139 § 3 may hear any staff member or any other person as decided by the judge.

2. The judge is empowered to dictate for the record the decisions and opinions of the technical council.

Article 141
Notification of the inmate

The inmate is notified of the decision within two days; a copy of the decision is delivered to him.

Article 142
Minutes of the sessions

The minutes of the sessions of the technical council are written into a book existing for that purpose and signed by the judge and the acting secretary.

Article 143
Appeal against disciplinary sanctions

1. Any inmate placed in a disciplinary cell for over 8 days may declare that he wishes to lodge an appeal with the judge of the court of execution of sentences, orally or in writing within the two days following notification of the sanction.

2. Any appeal is registered; the inmate may join a statement of reasons.

Article 144
Effect of the appeal

Appeals stay the execution of the measure as from the 8th day.

Article 145
Communication of appeals

1. The judge of the court of execution of the sentences is notified in writing of any appeals lodged.

2. The clerk of the court registers the notification and submits the file to the judge; the judge convenes the technical council and fixes the date to hear the appellant within the next 48 hours.

3. The technical council mentioned in § 2 has consultative only powers; it is chaired by the judge.

Article 146
Hearing of the inmate

The judge may decide that the inmate be heard by him alone.

Article 147
Change or confirmation of the measure appealed against

The judge may confirm, reduce or cancel the measure appealed against.

Article 148
Form of the decision

1. The decision may be announced orally; it will be registered in writing within 24 hours.

2. The procedure following the decision is under the responsibility of the clerk of the court who will notify the inmate and forward a copy of the decision to the prison director.

Article 149
Non admissible appeals

Decisions that confirm or change disciplinary sanctions may not be appealed against.

Article 150
Access to the organs of sovereignty

1. Inmates, individually or in group, may submit to the organs of sovereignty and to any authorities, any petitions, complaints or protests for the defence of their rights, the Constitution or laws of a general interest.

2. Inmates may exercise their rights of participation in public life, save any restrictions resulting from the sentence.

Article 151
Complaint to the Court of Human Rights

1. The right recognised in Articles 25 *et seq.* of the European Convention on Human Rights are in any event safeguarded, once internal remedies are exhausted.

2. The Minister of Justice will decide on the internal procedure and requirements to that effect.

PART XV

Release from prison

Article 152
Release from prison

1. Inmates are released upon a warrant or a written order from a competent authority.

2. The release of foreign inmates is always communicated to the director of the Aliens Department of the Ministry of Internal affairs, as soon before it takes place as possible.

3. The order mentioned in § 1 may be transmitted by official telegram; in that case the prison director only enforces it when he has reasons to believe on its conformity with the law.

4. Any order transmitted by telegram must in due time be confirmed in writing.

Article 153
Director's duty

It is the director's duty to seek, at least one month before the scheduled date of release, an order to release.

Article 154
Sick inmate

1. Where an inmate to be released is sick and the doctor informs in writing that his immediate release seriously harms his health, the prison director may authorise the inmate to rest in prison for such time as is indispensable.

2. The provisions of § 1 shall apply to pregnant women, women who recently gave birth and women who recently suffered abortion or miscarriage.

3. Inmates placed in a disciplinary cell are not released before having served the respective measure.

4. Any delay in releasing an inmate, as mentioned in the preceding §§ must immediately be communicated to the "Direcção-Geral dos Serviços Prisionais" and to the authority that issued the order to release.

Article 155
Time of release

1. At the time of release the inmate should receive a document certifying that he served his sentence.

2. At the time of release the inmate should receive the money in the available fund and the reserve fund, as well as any other property belonging to the inmate, as well as the certificate mentioned in Article 82.

3. Inmates may ask for a statement concerning their behaviour and professional capacity.

N.B: Cf. notes to Article 107.

PART XVI

Prison services

CHAPTER I

Inspection

Article 156
Inspection services

1. The inspection is integrated in the central services of the "Direcção-Geral dos Serviços Prisionais".

2. Every year an ordinary inspection will be made to every prison; extraordinary inspections may be made as necessary.

3. The Minister of Justice may ask court judges or public prosecutors and may appoint any official of the Ministry to proceed to enquiries or engage disciplinary procedures.

4. Inspection in matters pertaining to prison work, training, education, medical assistance and specialised treatment for inmates must be made by specialised personnel.

N.B: The Circular Nº 1/98/SAI, of 21 January, the Circular Nº 1/95/GA/ /1, of 10 January and the Circular-letter Nº 5/95/SIAJ, of 27 April include guidelines on the organisation and functioning of the Supervision Service, in particular:

a) The names and areas of jurisdiction of each of the three departments set up by the Minister of Justice;
b) Their multidisciplinary membership;
c) That each department is headed by an inspector-co-ordinator and the Service is headed by an Under Director General;
d) The existence in each prison of a correspondent of the Supervision Service;
e) That disciplinary procedures and investigations started in prison, after having been submitted to the prison director for an opinion, should be submitted to the inspector-coordinator for another opinion.

N.B: For matters relating to the registry and procedure of disciplinary action, see Circular-letter Nº 2/98/SAI, of 13 August.

CHAPTER II

Prisons

Article 157
Execution of measures involving deprivation of liberty

Any sanctions or measures involving deprivation of liberty are carried out in prisons under the Ministry of Justice.

Article 158
Prisons

1. Prisons under the Ministry of Justice include:

   a) Regional prisons;
   b) Central prisons;
   c) Special prisons.

2. Regional prisons host remand prisoners and prisoners serving sentences up to six months.
3. Central prisons host prisoners serving sentences of more than six months.
4. Special prisons host prisoners who need special treatment.
5. The following are special prisons:

   a) Prisons for young adults and detention centres;
   b) Prisons for women;
   c) Prison hospitals;
   d) Prison psychiatric hospitals.

Article 159
Security classification

1. In terms of security, prisons may be:

   a) Maximum security;
   b) Closed;
   c) Open;
   d) Mixed.

2. Sections with specific security requirements may be set up for inmates who are not adapted to the general regime.

3. The Ministry of Justice, upon proposal of the Director General of Prison Services, decides on the classification of prisons.

N.B: The decision of the Minister of Justice of 25 September 1986 that classifies prisons is divulged in Circular-letter Nº 49/86, of 3 October.

Article 160
Prisons for young adults

1. Prisons for young adults host inmates aged between 16 and 21.

2. Where treatment so advises, upon the proposal of the prison director, young adults may continue in a prison for young adults until their 25th anniversary.

Article 161
Special prisons for women

Prisons for women must be equipped with:

a) Special sections for pregnant women;
b) Special sections for women who have with them children younger than 1 year old;
c) Nursery for the inmates' children younger than 3 years old.

Article 162
Prisons to prepare release

Open sections may exist in closed prisons in order to prepare the release of inmates.

Article 163
Prisons affected to the "Polícia Judiciária"

1. Prisons for remand prisoners may be affected to the "Polícia Judiciária".
2. The provisions of this law apply to the prisons mentioned in § 1.

Article 164
Detention stations

Detention stations should exist in the vicinity of court houses, where prisoners can await before appearing in court and, if necessary, stay overnight if there are no prison facilities in the region.

Article 165
Allocation of expenses

1. Expenses with the acquisition of land, construction, works and putting into operation of prisons are borne by the State.

2. Expenses mentioned in § 1, where related to regional prisons, are borne by the "câmaras municipais[5]"

CHAPTER III

Special prisons, observation centres and psychiatric annexes

Article 166
Prison hospitals

1. Prison hospitals are used for receiving inmates who are in need of medical treatment that cannot be dispensed in their prison.

2. Inmates are placed in prisons hospitals upon a proposal made by the prison director, with the opinion of the doctor.

3. The doctor's opinion must mention the nature of the inmate's sickness, the reason why he cannot be treated in prison and the expected time of internment in hospital.

Article 167
Psychiatric hospitals

1. Psychiatric prison hospitals are used for receiving inmates who are deemed not to be responsible for their deeds, and dangerous, as well as inmates who became mentally disturbed while serving their sentence.

2. The inmates mentioned in Article 10 § 2 may also be placed in psychiatric hospitals.

3. Psychiatric hospitals may also receive inmates to be examined and observed, in conformity with the provisions of Article 169.

4. The provisions of §§ 1 to 3 above do not prevent psychiatric annexes from treating inmates in the cases mentioned in Article 172.

5. Placement in any psychiatric centre always requires a grounded medical proposal; the proposal is open to complaint under the terms of the law.

Article 168
Observation centres and psychiatric annexes

Observation centres and psychiatric annexes may operate next to prisons, as a specialised service.

Article 169
Observation centres

1. Observation centres aim at *a)* detecting possible physical or mental abnormalities, *b)* recommending measures for individualising the sentence, *c)* advising on the dangerousness of inmates and *d)* advising on treatment.

2. Observation centres should have the necessary staff to ensure medical, psychological and social examination of the inmates.

3. Directors of observation centres, where they deem fit, may suggest that any inmate under observation be examined in a psychiatric hospital or annex, or be examined in an institute of criminology, or a specialised non-prison service.

4. Inmates should not be placed in observation centres for more than 60 days, except if otherwise provided.

Article 170
Powers of observation centres

The following are studied in observation centres:

a) Accused persons;
b) Sentenced inmate, following a decision by the "Direcção-Geral dos Serviços Prisionais".

2. Any proposals by prison directors or by the judge of the court of execution of sentences aimed at having any person studied in an observation centre must give reasons.

Article 171
Mobile staff

Observation centres may have mobile staff in order to facilitate the study of persons placed in prison.

Article 172
Psychiatric annexes

1. Psychiatric annexes aim at:

a) Observing inmates whose behaviour during deprivation of liberty suggest that there might be a mental abnormality;
b) Performing, in the terms of the law, expertise relating to the legal liability of the persons observed.

2. Psychiatric annexes may also provide medical assistance to inmates who suffer from mental disturbance provided that the treatment does not exceed six months.

Article 173
Administration of psychiatric annexes

Psychiatric annexes are technically administered by the institutes of criminology, through their 2nd section.

Article 174
Authorisation for internment

1. The placement in a psychiatric annex of an inmate coming from another prison requires a decision by the "Direcção-Geral dos Serviços Prisionais".
2. The institutes of criminology may request the internment of any inmate whom they think it is necessary to study in a psychiatric annex.

Article 175
Duration of internment

The internment of inmates in psychiatric annexes must be limited in time to what is strictly necessary for observation, examination and treatment.

CHAPTER IV

Structure and capacity of prisons

Article 176
Structure of prisons

1. Prisons must be structured in such a way as to meet the requirements of the treatment of the inmates, considering the needs of each individual case.

2. Prisons must also, as far as possible, be structured in such a way as to facilitate the distribution of inmates in small groups for purposes of treatment.

Article 177
Facilities for work and training

1. Prisons should be equipped with workshops and farms as necessary for the work of inmates, as well as facilities for their training and occupation in ergotherapic activities.

2. Workshops, farms and other facilities mentioned in § 1 should have conditions similar to those outside the prison; legal provisions concerning the protection of workers and the prevention of accidents apply in such facilities.

3. Training and occupation in ergotherapic activities may be carried out in adequate premises of private enterprises.

4. The technical supervision of workshops and other premises of private enterprises may be given to members of such enterprises.

Article 178
Room and other premises

1. Whenever possible and except where otherwise advisable, inmates should have individual rooms.

2. In cases where dormitories are used, only inmates who meet the necessary requirements may be placed therein.

3. Rooms, dormitories, social rooms, places for receiving visitors and other premises should meet the necessary requirements, in particular with respect to light, ventilation, volume and furniture.

4. Light, natural or artificial, must allow in proper conditions for working and reading.

Article 179
Countenance

1. Countenance of prisons should not be in excess of 400 to 500 inmates.
2. The minimum countenance of regional prisons is 25 inmates.
3. The countenance of each prison is fixed by the supervision services of the "Direcção-Geral dos Serviços Prisionais".
4. In fixing the countenance of each prison account must be taken of the necessary conditions for a proper internment, in particular with respect to facilities for work, training, worship, occupation of free time, sport, visits, ergotherapic activities, education and specialised assistance.

N.B: Any change in the physical structures of the prison or in the distribution or earmarking of spaces in prison by the prison director depends on previous authorisation from the Director General (see Circular N° 1/GDG/99, of 29 January).

Article 180
Prohibition of overcrowding

The countenance of prisons and its different premises may only be exceeded on a temporary bases upon the consent of the supervising services of the "Direcção-Geral dos Serviços Prisionais".

CHAPTER V

Prison departments, administration and bodies

Article 181
Departments

1. Prisons with administrative autonomy include technical and administrative services.
2. Prisons without administrative autonomy include such services as deemed necessary.
3. Clerical services of regional prisons may be taken care of by the clerk of the court.

Article 182
Administration

1. Each prison has a director who has the duty to comply with the laws and rules as well as the instructions received from the "Direcção-Geral dos Serviços Prisionais", bridging gaps as necessary.

2. Directors of regional prisons, where they are not public prosecutors, are appointed following a competition open to the staff of the "Direcção-Geral dos Serviços Prisionais", by the Director General.

Article 183
Powers of directors of central and special prisons

1. Directors of central prisons and special prisons are in charge of the orientation and the co-ordination of the prison services, in particular the security services, the assistance services and those concerning the work and training of the inmates.

2. Directors of central prisons and special prisons are empowered in particular to:

a) Represent the prison;
b) Preside over the technical councils other that those convened under the provisions of Article 23 § 5 of Decree-Law 783/76, of 29 October;
c) Preside over the administrative council;
d) Assign the staff to the different services;
e) Give such instructions as he deems necessary;
f) Exercise the disciplinary power over staff, according to the law;
g) Apply disciplinary measures to inmates, according to the law.

Article 184
Powers of directors of regional prisons

1. Directors of regional prisons are in charge of the orientation and the co-ordination of the prison services and activities, within the scope of the powers conferred upon them by the organic law of the prison services.

2. Directors of regional prisons are empowered in particular to:

a) Represent the prison;
b) Preside over the technical councils other that those convened under the provisions of Article 23 § 5 of Decree-Law 783/76, of 29 October;

c) Give such instructions as he deems necessary;
d) Exercise the disciplinary power over staff, as delegated upon him;
e) Apply disciplinary measures to inmates, according to the law.

Article 185
Internal rules

1. Prison directors must prepare internal rules for approval by the "Direcção-Geral dos Serviços Prisionais" and adoption by the Ministry of Justice.
2. Internal rules must include rules on:

a) Opening and closing times of the prison;
b) Timetable for visitors;
c) Timetable for work;
d) Timetable for meals;
e) Free time and rest time;
f) Periods and special requirements for mail and telephone;
g) Periods and special requirements for access to bathing facilities and barber facilities;
h) Cases in which inmates may be authorised to use their own clothes and indication of which clothes they may wear;
i) Foodstuffs and objects that inmates may have and receive, as well as quantities thereof;
j) Requirement concerning foodstuffs received from outside the prison, their reception, inspection and handing out;
l) Number and periodicity of parcels received from outside the prison;
m) Cases in which ordinary searches must be performed and their periodicity;
n) Requirements concerning the use of radio and television sets;
o) Requirements concerning bill-posting;
p) Authorised games.

3. Internal rules may provide different rules on the same subject for different sections of the prison.
4. The internal rules must be kept in the prison library or in any other place accessible to all inmates.
5. At the time of arrival, inmates must be given a summary of the internal rules indicating the place where the full rules can be found; the summary must be returned at the time of release.

6. The provisions of § 5 must be adequately compensated where the inmate cannot read or does not know how to read.

Article 186
Membership of the technical council

1. The technical council is made up of the prison director, who presides, and five members of the staff appointed by the Minister of Justice upon a proposal by the Director General of the "Direcção-Geral dos Serviços Prisionais", after the prison director having been heard.

2. In principle the technical council should include representatives of the main services of the prison.

3. When the Minister of Justice deems fit, the technical council may be made up by the prison director and three members of the staff.

4. The provisions of §§ 1 to 3 do not prevent any member of the staff especially knowledgeable of the matters under discussion from being called to participate in the meeting.

5. Members of the technical council other than the prison director are appointed for a term of two years; they may be re-appointed.

Article 187
Powers of the technical council

The technical council has special powers to:

a) Give an opinion on treatment programmes, including individual re-adaptation plans;
b) Assess the results of treatment, including individual re-adaptation plans, suggesting changes if and when necessary;
c) Give an opinion on whether or not to suggest to courts any change in prison situations;
d) Give an opinion on the application to inmates of disciplinary measures, when the law so requires and when the prison director deems it fit;
e) Give an opinion on matters submitted to it, where such matters may only be decided by the judge of the court of execution of sentences; also in the cases in which it is convened according to the provisions of Article 23, § 5, of Decree-Law 783/76, of 29 October;

f) Decide upon the requests made by inmates, as mentioned in Article 23, § 2, of Decree-Law 783/76, of 29 October.

Article 188
Membership of the administrative council

1. The administrative council is made up of the prison director, who presides, and the head of the clerk's office and the head of the steward's office.

2. The treasurer may participate in the meetings of the administrative council when convened by the prison director, without however the right to vote.

3. Members of the administrative council are replaced in their absence by the persons who legally exercise their respective functions.

Article 189
Powers of the administrative council

The administrative council has special powers to:

a) Examine the accounts, ask for the necessary funds and decide on payments;
b) Supervise entries of money and check the amounts in cash;
c) Examine the documents supporting expenses with a view to their approval;
d) Decide on the prices of the goods produced in prison and on the advisability of selling them;
e) Administrate the canteen and suggest the approval of its rules;
f) Prepare the draft budget and submit accounts in accordance with the law.

Article 190
Powers of the director against the vote of the administrative council

1. Exceptionally, the prison director may, under his responsibility decide against the vote of the administrative council on any small expense or any expense that he deems urgent.

2. When the decisions mentioned in § 1 are not ratified at the next meeting of the administrative council, the "Direcção-Geral dos Serviços Prisionais" is informed; if the latter cannot decide, the matter is submitted to the Minister of Justice or, if appropriate, to the Minister of Finances.

Article 191
Staff meetings

Staff meetings under the chairmanship of the prison director, aimed at examining matters of a general interest, should be promoted as often as the prison director deems fit.

Article 192
Moral and spiritual assistance

1. Moral and spiritual assistance to inmates belongs mainly to specialised members of the staff in co-operation with the other prison staff.

2. Religious assistance to inmates as well as religious ceremonies are carried out by ministers of the different religions, in contact with the prison, as necessary having into consideration the number of inmates of each confession.

3. When the number of inmates of a given confession is so small that the provisions of § 2 cannot apply, ministers of that confession may be invited in to prison.

4. For the celebration of catholic ceremonies, a number of catholic ministers should be effected to each prison, without prejudicing the provisions of § 2 above.

5. For the purposes of § 4, each prison should, as far as possible, be equipped with a chapel.

6. For celebrating ceremonies of religions other than the catholic religion or where no chapel is available, the "Direcção-Geral dos Serviços Prisionais" should, as far as possible, affect premises as necessary to that end.

7. The minister of each of the religions linked to the prison may organise in the prison library a section with books and texts of that religion, provided there is no prejudice for the functioning of the library or for the order and security of the prison.

8. The ministers of the different religions as mentioned in this Article are submitted to the instructions of the prison director in all matters that do not pertain to their spiritual activity.

Article 193
Health assistance

1. Medical assistance in prison is ensured by one or more doctors.

2. The "Direcção-Geral dos Serviços Prisionais" must be staffed with nurses, paramedical, pharmacists, clinical annalists, as necessary for the smooth running of the services in charge of assisting the health of inmates.

CHAPTER VI

Staff

Article 194
Prison staff

1. Prison staff are the warrant of the achievement of the goals of prison.

2. Prison staff must abide to the principle according to which the social rehabilitation of the inmates constitutes their main task and that task is one of the highest social relevance.

3. Each prison must have, depending on its aims, of technical, administrative and ancillary staff as necessary for it to work properly, in particular with respect to education, training, health and security.

4. Social assistance in criminal matters will be regulated in special law.

5. The scales, appointment requirements and tasks of prison staff are such as described in this law, in the organic law of the Ministry of Justice and rules relating thereto.

Article 195
Temporary staff

The Ministry of Justice may authorise, after having heard the Ministry of Finances, the recruitment on a temporary basis of technical, administrative and ancillary staff in order to cope with occasional or extraordinary needs.

Article 196
Selection and preparation of staff

1. The "Direcção-Geral dos Serviços Prisionais" should promote the selection and training of staff for the exercise of their own specific functions; such training should be brought up to date in harmony with the development of knowledge and new techniques.

2. Education is achieved through courses, study visits, conferences and other means, as necessary.

3. The courses mentioned in § 2 are given having into account the category and training of the staff concerned.

Article 197
Assignment of staff

Prison staff are assigned by the Director General of the "Direcção-Geral dos Serviços Prisionais", having into account the needs of the services and the categories and training of the staff concerned.

Article 198
Duty to co-operate

1. Staff in charge of the execution of measures involving deprivation of liberty are under a duty to co-operate and contribute to achieving the purposes of such measures.

2. The rules on social assistance in criminal matters shall otherwise apply.

3. The authority responsible for the execution of measures involving deprivation of liberty must co-operate with the persons and the associations that might have a positive influence in the social rehabilitation of the inmate.

PART XVII

Advisers

Article 199
Council of advisers

1. Councils of advisers may be set up in prisons; they are made up of persons outside the prison who share a common feeling of solidarity.

2. Members of the councils of advisers co-operate in developing the execution of sentences and in assisting the inmates.

3. Advisers co-operate with prison directors by making proposals; they might also assist inmates in their social rehabilitation after release.

4. Members of the councils of advisers must keep in confidence all the confidential information that they get, in particular the name and personality of inmates.

5. The setting up of the councils of advisers is subject to approval by the Director General of the "Direcção-Geral dos Serviços Prisionais", under the proposal of the prison director.

PART XVIII

Criminal investigation and execution of the sentence

Article 200
Criminal investigation and execution of the sentence

Institutes of criminology, in co-operation with the investigation services linked to the execution of measures involving deprivation of liberty, are

empowered to develop in a scientific way the data obtained and apply the results in the administration of prison justice.

PART XIX

Special rules

CHAPTER I

Special rules concerning the internment in detention centres of young adults

Article 201
General principles

1. The execution of sentences in detention centres for liable adults aged 25 or less must develop their sense of social rehabilitation and make them aware of their responsibility for the offences committed.

2. The execution of sentences in detention centres, once order and security are ensured, should aim at education, physical exercises and rational use of free time, under the supervision of specialised assistance.

3. Where the offence originates on insufficient professional training, the execution should have as its main aim to achieve such training; accelerated procedures to that end should be used as far as possible.

4. Flexibility as necessary for the re-education with a view to future social rehabilitation, applies to liable adults aged 25 or less.

5. Placement in detention centres must in no case hinder the professional training or the work of the inmate.

6. The reactions mentioned in this Article must not produce any ancillary effect linked to prison.

Article 202
Assistance after release

When the sentence that orders placement in a detention centre follows an offence which is linked to a jobless situation, assistance after release must predominantly aim at finding a public or private job.

CHAPTER II

Special rules concerning women

Article 203
Assistance in maternity

1. Pregnant inmates and inmates having recently given birth are entitled to medical assistance adapted to their situation.

2. The general rules on the protection of working mothers, in particular the rules concerning the nature and the duration of work, shall apply to the inmates mentioned in § 1.

3. As far as possible measures should be taken to ensure that inmates give birth in a non-prison hospital.

4. During delivery, the inmate should be assisted by a midwife or if necessary by a doctor.

Article 204
Pharmaceutical assistance

Pregnant inmates, inmates having recently given birth and inmates who suffered abortion or miscarriage should be provided with all necessary pharmaceutical and other care.

Article 205
Register of birth

The communication of a birth for purposes of public register must not mention that the birth occurred in prison, must not mention the link between the person who communicates and the prison and must not mention the fact that the mother is a prisoner.

Article 206
Women inmates with children

1. Women inmates' children aged 3 or less may remain in prison with their mother if such is in the advantage of the child and if such is authorised by the person entitled to fix the place of residence of the child.

2. Women inmates should be encouraged and, where necessary, taught to take care of their children, especially during the first year of life; in all cases

they shall be allowed to be with their children every day, for the time and under the conditions set out in the internal rules.

CHAPTER III

Special rules concerning foreign inmates

Article 207
Main principals

1. The authority in charge of execution should take measures as necessary in order to avoid that foreign inmates suffer any discriminatory treatment either from the staff or from the other inmates.

2. In order to avoid the social isolation of foreign inmates, family ties as well as contacts with consulates should be promoted; the participation of voluntary organisations and persons who have the same nationality as the foreign inmates in the organisation of activities that contribute to keep the latter close to their culture of origin should also be promoted.

3. The religious and cultural needs of foreign inmates should be safeguarded, in particular by making it possible for a minister of their religion to visit them, by providing them with adequate food and by provided them with one publication likely to established a link with their structures of origin.

N.B: Special procedures are laid down for the transfer of foreign inmates to their countries of origin. The request for transfer should be forwarded to the public prosecutor attached to the court that sentenced the person. The re-education services are under a duty to divulge the text of the Convention on the Transfer of Sentenced Persons (see Circular N° 1/94-DCSDEPMS of 21 June and Circular N° 39/93-DCSDEPMS-2, of 27 August). The text of that convention was made public in Circular-letter N°10/94/DEP, of 6 July.

N.B: See Circular N° 27/88/DCSDEPMS-19, of 12 September, as well as Circular N° 23/86/DCSDEPMS-16, of 30 October, as well as notes to Article 38.

N.B: At the time of admission, foreign inmates must be informed that they are entitled, either to ask the prison director to communicate without delay the fact to the consular officials, or to communicate themselves. Visits by con-

sular officials do not require previous authorisation by a higher authority; the prison director should inform the consular authorities about the conditions under which they may visit inmates. (see Circular Nº 6/83/DCSDEPMS-4, of 22 February).

Article 208
Access to means that facilitate the communication

1. Difficulties arising from the fact that foreign inmates may ignore the Portuguese language should, as far as possible, be softened by way of facilitating the translation of documents or the use of an interpreter, so that the inmates may get aquainted with the rights and duties that result from their penal and penitentiary situation.

2. When possible and justified Portuguese language courses for foreign inmates will be organised.

CHAPTER IV
Special rules concerning remand in custody

Article 209
General principle

1. Remand prisoners must benefit from the presumption of innocence and be treated accordingly.

2. Remand in custody must be executed in such a way as to exclude any restriction of liberty that is not strictly indispensable to the aims for remand, to ensure discipline, security and order in prison.

Article 210
Regime

1. The normal regime for remand prisoners is to live in common with small groups of other detainees during the day and being isolated during the night.

2. The provisions of § 1 do not apply to detainees:

a) incommunicado, according to the law;
b) who expressly so request to the prison director, in writing;

c) Who show that they are not adapted to the normal regime or who are presumed to be especially dangerous because of the facts that caused their detention or because of their criminal record;
d) Whose physical or mental condition do not allow.

3. Where the regime mentioned in sub-paragraphs c) and d) of § 2 applies, the grounds for that should be re-examined by the prison director every month.

4. The request mentioned in sub-paragraph b) of § 2 may at any time be withdrawn.

5. In the cases mentioned in § 2, the detainee may be placed in a prison of a different category, subject to the authorisation of the Director General of the "Direcção-Geral dos Serviços Prisionais"; remand regime should however remain as well as if possible, separation from other categories of inmates.

Article 211
Incommunicability

1. Remand prisoners, upon a decision of the competent authority in conformity with the provisions of the Code of Criminal Procedure, may be subjected to:

a) The regime of total incommunication;
b) The regime of restricted incommunication where communication with certain persons only is forbidden.

2. When any prisoner is placed in a regime of incommunication, the competent authority must issue the warrant in writing and, in case of restricted incommunication, mentioning explicitly the limitations attached.

3. The provisions of §§ 1 and 2 do not prevent the application of the provisions of Article 6, § 3, and Article 107; neither do they prevent the detainee to communicate to the prison director, the doctor, the religious assistant, members of the staff authorised by the prison director and any other persons who under the law are entitled personally to communicate with him.

4. When isolation seriously harms the detainee, in particular his physical or mental health, the prison director, having heard the doctor, will report the case to the authority that issued the warrant; the latter will take responsibility of the consequences should it not authorised the measures proposed by the director.

5. The provisions of § 3 impose upon the staff concerned an obligation of secrecy.

Article 212
Visits

If possible, remand prisoners may receive visitors every day, in accordance with the internal rules.

Article 213
Clothes

Remand prisoners may use their own clothes provided that they bear the expenses.

Article 214
Food

Remand prisoners may receive food, at their own expenses, from the outside the prison.

Article 215
Work

1. Remand prisoners may not be obliged to work
2. Remand prisoners may, at their request, be authorised to work, to follow education and training courses, or other courses and to participate in other activities organised in prison, cultural, recreational, sportive.
3. The provisions of § 1 do not free the detainees from the obligation to clean and tidy up their room and general obligation of up-keeping the prison, without prejudice to the provisions of Article 64 § 2.

Article 216
Young adults

1. Young liable adults aged 25 or less remanded in prison should be placed in prisons or sections of prisons for young people.
2. Remand prison of young liable adults age 25 or less bears a predominantly educational aim.

Article 216 - A

The rules on the execution of sentences involving deprivation of liberty shall also apply to remand in prison, unless otherwise provided in the law.

PART XX

Execution of security measures involving deprivation of liberty

Article 217
Aim of the internment

Intemment resulting from the application of a security measure aims at defending the society and should be directed towards re-integrating the inmate into free life.

Article 218
Application of other rules

The rules on the execution of sentences involving deprivation of liberty shall also apply to intemment resulting from the application of a security measure, to the extent that nothing prevents it.

Article 219
Conditions in prison

The conditions in prisons with respect to the execution of security measures, in particular conceming individual rules and special assistance measures, should as far as possible aim at sheltering the inmate from damages inherent to long deprivation of liberty.

Article 220
Clothes

Inmates may use their own clothes, including underwear, as well as their own bed linen, provided they bear the expenses.

Article 221
Preparation for release

With a view to preparing release, the execution of security measures may be made more flexible, in particular by granting leave in accordance with the provisions of Articles 49 *et seq.*

Article 222
Security measures in prisons for women

The application of security measures to women may take place in prisons for the execution by women of sentences involving deprivation of liberty, provided that such prisons meet the necessary requirements, in particular with respect to security.

PART XXI

Final and transitional provisions

Article 223
Social assistance

A separate act concerning specialised social assistance in criminal matters must be published before the entry into force of this law.

Article 224
Decrees, regulations and instructions

The Minister of Justice, after having heard the "Direcção-Geral dos Serviços Prisionais", will issue such decrees, regulations and instructions as are necessary for the clarification and implementation of this law.

Article 225
Legal norms in force

The rules presently in force that are not contrary to the provisions, the spirit and the aims of this law, shall remain applicable.

Article 226
Public participation

For a period of three months as from the date of their publication, the rules of this law will be subject to public scrutiny with a view to their modification, if appropriate.

Article 227
Entry into force

This law shall enter into force on 1 January 1980.

COOPÉRATION JUDICIAIRE INTERNATIONALE EN MATIÈRE PÉNALE

(Loi N° 144/99, du 31 août)

Loi N° 144/99 du 31 août

Approuve la loi de la coopération judiciaire internationale en matière pénale *

Conformément à l'alinéa *c)* de l'article 161 de la Constitution, l'Assemblée de la République décrète, afin de valoir en tant que loi générale de la République, ce qui suit:

TITRE I

Dispositions générales

CHAPITRE I

Objet, champ d'application et principes généraux de la coopération judiciaire internationale en matière pénale

Article 1cr
Objet

1. Le présent texte s'applique aux suivantes formes de coopération judiciaire internationale en matière pénale:

a) Extradition;
b) Transmission de procédures pénales;

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* Traduction par Maria Celeste Raimundo.

c) Exécution de jugements pénaux;
d) Transfèrement des personnes condamnées à des peines et mesures de sûreté privatives de liberté;
e) Surveillance des personnes condamnées ou libérées sous condition;
f) Entraide judiciaire en matière pénale.

2. Les dispositions du paragraphe précédent, dûment adaptées, s'appliquent à la coopération entre le Portugal et les entités judiciaires internationales établies dans le cadre des traités ou des conventions auxquels l'Etat portugais est lié.

3. Le présent texte est subsidiairement applicable à la coopération concernant les infractions de nature pénale, durant la phase procédurale qui se déroule devant les autorités administratives, ainsi que les infractions de nature administrative [1] dont les procédures sont susceptibles de recours judiciaire.

Article 2
Domaine de la coopération

1. L'application du présent texte est subordonnée à la protection des intérêts de la souveraineté, de la sécurité, de l'ordre public et d'autres intérêts de la République portugaise définis constitutionnellement.

2. Le présent texte ne confère pas le droit d'exiger n'importe quelle forme de coopération internationale en matière pénale.

Article 3
Prééminence des traités, conventions et accords internationaux

1. Les formes de coopération mentionnées à l'article 1[er] sont régies par les normes des traités, des conventions et des accords internationaux auxquels l'Etat portugais est lié et, à leur défaut ou insuffisance, par les dispositions du présent décret-loi.

2. Sont applicables, subsidiairement, les dispositions du Code de procédure pénale.

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[1] En portugais: *ilícito de mera ordenação social".*

Article 4
Principe de la réciprocité

1. La coopération internationale en matière pénale réglée par le présent texte relève du principe de la réciprocité.

2. Le ministère de la Justice peut demander une garantie de réciprocité si les circonstances l'exigent, de même qu'il peut donner cette garantie à d'autres Etats dans les limites du présent texte.

3. Le défaut de réciprocité ne fait pas obstacle à ce qu'il soit donné suite à une demande de coopération, si cette coopération:

a) Se révèle nécessaire en raison de la nature du fait ou du besoin de lutter contre certaines formes graves de criminalité;
b) Peut contribuer à l'amélioration de la situation de l'inculpé ou à sa réinsertion sociale;
c) Peut servir à éclairer certains faits imputés à un citoyen portugais.

Article 5
Définitions

Aux fins du présent texte, est considéré comme:

a) "Suspect" toute personne contre laquelle pèsent des indices d'avoir commis une infraction pénale ou d'y avoir participé;
b) "Inculpé" toute personne qui fait l'objet d'une poursuite ou d'une accusation ou bien d'une demande d'instruction;
c) "Condamné" toute personne qui, suite à un jugement, a fait l'objet d'une réaction criminelle ou qui a fait l'objet d'une décision judiciaire constatant sa culpabilité bien que celle-ci suspende conditionnellement le prononcé de la peine ou emporte une sanction criminelle privative de liberté dont l'exécution a été suspendue, en tout ou en partie, soit au moment de la condamnation soit à un moment ultérieur, ou remplacée par une mesure non privative de liberté;
d) "Réaction criminelle" toute peine ou mesure de sûreté privatives de liberté, toute peine pécuniaire ou autre sanction non privative de liberté, y compris les sanctions accessoires.

Article 6
Conditions générales contraires à la coopération internationale

1. La demande de coopération est refusée:

a) Lorsque la procédure ne remplit pas ou n'observe pas les conditions de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, du 4 novembre 1950, ou de tout autre instrument international pertinent en la matière, ratifié par le Portugal;

b) Lorsqu'il y a de sérieuses raisons de croire que la coopération est demandée aux fins de poursuivre ou punir une personne en raison de la race, de la religion, du sexe, de la nationalité, de la langue, des opinions politiques ou idéologiques ou de l'appartenance à un groupe social déterminé;

c) Lorsque la situation de cette personne risque d'être aggravée pour l'une ou l'autre des raisons énoncées à l'alinéa précédent;

d) Lorsqu'elle peut mener à un jugement par un tribunal d'exception ou se rapporte à l'exécution d'un jugement rendu par un tribunal de cette nature;

e) Lorsque le fait auquel elle se rapporte est punissable de la peine de mort ou autre peine susceptible d'entraîner toute lésion irréversible de l'intégrité de la personne;

f) Lorsqu'elle se rapporte à une infraction à laquelle correspond une peine d'emprisonnement ou une mesure de sûreté à caractère perpétuel ou de durée indéfinie.

2. Les dispositions des alinéas *e)* et *f)* du paragraphe précédent ne font pas obstacle à la coopération:

a) Si l'Etat qui formule la demande, par acte irrévocable auquel sont liés les tribunaux ou autres entités compétentes pour l'exécution de la peine, a au préalable commué la peine de mort ou autre qui puisse entraîner une lésion irréversible de l'intégrité de la personne ou enlevé à la peine ou mesure de sûreté le caractère perpétuel ou la durée indéfinie;

b) Si, concernant l'extradition pour des crimes auxquels correspond, selon le droit de l'Etat requérant, une peine ou mesure de sûreté privative ou restrictive de la liberté à caractère perpétuel ou de

durée indéfinie, l'Etat requérant garantit qu'une telle peine ou mesure de sûreté ne sera pas appliquée ou exécutée;

c) Si l'Etat qui formule la demande accepte la conversion des mêmes peines ou mesures par un tribunal portugais selon les dispositions de la loi portugaise applicables au crime ayant motivé la condamnation; ou

d) Si la demande concerne l'entraide prévue à l'alinéa *f)* du paragraphe 1 de l'article 1er, fondée sur l'importance de l'acte aux fins d'une éventuelle non application de ces peines ou mesures.

3. Aux fins de l'appréciation de la suffisance des garanties mentionnées à l'alinéa *b)* du paragraphe précédent, la possibilité de non application de la peine, de réappréciation de la situation de la personne réclamée et de la concession de la liberté conditionnelle ainsi que la possibilité de grâce, d'amnistie, de commutation de la peine ou mesure similaire prévues par la législation de l'Etat requérant doivent être notamment prises en compte conformément à la législation et à la pratique de l'Etat requérant.

4. Lorsque n'est pas garantie la réciprocité de la demande de coopération est toujours refusée, sauf les dispositions du paragraphe 3 de l'article 4.

5. Lorsque l'extradition est niée sur la base des alinéas *d), e)* et *f)* du paragraphe 1, est appliqué le mécanisme de coopération prévu au paragraphe 5 de l'article 32.

Article 7
Refus en raison de la nature de l'infraction

1. La demande est aussi refusée lorsque la procédure se rapporte à un fait qui constitue:

a) Une infraction de nature politique ou une infraction connexe à une infraction politique au regard du droit portugais;

b) Un crime militaire non prévu simultanément dans la loi pénale commune.

2. Ne sont pas considérées comme des infractions de nature politique:

a) Le génocide, les crimes contre l'humanité, les crimes de guerre et les infractions graves d'après les Conventions de Genève de 1949;

b) Les infractions mentionnées à l'article 1er de la Convention européenne pour la répression du terrorisme, ouverte à la signature le 27 janvier 1977;

c) Les actes mentionnés dans la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée le 17 décembre 1984 par l'Assemblée des Nations unies;

d) Tout autre crime dont la nature politique ait été enlevée par les traités, conventions ou accords internationaux auxquels le Portugal est partie.

Article 8
Extinction de la poursuite pénale

1. La coopération n'est pas admissible si, au Portugal ou dans un autre Etat où des poursuites pénales ont été engagées pour le même fait:

a) La procédure s'est terminée par une décision absolutoire rendue en force de chose jugée ou par une décision de radiation du rôle;

b) La décision condamnatoire a été exécutée ou ne peut être exécutée au regard du droit de l'Etat où elle a été prononcée;

c) La procédure pénale est déjà éteinte par tout autre motif, à moins que celui-ci ne soit prévu par une convention internationale comme ne faisant pas obstacle à la coopération de l'Etat requis.

2. Les dispositions des alinéas *a)* et *b)* du paragraphe précédent ne s'appliquent pas si l'autorité étrangère qui formule la demande la justifie aux fins de révision du jugement et les fondements de celle-ci sont analogues à ceux admis par le droit portugais.

3. Les dispositions de l'alinéa *a)* du paragraphe 1 ne sont pas contraires à la coopération ayant pour fondement la réouverture d'un procès rayé du rôle, conformément à la loi.

Article 9
Concours de cas d'admissibilité et d'inadmissibilité de la coopération

1. Si le fait imputé à la personne qui fait l'objet d'une procédure pénale est prévu dans plusieurs dispositions du droit pénal portugais, la demande de

coopération n'est satisfaite que dans la partie concernant l'infraction ou les infractions par rapport auxquelles la demande est admissible, à condition que l'Etat qui formule la demande donne des assurances qu'il tiendra compte des conditions établies pour la coopération.

2. La coopération est toutefois exclue si le fait est prévu dans plusieurs dispositions du droit pénal portugais ou étranger et si la demande ne peut être satisfaite en vertu d'une disposition légale prévoyant ce fait dans sa globalité et constituant un motif de refus de coopération.

Article 10
Importance réduite de l'infraction

La coopération peut être refusée si l'importance réduite de l'infraction ne la justifie pas.

Article 11
Protection du secret

1. Dans l'exécution d'une demande de coopération internationale adressée au Portugal sont observées les dispositions du Code de procédure pénale et législation complémentaire relatives au refus de témoigner, aux saisies, aux écoutes téléphoniques et aux secrets professionnel ou d'Etat et dans tous les autres cas où le secret est protégé.

2. Les dispositions du paragraphe précédent s'appliquent aux renseignements qui, d'après la demande, sont tenus d'être fournis par des personnes non impliquées dans la procédure pénale étrangère.

Article 12
Droit applicable

1. Au Portugal prend effet:

   a) Tout motif d'interruption ou de suspension de la prescription d'après le droit de l'Etat qui formule la demande;
   b) La plainte déposée en temps utile devant une autorité étrangère, pourvu que cette plainte soit également exigée par le droit portugais.

2. Si une plainte n'est exigée que par le droit portugais, aucune réaction criminelle ne peut être imposée ou exécutée au Portugal si son titulaire s'y oppose.

Article 13
Imputation de la détention

1. La durée de la détention provisoire subie à l'étranger ou de la détention décrétée à l'étranger à la suite d'une des formes de coopération prévues dans le présent texte est prise en compte dans le cadre de la procédure portugaise ou imputée sur la durée de la peine, aux termes du Code pénal, comme si la privation de liberté était intervenue au Portugal.

2. Les informations nécessaires sont fournies afin que la prise en compte de la détention provisoire ou de la peine déjà subies au Portugal soit possible.

Article 14
Indemnité

La loi portugaise s'applique à l'indemnité due pour détention ou emprisonnement illégaux ou injustifiés ou pour d'autres dommages subis par le suspect et par l'inculpé:

a) Au cours d'une poursuite engagée au Portugal pour donner suite à une demande de coopération adressée au Portugal;

b) Au cours d'une poursuite engagée à l'étranger pour donner suite à une demande de coopération formulée par une autorité portugaise.

Article 15
Concours de demandes

1. Si la demande de coopération internationale est formulée par plusieurs Etats, portant sur un même fait ou sur des faits différents, elle sera accordée en faveur de l'Etat qui, compte tenu des circonstances du cas d'espèce, soit en mesure de mieux assurer les intérêts de la justice et de la réinsertion sociale du suspect, de l'inculpé ou du condamné.

2. Les dispositions du paragraphe précédent:

a) Cèdent devant la règle de prééminence de la juridiction internationale, dans les cas mentionnés au paragraphe 2 de l'article 1[er].

b) Ne s'appliquent pas à la forme de coopération mentionnée à l'alinéa *f)* du paragraphe 1 de l'article 1er.

Article 16
Règle de la spécialité

1. La personne qui, suite à un acte de coopération, comparaît au Portugal afin d'intervenir dans une procédure pénale comme suspect, inculpé ou condamné, ne peut être ni poursuivie, ni jugée, ni détenue, ni soumise à aucune autre restriction de sa liberté pour un fait antérieur à sa présence sur le territoire national autre que celui ayant motivé la demande de coopération formulée par une autorité portugaise.

2. La personne qui, aux termes du paragraphe précédent, comparaît devant une autorité étrangère, ne peut être ni poursuivie, ni détenue, ni jugée, ni soumise à aucune autre restriction de sa liberté pour un fait ou condamnation antérieurs à son départ du territoire portugais autres que ceux figurant sur la demande de coopération.

3. Avant l'autorisation pour le transfèrement mentionné au paragraphe précédent, l'Etat qui formule la demande doit donner des assurances suffisantes qu'il observera la règle de la spécialité.

4. L'immunité prévue par le présent article cesse lorsque:

a) La personne en cause, ayant la possibilité de quitter le territoire portugais ou étranger, ne le fait pas dans un délai de 45 jours ou retourne volontairement à l'un de ces territoires;

b) L'Etat qui autorise le transfèrement, après avoir entendu le suspect, l'inculpé ou le condamné, entend déroger à la règle de la spécialité.

5. Les dispositions des paragraphes 1 et 2 ne sont pas contraires à ce que la coopération soit étendue à des faits autres que ceux ayant motivé la demande, moyennant une nouvelle demande présentée et formulée aux termes du présent texte.

6. Dans le cas mentionné au paragraphe précédent, la production du procès-verbal consignant les déclarations de la personne qui bénéficie de la règle de la spécialité est obligatoire.

7. Dans le cas où la demande est présentée à un Etat étranger, le procès-verbal mentionné au paragraphe précédent est dressé devant la Cour d'appel du lieu où réside ou se trouve la personne qui bénéficie de la règle de la spécialité.

Article 17
Cas particuliers de non application de la règle de la spécialité

1. L'immunité prévue aux paragraphes 1 et 2 de l'article précédent cesse également dans les cas où, par un traité, une convention ou un accord international auxquels le Portugal est partie, le bénéfice de la règle de la spécialité n'a pas lieu.

2. Lorsque la cessation de l'immunité découle de la renonciation de la personne qui bénéficie de la règle de la spécialité, cette renonciation doit résulter de la déclaration personnelle prêtée devant le juge, faisant preuve que la personne l'a exprimé volontairement et en toute conscience sur les conséquences de son acte, assistée d'un défenseur commis d'office si elle n'a pas un conseil désigné.

3. Lorsque la personne concernée doit prêter des déclarations au Portugal, à la suite d'une demande présentée au Portugal ou formulée par une autorité portugaise, les déclarations sont prêtées devant la Cour d'appel du ressort de la résidence ou du lieu où se trouve ladite personne.

4. Sous réserve des dispositions du paragraphe précédent, la renonciation de la personne qui comparaît au Portugal suite à un acte de coopération sollicité par l'autorité portugaise, est versée au procès où il doit prendre effet, lorsque les autorités portugaises, après la remise de la personne, auront entre-temps pris connaissance des faits que celle-ci aura pratiqués avant ladite remise.

Article 18
Refus facultatif de la coopération internationale

1. La coopération peut être refusée lorsque le fait qui la motive est l'objet d'une procédure pendante ou lorsque ce fait doit ou peut faire également l'objet d'une poursuite de la compétence d'une autorité judiciaire portugaise.

2. La coopération peut également être refusée lorsque, compte tenu des circonstances du fait, l'acceptation de la demande est susceptible d'entraîner de graves conséquences pour la personne visée en raison de son âge, de son état de santé ou de tout autre motif de caractère personnel.

Article 19
Non bis in idem

Dès qu'une demande de coopération emportant délégation de la poursuite à une autorité judiciaire étrangère est acceptée, il ne peut être engagé ou se

poursuivre au Portugal aucune autre procédure pour le même fait qui ait motivé cette demande ni mis à exécution le jugement dont l'exécution ait été déléguée à une autorité judiciaire étrangère.

CHAPITRE II

Dispositions générales de la procédure de coopération

Article 20
Langue applicable

1. La demande de coopération est accompagnée d'une traduction dans la langue officielle de l'Etat auquel elle est adressée, sauf convention ou accord contraire ou si cet Etat y renonce.

2. Les dispositions du paragraphe précédent s'appliquent à la demande de coopération adressée à l'Etat portugais.

3. Les décisions d'admissibilité ou de refus d'une demande de coopération sont notifiées à l'autorité de l'Etat qui l'a formulée et accompagnées d'une traduction dans la langue officielle respective, sauf dans les cas prévus à la fin du paragraphe 1.

4. Les dispositions du présent article s'appliquent aux documents qui accompagnent la demande.

Article 21
Déroulement de la demande

1. L'Office du Procureur Général de la République (*Procuradoria-Geral da República*) est désigné en tant qu'Autorité centrale aux fins de réception et de transmission des demandes de coopération couvertes par le présent texte ainsi que pour toute communication concernant ces demandes.

2. Le Procureur Général de la République transmet au Ministre de la Justice la demande de coopération adressée au Portugal en vue d'une décision sur sa recevabilité.

3. La demande de coopération formulée par une autorité portugaise est transmise au Ministre de la Justice par le Procureur Général de la République.

4. Les dispositions du paragraphe 1 ne font pas obstacle aux contacts directs concernant les demandes de coopération mentionnées à l'alinéa f) du paragraphe 1 de l'article 1er.

Article 22
Formes de transmission de la demande

1. Pour la transmission des demandes, moyennant accord entre l'Etat requérant et l'Etat requis, les moyens télématiques adéquats, notamment la télécopie, peuvent être utilisés lorsqu'ils sont disponibles et à condition que l'authenticité et la confidentialité de la demande ainsi que la fiabilité des données transmises soient garanties.

2. Les dispositions du paragraphe précédent ne font pas obstacle à ce que l'on ait recours aux voies urgentes prévues par le paragraphe 2 de l'article 29.

Article 23
Conditions de la demande

1. La demande de coopération doit indiquer:

a) L'autorité dont elle émane et l'autorité à laquelle elle est adressée, cette indication pouvant être faite en des termes généraux;
b) L'objet et les motifs de la demande;
c) La qualification juridique des faits qui motivent la poursuite;
d) L'identité du suspect, de l'inculpé ou du condamné, de la personne qui fait l'objet d'une demande d'extradition ou de transfèrement ainsi que du témoin ou de l'expert tenu de prêter des déclarations;
e) Un exposé des faits, y compris le lieu et le temps de leur pratique, proportionnel à l'importance de l'acte de coopération qui est demandé;
f) Le texte des dispositions légales applicables dans l'Etat qui formule la demande;
g) Tout autre document concernant le fait.

2. Ces documents sont dispensés de toutes formalités de légalisation.

3. L'autorité compétente peut exiger qu'une demande formellement irrégulière ou incomplète soit modifiée ou complétée, sans préjudice de l'adoption de mesures provisoires lorsque celles-ci ne peuvent attendre la régularisation.

4. La condition mentionnée à l'alinéa *f)* du paragraphe 1 peut être dispensée lorsqu'il s'agit de la forme de coopération prévue à l'alinéa *f)* du paragraphe 1 de l'article 1er.

Article 24
Décision sur la recevabilité

1. La décision du Ministre de la Justice déclarant la demande recevable ne lie pas l'autorité judiciaire.

2. La décision qui déclare la demande de coopération internationale irrecevable est motivée et n'admet pas de recours.

3. La décision mentionnée au paragraphe précédent rejetant la demande de coopération est communiquée par l'Autorité centrale à l'autorité nationale ou étrangère qui l'a formulée.

Article 25
Compétence interne en matière de coopération internationale

1. La compétence des autorités portugaises pour formuler une demande de coopération ou pour exécuter une demande adressée au Portugal est déterminée par les dispositions des titres suivants.

2. Le Code de procédure pénale et la législation complémentaire respective, ainsi que la législation concernant les infractions de nature administrative [2], sont subsidiairement applicables.

Article 26
Frais

1. L'exécution d'une demande de coopération est, en règle générale, gratuite.

2. Sont, toutefois, à la charge de l'Etat ou de l'entité judiciaire internationale qui formule la demande:

a) Les indemnités et rémunérations des témoins et des experts, ainsi que les frais de voyage et de séjour;

b) Les dépenses occasionnées par l'envoi ou la remise de choses;

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[2] *Op. cit.*

c) Les dépenses occasionnées par le transfèrement de personnes vers le territoire de l'Etat requérant ou vers le siège de l'entité judiciaire internationale;

d) Les dépenses occasionnées par le transit d'une personne du territoire d'un Etat étranger ou du siège de l'entité judiciaire internationale vers un Etat tiers ou vers le siège de cette entité-là;

e) Les dépenses occasionnées par le recours à la téléconférence en exécution d'une demande de coopération;

f) Autres dépenses considérées comme pertinentes par l'Etat requis en fonction des moyens humains et technologiques utilisés pour l'accomplissement de la demande.

3. Aux fins de l'alinéa a) du paragraphe précédent, il peut être octroyé une avance au témoin ou à l'expert, laquelle sera mentionnée sur la notification et remboursée dès que la démarche sera terminée.

4. Par accord entre l'Etat portugais et l'Etat étranger ou l'entité judiciaire internationale intéressés dans la demande, il peut être dérogé aux dispositions du paragraphe 2.

Article 27
Transfèrement de personnes

1. Le transfèrement des personnes détenues ou condamnées à des peines ou mesures de sûreté privatives de liberté, en exécution des décisions prévues dans le présent texte, est effectué par les services du ministère de la Justice, avec l'accord de l'autorité de l'Etat étranger où se trouve la personne visée ou de l'Etat vers lequel celle-ci doit être transférée, pour ce qui est du moyen de transport, de la date, du lieu et de l'heure de la remise.

2. Le transfèrement a lieu aussitôt que possible après la date de la décision qui l'a déterminé.

3. Les dispositions des paragraphes précédents, dûment adaptées, s'appliquent au transfèrement concernant la demande formulée par une autorité judiciaire internationale.

Article 28
Remise d'objets et valeurs

1. Si la demande de coopération se rapporte à la remise d'objets ou de valeurs, soit exclusivement soit comme complément d'une autre demande,

ceux-ci peuvent être remis lorsqu'ils ne sont pas indispensables à la preuve de faits constitutifs de l'infraction dont le jugement est de la compétence des autorités portugaises.

2. Est réservée la possibilité de remise différée ou sous condition de restitution.

3. Sont réservés les droits des tiers de bonne foi, ainsi que les droits des propriétaires légitimes ou détenteurs et les droits de l'Etat lorsque ces objets et valeurs peuvent revenir en faveur de celui-ci.

4. En cas d'opposition, les objets et valeurs ne seront remis qu'après décision favorable de l'autorité compétente, celle-là passée en force de chose jugée.

5. Pour ce qui est de la demande d'extradition, la remise des choses mentionnées au paragraphe 1 peut être effectuée même s'il n'y a pas lieu à extradition notamment par fugue ou mort de la personne à extrader.

Article 29
Mesures provisoires urgentes

1. En cas d'urgence, les autorités judiciaires étrangères peuvent communiquer avec les autorités judiciaires portugaises, soit directement, soit par l'intermédiaire de l'Organisation internationale de police criminelle - INTERPOL - ou d'organes centraux compétents en matière de coopération policière internationale désignés à cet effet, afin de demander l'adoption d'une mesure provisoire ou la pratique d'un acte n'admettant pas de demeure; cette demande doit être accompagnée d'un exposé des motifs de cette urgence, compte tenu des conditions prévues à l'article 23.

2. Cette demande est transmise soit par la voie postale, électronique ou télégraphique, soit par tout autre moyen laissant une trace écrite ou admis par la loi portugaise.

3. Si les autorités judiciaires portugaises considèrent la demande recevable, elles lui donnent suite sans préjudice de soumettre à la décision du Ministre de la Justice, par l'intermédiaire de l'Autorité centrale, les matières qui, d'après ce texte, dépendent de son appréciation préalable ou, en cas d'impossibilité, sa ratification.

4. Conformément au présent article, lorsque la coopération concerne des autorités portugaises et étrangères de différente nature, la demande est effectuée par l'intermédiaire de l'Autorité centrale.

Article 30
Destination de la demande

1. La décision définitive de l'autorité judiciaire rejetant la demande de coopération est communiquée à l'autorité étrangère qui a formulé la demande, par les voies énoncées à l'article 21.

2. Dès qu'une demande de coopération est acceptée, l'autorité judiciaire envoie, le cas échéant, le dossier respectif à l'autorité étrangère conformément à l'article 160.

TITRE II

Extradition

CHAPITRE I

Extradition passive

SECTION I

Conditions de l'extradition

Article 31
Objectif et fondement de l'extradition

1. L'extradition peut avoir lieu aux fins de poursuite pénale ou d'exécution d'une peine ou mesure de sûreté privatives de liberté pour un crime dont le jugement soit de la compétence des tribunaux de l'Etat requérant.

2. À toutes ces fins, la remise de la personne réclamée n'est admissible que dans le cas d'un crime, même sous la forme de tentative, punissable par la loi portugaise et par la loi de l'Etat requérant d'une peine ou mesure privatives de liberté d'une durée maximale non inférieure à un an.

3. Si la demande d'extradition est motivée par plusieurs faits distincts punis chacun par la loi de l'Etat requérant et par la loi portugaise d'une peine privative de liberté, mais dont certains ne remplissent pas la condition mentionnée au paragraphe précédent, l'extradition peut être également accordée pour ces derniers.

4. Lorsqu'elle est demandée aux fins d'exécution d'une peine ou d'une mesure de sûreté privatives de liberté, l'extradition ne peut être accordée que si la durée de la peine à purger n'est pas inférieur à quatre mois.

5. Les dispositions des paragraphes précédents, dûment adaptées, sont applicables à la coopération impliquant l'extradition ou la remise de personnes aux entités judiciaires internationales mentionnées au paragraphe 2 de l'article 1 de ce texte.

6. Les dispositions du présent article ne font pas obstacle à l'extradition lorsque les limites minimum établis par traité, convention ou accord auxquels le Portugal est partie, sont inférieurs.

Article 32
Cas où l'extradition est exclue

1. En dehors des cas mentionnés aux articles 6 à 8, l'extradition est aussi exclue dans les cas suivants:

a) Lorsque le crime a été commis sur le territoire portugais;
b) Lorsque la personne réclamée a la nationalité portugaise, sauf dispositions contraires au paragraphe suivant.

2. L'extradition de citoyens portugais du territoire national est admissible lorsque:

a) L'extradition de nationaux est établie par traité, convention ou accord auxquels le Portugal est partie;
b) Les faits ont trait à des cas de terrorisme ou de criminalité internationale organisée; et
c) L'ordre juridique de l'Etat requérant consacre la garantie d'un procès juste et équitable.

3. Dans les cas prévus au paragraphe précédent, l'extradition n'a lieu qu'aux fins de poursuite pénale et pourvu que l'Etat requérant assure la remise de la personne extradée au Portugal, pour l'accomplissement de la peine ou mesure à lui appliquer, après révision et confirmation aux termes du droit portugais, à moins que la personne ne s'oppose à la remise moyennant déclaration expresse.

4. Aux fins d'appréciation des garanties mentionnées à l'alinéa c) du §2, il faudra prendre en compte le respect des exigences de la Convention

européenne de sauvegarde des droits de l'homme et des libertés fondamentales et d'autres instruments internationaux essentiels en cette matière ratifiés par le Portugal, ainsi que les conditions de protection contre les situations mentionnées aux alinéas *b)* et *c)* du § 1 de l'article 6.

5. Lorsque l'extradition est refusée à raison des alinéas du paragraphe 1 du présent article ou des alinéas *d), e)* et *f)* du paragraphe 1 de l'article 6, une poursuite pénale est engagée pour les faits qui motivent la demande, les éléments nécessaires ayant été sollicités à l'Etat requérant. Le juge peut prononcer des mesures provisoires qui se révéleraient adéquates.

6. La qualité de national est appréciée lors de la prise de décision sur l'extradition.

7. Des accords spéciaux, dans le cadre d'alliances militaires ou d'autre nature, pourront admettre des crimes militaires comme fondement d'extradition.

Article 33
Crimes commis dans un Etat tiers

Dans le cas de crimes commis sur le territoire d'un Etat autre que l'Etat requérant, l'extradition peut être accordée lorsque la loi portugaise confère compétence à sa juridiction dans des circonstances analogues ou lorsque l'Etat requérant fait preuve que cet Etat ne réclame pas l'auteur de l'infraction.

Article 34
Réextradition

1. L'Etat requérant ne peut réextrader à un Etat tiers la personne qui lui a été remise à la suite d'une demande d'extradition.

2. L'interdiction prévue au paragraphe précédent cesse:

a) Lorsque, aux termes établis pour la demande d'extradition, une autorisation de réextradition est demandée et obtenue, l'extradé ayant été préalablement entendu; ou

b) Lorsque, ayant la possibilité de quitter le territoire de l'Etat requérant, l'extradé y demeure pendant plus de 45 jours ou, ayant quitté ce territoire, y retourne volontairement.

3. Aux fins de l'alinéa *a)* du paragraphe précédent, il peut être demandé l'envoi d'une déclaration de la personne réclamée au sujet de sa réextradition.

4. L'interdiction de la réextradition cesse également dans les cas où, par traité, convention ou accord international auxquels le Portugal est partie, le consentement de l'Etat requis n'est pas nécessaire. Lorsque cet effet résulte du consentement de la personne concernée, les dispositions du paragraphe suivant sont appliquées.

5. Les déclarations de la personne réclamée, qui ont lieu en exécution des paragraphes 3 et 4, sont prêtées devant la Cour d'appel du ressort judiciaire de la résidence ou du lieu où se trouve ladite personne, les formalités prévues à l'article 17 devant être observées pour ce qui est du paragraphe 4.

Article 35
Extradition ajournée

1. L'existence d'une procédure pénale devant les tribunaux portugais contre la personne réclamée ou le fait que celle-ci soit en train de purger une peine privative de liberté à raison d'une infraction autre que celle ayant motivée la demande, n'empêche pas l'extradition.

2. Dans les cas mentionnés au paragraphe précédent, la remise de l'extradé peut être ajournée jusqu'à ce que la procédure ou l'accomplissement de la peine soient terminés.

3. Constitue aussi motif d'ajournement de la remise la constatation, par un expert médecin, d'une maladie pouvant mettre la vie de l'extradé en danger.

Article 36
Remise temporaire

1. Dans le cas prévu au paragraphe 1 de l'article précédent, la personne réclamée peut être remise temporairement pour l'accomplissement d'actes de procédure, tels que le jugement, dont l'Etat requérant fait preuve que l'ajournement entraînerait un grave préjudice, pourvu que cette remise ne nuise pas au déroulement de la procédure en cours au Portugal et que l'Etat requérant s'engage, une fois terminés ces actes, à renvoyer la personne réclamée sans d'autres conditions.

2. Si la personne remise temporairement purgeait une peine, l'exécution de celle-ci est considérée comme suspendue dès la date où cette personne a été remise au représentant de l'Etat requérant jusqu'à ce qu'elle soit restituée aux autorités portugaises.

3. Est, toutefois, imputée sur la peine la durée de détention dont la computation n'ait pas été considérée dans la procédure à l'étranger.

4. Au cas où la remise aurait été ajournée aux termes de l'article précédent, l'autorisation pour la remise temporaire suit en tant qu'incident de la demande d'extradition par la Cour d'appel, exclusivement en vue de l'appréciation des critères énoncés à l'article 1er. La Cour d'appel entend aussi bien le tribunal sous l'autorité duquel se trouve la personne que le Ministre de la Justice.

Article 37
Concours de demandes d'extradition

1. Dans le cas de plusieurs demandes d'extradition concernant la même personne, la décision à laquelle la préférence sera accordée considère:

a) Pour ce qui est des demandes concernant les mêmes faits, le lieu où l'infraction a été consommée ou celui où le fait principal a été pratiqué;

b) Pour ce qui est des demandes concernant des faits différents, la gravité de l'infraction, d'après la loi portugaise; la date de la demande; la nationalité ou le lieu de résidence de la personne à extrader ainsi que d'autres circonstances concrètes, nommément l'existence d'un traité ou la possibilité de réextradition entre les Etats requérants.

2. Sont considérées sans préjudice de la prééminence de la juridiction internationale dans les cas mentionnés au paragraphe 2 de l'article 1er, les dispositions du paragraphe précédent.

3. Les dispositions des paragraphes précédents, dûment adaptées, sont applicables aux fins de maintien de la détention anticipée.

Article 38
Arrestation provisoire

1. En cas d'urgence, et en tant qu'acte préalable à toute demande formelle d'extradition, il peut être demandé l'arrestation provisoire de la personne à extrader.

2. La décision sur l'arrestation et sur le maintien d'une détention est prise conformément à la loi portugaise.

3. La demande doit indiquer l'existence d'un mandat d'arrêt ou d'une décision condamnatoire contre la personne réclamée, contenir un exposé des faits constitutifs de l'infraction, lequel doit préciser la date et le lieu où elle a été commise, et mentionne les dispositions légales applicables ainsi que les données disponibles sur l'identité, la nationalité et la localisation de cette personne.

4. Dans la transmission de la demande, sont observées les dispositions de l'article 29.

5. L'arrestation provisoire prend fin si la demande d'extradition ne parvient pas dans un délai de 18 jours après l'arrestation, ce délai pouvant toutefois être prorogé jusqu'à 40 jours si des raisons valables, invoquées par l'Etat requérant, le justifient.

6. La détention peut être remplacée par d'autres mesures de coercition aux termes prévus dans le Code de procédure pénale.

7. Les dispositions du paragraphe 5 ne s'opposent pas à une nouvelle arrestation et à l'extradition si la demande d'extradition parvient ultérieurement.

8. Il ne peut être donné suite à une demande d'arrestation provisoire que lorsqu'il n'y a aucun doute de la compétence de l'autorité requérante et la demande contient les éléments mentionnés au paragraphe 3.

Article 39
Arrestation non demandée directement

Il est permis aux autorités de police criminelle de procéder à l'arrestation de tout individu qui, d'après informations officielles, nommément de l'INTERPOL, soit recherché par des autorités étrangères compétentes aux fins de poursuite ou d'exécution d'une peine pour des faits qui manifestement justifient l'extradition.

Article 40
Extradition avec le consentement de la personne à extrader

1. Toute personne arrêtée aux fins d'extradition peut déclarer qu'elle accepte d'être remise à l'Etat requérant ou à l'entité judiciaire internationale et qu'elle renonce à la procédure judiciaire d'extradition réglementée aux articles 51 à 62, après avoir été informée de son droit à cette procédure.

2. La déclaration est signée par la personne à extrader et par son défenseur ou conseil.

3. Le juge vérifie si les conditions pour accorder l'extradition sont remplies, entend le déclarant afin de se certifier que sa déclaration résulte de sa libre détermination et, dans le cas affirmatif, homologue cette déclaration en ordonnant qu'il soit remis à l'Etat requérant; il en est dressé procès-verbal.

4. La déclaration homologuée aux termes du paragraphe précédent est irrévocable.

5. L'acte judiciaire d'homologation équivaut, à tous les effets, à la décision finale de la procédure d'extradition.

6. Sauf traité, convention ou accord qui dispense la présentation de la demande d'extradition, l'acte d'homologation a lieu après la décision favorable du Ministre de la Justice donnant suite à la demande, cas où la procédure poursuit aux fins de cette homologation judiciaire.

Article 41
Mesures de coercition non privatives de liberté

En cours d'examen de la procédure et jusqu'à ce que la décision finale soit rendue en force de chose jugée, sont applicables, de façon correspondante, les dispositions du paragraphe 6 de l'article 38.

Article 42
Évasion de l'extradé

L'extradé qui, après avoir été remis à l'Etat requérant ou à l'entité judiciaire internationale, s'évade avant que la poursuite pénale ne soit éteinte ou que la peine n'est purgée et qui retourne ou est trouvé sur le territoire portugais, sera de nouveau arrêté et remis à cet Etat ou à cette entité, moyennant un mandat d'arrêt délivré par l'autorité étrangère compétente, sauf dans le cas où il y aurait eu violation des conditions dans lesquelles l'extradition a été accordée.

Article 43
Transit

1. Le transit, à travers le territoire ou l'espace aérien national, d'une personne qui n'est pas un ressortissant portugais et qui a été extradée d'un Etat étranger vers un autre peut être accordé, pourvu que des motifs d'ordre public

ne s'y opposent pas et qu'il s'agisse d'une infraction de nature à donner lieu à extradition, au regard de la loi portugaise.

2. Si la personne extradée a la nationalité portugaise, le transit n'est accordé que dans les situations où l'extradition serait accordée.

3. Le transit est accordé sur demande de l'Etat intéressé.

4. Dans le cas où un transport aérien serait utilisé et il n'est pas prévu un atterrissage sur le territoire national, il suffira une communication de l'Etat requérant intéressé dans l'extradition.

5. Au cas d'atterrissage non prévu, s'appliquent les dispositions du par. 3.

6. L'extradé en transit est maintenu en détention pendant le temps qu'il demeure sur le territoire portugais.

7. La demande doit identifier l'extradé en transit, contient les éléments mentionnés au paragraphe 3 de l'article 38 avec les adaptations nécessaires et est adressée au Ministre de la Justice par les voies prévues dans le présent texte.

8. La décision sur la demande doit être prise dans le plus bref délai et communiquée immédiatement à l'Etat requérant par la voie qui a été utilisée pour la demande.

9. La décision qui autorise le transit doit préciser les conditions dans lesquelles il aura lieu et indiquer l'autorité qui en est chargée.

SECTION II

Procédure d'extradition

Article 44
Contenu de la demande d'extradition et pièces à l'appui

1. En dehors des éléments mentionnés à l'article 23, la demande d'extradition doit contenir:

a) La preuve que, dans le cas précis, la personne à extrader est soumise à la juridiction pénale de l'Etat requérant;

b) La preuve, en cas d'une infraction commise dans un Etat tiers, que cet Etat ne réclame pas la personne à extrader en raison de cette infraction.

c) La garantie formelle que la personne réclamée ne sera ni extradée vers un Etat tiers, ni détenue aux fins de poursuite pénale ou d'exécution d'une peine ou à toute autre fin, pour un fait autre

que celui ayant motivé la demande et qui lui soit antérieur ou contemporain.

2. La demande d'extradition doit être accompagnée:

a) Du mandat d'arrêt délivré par l'autorité compétente contre la personne réclamée;

b) De l'extrait ou de la copie certifiée conforme de la décision ordonnant l'expédition du mandat d'arrêt, dans le cas d'extradition aux fins de poursuite pénale;

c) De l'extrait ou de la copie certifiée conforme de la décision condamnatoire, dans le cas d'extradition aux fins d'exécution d'une peine, ainsi que d'un document certifiant la peine à purger, si celle-ci ne correspond pas à la durée de la peine imposée dans la décision condamnatoire;

d) D'une copie des textes légaux sur la prescription de la poursuite pénale ou de la peine, selon le cas;

e) D'une déclaration de l'autorité compétente sur les motifs de suspension ou d'interruption du délai de prescription, selon la loi de l'Etat requérant, s'il y a lieu;

f) D'une copie des textes légaux relatifs à la possibilité de recours contre la décision ou d'un nouveau jugement, en cas de condamnation dans une procédure dont l'audience de jugement se soit déroulée en absence de la personne réclamée.

Article 45
Eléments complémentaires

1. Lorsque la demande est incomplète ou n'est pas accompagnée d'éléments suffisants pour la prise d'une décision, sont observées les dispositions du paragraphe 3 de l'article 23 et un délai est fixé pour l'envoi de ces éléments, lequel pourra être prorogé en vertu de raisons valables invoquées par l'Etat requérant.

2. Le non-envoi des éléments demandés aux termes du paragraphe précédent dans le délai fixé peut déterminer la radiation de la procédure du rôle, celle-ci pouvant être toutefois reprise dès que ces éléments seront présentés.

3. Si la demande concerne une personne déjà détenue aux fins d'extradition, la radiation prévue au paragraphe précédent détermine la mise en liberté immédiate, les dispositions du paragraphe 7 de l'article 38 s'appliquant de façon correspondante.

Article 46
Nature de la procédure d'extradition

1. La procédure d'extradition a un caractère urgent et comprend la phase administrative et la phase judiciaire.

2. La phase administrative est réservée à l'appréciation de la demande d'extradition par le Ministre de la Justice aux fins de décider, en tenant compte notamment des garanties auxquelles il y a lieu, s'il est possible de lui donner suite ou si elle doit être rejetée immédiatement pour des raisons soit d'ordre politique, soit d'opportunité ou de pertinence.

3. La phase judiciaire est de la compétence exclusive de la Cour d'appel et est réservée à la prise d'une décision, après audition de l'intéressé, sur l'accord de l'extradition, étant donné que sont réunies les conditions de forme et de fond, et elle n'admet aucune preuve sur les faits imputés à la personne à extrader.

Article 47
Représentation de l'État requérant dans la procédure d'extradition

1. L'État étranger peut être admis, sur demande adressée au Portugal, à participer à la phase judiciaire de la procédure d'extradition, par l'intermédiaire d'un représentant désigné à cette fin.

2. Si la demande de participation n'accompagne pas la demande d'extradition, elle est adressée à la Cour d'appel par l'intermédiaire de l'Autorité centrale.

3. La demande de participation est soumise à la décision du Ministre de la Justice sur sa recevabilité, et précède l'information de l'Office du Procureur Général de la République, pouvant être rejetée si la réciprocité n'est pas garantie.

4. La participation mentionnée au paragraphe 1 vise d'une part à ce que l'État requérant ait la possibilité de prendre directement contact avec la procédure tout en observant les règles relatives au secret de justice et, d'autre part, à fournir à la Cour les éléments que celle-ci entend solliciter.

Article 48
Procédure administrative

1. Dès réception de la demande d'extradition et une fois sa régularité formelle vérifiée, l'Office du Procureur Général de la République, dès qu'il la

considère dûment complète, élabore une information dans un délai maximum de 20 jours et transmet la demande au Ministre de la Justice aux fins d'appréciation.

2. Dans les 10 jours qui suivent, le Ministre de la Justice statue sur la demande.

3. Si la demande est rejetée, la procédure est rayée du rôle; communication en sera faite aux termes du paragraphe 3 de l'article 24.

4. L'Office du Procureur Général de la République prend toutes mesures nécessaires à la surveillance de la personne réclamée.

Article 49
Procédure judiciaire; compétence; recours

1. Est compétente pour la procédure judiciaire d'extradition la Cour d'appel du ressort judiciaire où résidait ou se trouvait la personne réclamée à l'époque de la demande.

2. Le jugement est de la compétence de la section criminelle.

3. Seule la décision finale est susceptible de recours dont le jugement est de la compétence de la section criminelle de la Cour Suprême de Justice.

4. Le recours de la décision qui accorde l'extradition a effet suspensif.

Article 50
Début de la procédure judiciaire

1. La demande d'extradition à laquelle il y a lieu de donner suite est transmise, accompagnée de toutes les pièces à l'appui et de la décision respective, au Ministère public près la Cour d'appel compétente.

2. Dans les quarante-huit heures qui suivent, le Ministère public effectue les diligences nécessaires à l'accomplissement de la demande.

Article 51
Ordonnance liminaire et arrestation de la personne à extrader

1. Lorsque distribuée, la procédure est immédiatement présentée au juge rapporteur qui, dans un délai de 10 jours, rend une ordonnance liminaire sur la suffisance des éléments à l'appui de la demande et sur la viabilité de celle-ci.

2. Si le juge rapporteur décide de rayer immédiatement la procédure du rôle, il soumet le dossier, avec son avis écrit, aux observations de chacun des juges adjoints pendant cinq jours, afin qu'une décision soit prise à la première session.

3. Lorsque la procédure doit se poursuivre, un mandat d'arrêt contre la personne à extrader est délivré au Ministère public afin que celui-ci prenne toutes les mesures nécessaires à son exécution.

4. Dans le cas où un complément d'informations serait nécessaire, il n'est ordonné que la surveillance de la personne à extrader par les autorités compétentes, son arrestation pouvant avoir immédiatement lieu lorsque celle-ci se révèle nécessaire et il y a des indices que la demande d'extradition parviendra ultérieurement.

Article 52
Délai de détention

1. La détention de la personne à extrader doit cesser et être remplacée par une autre mesure procédurale de coercition si la décision finale de la Cour d'appel n'est pas prononcée dans les 65 jours après l'arrestation.

2. S'il n'est pas admissible de mesure de coercition non privative de liberté, le délai mentionné au paragraphe précédent est prorogé jusqu'à un maximum de 25 jours, délai pendant lequel la décision de la Cour d'appel doit être obligatoirement prononcée.

3. Sans préjudice des dispositions de l'article 40, la détention est maintenue en cas de recours contre la décision de la cour d'appel accordant l'extradition, mais elle ne peut pas être maintenue si une décision sur le recours n'est pas rendue dans un délai de 80 jours après la date où celui-ci a été introduit.

4. Au cas où un recours aurait été introduit devant le Tribunal constitutionnel, la détention ne peut se prolonger au-delà de trois mois à compter de la date d'introduction dudit recours.

Article 53
Présentation du détenu

1. L'autorité qui procède à l'arrestation de la personne à extrader doit immédiatement en faire communication, par la voie la plus rapide et de façon à laisser une trace écrite, au Ministère public près la Cour d'appel compétente.

2. La personne à extrader est présentée devant le Ministère public, ainsi que les choses lui ayant été saisies, afin d'être entendue personnellement dans un délai maximum de quarante-huit heures après la détention.

3. Le juge rapporteur procède à l'audition de la personne à extrader, après lui avoir nommé un défenseur d'office, au cas où elle n'aurait pas de conseil.

4. La citation de la personne à extrader aux fins de comparaître à cet acte doit être faite à personne et porter mention qu'elle pourra se faire accompagner d'un conseil et d'un interprète.

5. Lorsque la détention ne peut, pour une raison quelconque, être appréciée par la Cour d'appel, le détenu est présenté devant le Ministère public près le tribunal de première instance du ressort de la Cour d'appel compétente.

6. Au cas prévu au paragraphe précédent, l'audition a lieu, exclusivement, aux fins de validation et maintien de la détention par le juge du tribunal de première instance, le Ministère public devant prendre les mesures nécessaires à la présentation de la personne à extrader au premier jour ouvrable subséquent.

Article 54
Audition de la personne à extrader

1. En présence du Ministère public et du défenseur ou conseil de la personne à extrader et, dans les cas où elle est nécessaire, avec l'intervention de l'interprète, le juge rapporteur procède à l'identification du détenu et lui fait connaître son droit de s'opposer à l'extradition ou d'y consentir, les termes dans lesquels il peut le faire et la faculté de renoncer au bénéfice de la règle de la spécialité selon le droit conventionnel applicable en ce cas.

2. Au cas où la personne à extrader déclarerait qu'elle consent à sa remise à l'Etat requérant sont applicables, de façon correspondante, les dispositions des paragraphes 2 à 5 de l'article 40. Si elle déclare qu'elle s'oppose à l'extradition, le juge apprécie les motifs de son opposition, si elle veut les présenter; il en est dressé procès-verbal.

3. Lorsque la faculté de renonciation au bénéfice de la règle de la spécialité mentionnée au par. 1 existe, il est dressé procès-verbal de la teneur de l'information fournie sur ladite règle de la spécialité, ainsi que de la déclaration de la personne à extrader, les dispositions des paragraphes 2 à 5 de l'article 40 étant applicables, de façon correspondante.

4. Il est également dressé procès-verbal de l'information mentionnée au paragraphe précédent lorsque, aux termes du droit conventionnel applicable, la

renonciation au bénéfice de la spécialité peut encore être déclarée devant l'autorité judiciaire requérante, après la remise de la personne extradée.

5. Le Ministère public et le défenseur ou conseil de la personne à extrader peuvent suggérer des questions au détenu que le juge rapporteur formulera s'il les juge pertinentes.

6. Les dispositions des paragraphes 3 et 4 sont également applicables à la réextradition.

Article 55
Opposition de la personne à extrader

1. Suite à l'audition de la personne à extrader, le dossier de la procédure est mis à la disposition de son défenseur ou conseil pour qu'elle puisse présenter, par écrit et dans un délai de huit jours, opposition motivée à la demande d'extradition et indiquer les moyens de preuve admis par la loi portugaise, le nombre de témoins étant toutefois limité à 10.

2. L'opposition ne peut être fondée que sur le fait que le détenu n'est pas la personne réclamée ou que les conditions pour l'extradition ne sont pas remplies.

3. Présentée l'opposition ou épuisé le délai pour sa présentation, la procédure est soumise pendant cinq jours au Ministère public pour qu'il demande ce qu'il juge pertinent, compte tenu de la limite mentionnée au paragraphe précédent pour ce qui est du nombre des témoins.

4. Dans le cas où il existerait des objets saisis, soit la personne à extrader, soit le Ministère public peuvent se prononcer sur la destination à leur donner.

5. Les moyens de preuve offerts peuvent être remplacés jusqu'au jour qui précède celui où ils doivent être produits, pourvu que ce remplacement n'entraîne pas d'ajournement.

Article 56
Production de la preuve

1. Les diligences qui ont été requises et celles que le juge rapporteur estime nécessaires, nommément pour décider de la destination des choses saisies, doivent avoir lieu dans un délai maximum de 15 jours, en présence de la personne à extrader, de son défenseur ou conseil et, si nécessaire, de l'interprète, et bien aussi du Ministère public.

2. Une fois la production de la preuve terminée, la procédure est soumise successivement au Ministère public, au défenseur ou conseil, pendant cinq jours, pour allégations.

Article 57
Décision finale

1. Si la personne à extrader n'a pas présenté opposition écrite, ou suite au dépôt des allégations conformément au paragraphe 2 de l'article précédent, le juge rapporteur procède à l'examen de la procédure pendant 10 jours et ordonne de la soumettre à l'avis de chacun des deux juges adjoints pendant 5 jours.

2. Suite au dernier visa, la procédure est présentée pour décision finale à la session immédiate, indépendamment de son inscription au rôle et en priorité sur les autres, l'arrêt étant élaboré conformément à la loi de procédure pénale commune.

Article 58
Introduction et instruction du recours

1. Le Ministère public et la personne à extrader peuvent former recours contre la décision finale dans un délai de 10 jours.

2. La pétition de recours comprend le mémoire du requérant à défaut duquel le recours est tout de suite jugé dénué de fondement.

3. La partie contraire peut présenter son mémoire en réponse dans un délai de 10 jours.

4. Le dossier de la procédure est transmis à la Cour Suprême de Justice dès réception du dernier mémoire ou à l'expiration du délai mentionné au paragraphe précédent.

Article 59
Examen de la procédure et jugement

1. Dès que distribuée devant la section criminelle de la Cour Suprême de Justice, la procédure est présentée au juge rapporteur qui dispose de 10 jours pour élaborer le projet d'arrêt, et assortie de celui-ci, elle est ensuite transmise à l'ensemble des restants juges de la section pour observations pendant 8 jours.

2. Dès que présenté le dernier visa, la procédure est soumise pour jugement à la première session immédiate, indépendamment de son inscription au rôle et en priorité sur les autres et renvoyée en première instance dans les trois jours après que la décision est devenue définitive.

Article 60
Remise de l'extradé

1. Est considéré titre nécessaire et suffisant à la remise de l'extradé un extrait de la décision, rendue en force de chose jugée, qui ordonne l'extradition.

2. Lorsque la décision est rendue en force de chose jugée, le Ministère public en fait part aux services compétents du Ministère de la Justice, aux fins prévues à l'article 27, et en donne connaissance à l'Office du Procureur Général de la République. La date de la remise est fixée jusqu'à 20 jours à compter de la date où la décision est devenue définitive.

Article 61
Délai pour le transfèrement de l'extradé

1. L'extradé doit être transféré du territoire portugais à la date qui a été fixée conformément à l'article 60.

2. Si personne ne se présente pour recevoir l'extradé à la date mentionnée au paragraphe précédent, celui-ci sera mis en liberté à l'expiration d'un délai de 20 jours sur cette date.

3. Le délai mentionné au paragraphe précédent est susceptible de prorogation dans la mesure exigée par le cas d'espèce jusqu'à un délai maximum de 20 jours, lorsque des raisons de force majeure, notamment maladie certifiée conformément au paragraphe 3 de l'article 35, empêchent le transfèrement dans ce délai.

4. Il peut être refusé une nouvelle demande d'extradition de la personne qui n'a pas été transférée dans le délai mentionné au paragraphe 2 ou, en cas de prorogation, à l'expiration du délai de celle-ci.

5. Après la remise de la personne, les communications nécessaires sont transmises au tribunal et à l'Office du Procureur Général de la République.

SECTION III

Règles spéciales de la procédure en cas de détention anticipée

Article 62
Compétence et forme de détention provisoire

1. La détention provisoire est ordonnée par le juge rapporteur mentionné à l'article 51, après s'être assuré de l'authenticité, de la régularité et de la

recevabilité de la demande, un mandat étant délivré, à cette fin, au Ministère public.

2. L'entité qui procède à la détention présente le détenu devant le Ministère public près la Cour d'appel compétente, aux fins d'audition judiciaire et décision de validation et maintien, dans un délai maximum de quarante-huit heures après la détention.

3. La détention est communiquée immédiatement à l'Office du Procureur Général de la République, un mandat de mise en liberté étant émis lorsque, conformément au paragraphe 5 de l'article 38, la détention doit cesser.

4. Les dispositions des paragraphes 5 et 6 de l'article 53 sont applicables de façon correspondante.

Article 63
Délais

1. Dès réception de la demande d'extradition d'une personne détenue, la procédure réglée par l'article 48 doit se terminer dans un délai maximum de 15 jours.

2. Dans le cas où la décision du Ministre de la Justice lui serait favorable, la demande est envoyée immédiatement, par l'intermédiaire du Procureur Général de la République, au Ministère public afin que celui-ci prenne d'immédiat toutes mesures nécessaires à son exécution.

3. La détention de la personne à extrader doit cesser et être remplacée par une autre mesure procédurale de coercition si la demande ne parvient pas au tribunal dans les 60 jours après l'arrestation.

4. La distribution de la procédure dans la Cour d'appel est immédiate; les délais prévus aux paragraphes 1 et 2 de l'article 51 sont réduits à trois jours et le délai prévu au paragraphe 1 de l'article 52 compte à partir de la date de la présentation de la demande devant le tribunal.

5. La décision du Ministre de la Justice rejetant la demande est communiquée immédiatement, conformément au paragraphe 2 du présent article, aux fins de libération du détenu.

Article 64
Compétence et forme d'arrestation non requise directement

1. L'autorité qui effectue une arrestation aux termes de l'article 39 présente le détenu devant le Ministère public près la Cour d'appel du ressort où

l'arrestation a eu lieu, afin que celui-ci prenne toutes les mesures nécessaires à l'audition judiciaire dudit détenu, conformément au paragraphe 2 de l'article 62.

2. En cas de confirmation, l'arrestation est communiquée immédiatement à l'Office du Procureur Général de la République et, par la voie jugée la plus rapide, à l'autorité étrangère intéressée afin que celle-ci informe, d'urgence et par la même voie, si une demande d'extradition parvenait ultérieurement, le respect des délais prévus au par. 5 de l'article 38 lui étant demandé.

3. Le détenu sera mis en liberté à l'expiration d'un délai de 18 jours après son arrestation si l'information mentionnée au paragraphe précédent n'est pas reçue de l'autorité étrangère, ou d'un délai de 40 jours après la date de détention si, dans le cas d'information positive, la demande d'extradition ne parvient pas dans ce délai.

4. Les dispositions des paragraphes 5 et 6 de l'article 53 et celles de l'article 63 sont applicables de façon correspondante.

Article 65
Mesures de coercition non privatives de liberté et compétence

Les mesures de coercition non privatives de liberté, lorsque admises dans les cas prévus aux articles 38 et 64, sont de la compétence de la Cour d'appel.

SECTION IV

Nouvelle remise de l'extradé

Article 66
Arrestation ultérieure à l'évasion de l'extradé

1. Le mandat d'arrêt mentionné à l'article 42 est transmis à l'Autorité centrale par les voies prévues dans le présent texte et doit contenir ou être accompagné des éléments nécessaires à établir qu'il s'agit d'une personne qui a déjà été extradée par le Portugal et s'est évadée avant que la procédure pénale n'était éteinte ou que la peine n'était purgée.

2. Le mandat d'arrêt est transmis au Ministère public près la Cour d'appel où s'est déroulée la procédure d'extradition afin que celui-ci puisse requérir son exécution dans la même procédure.

Article 67
Exécution de la demande

1. Dès que requise, le juge rapporteur ordonne l'exécution du mandat d'arrêt après s'être assuré de sa régularité et qu'il se rapporte à la personne qui a déjà été extradée.

2. Dans les huit jours qui suivent l'arrestation, l'extradé peut former, par écrit, opposition à être de nouveau remis à l'Etat requérant au motif que cet Etat a violé les conditions dans lesquelles l'extradition a été accordée et il peut faire l'offre des preuves, le nombre de témoins étant limité à cinq.

3. En cas d'opposition, seront observées, dans la partie applicable, les dispositions des paragraphes 3 et 5 de l'article 55 et des articles 56 et 57.

4. Le recours contre la décision finale est introduit, instruit et jugé conformément aux dispositions des articles 58 et 59.

Article 68
Nouvelle remise de l'extradé

1. Le Ministère public prend toutes les mesures nécessaires à une nouvelle remise de l'extradé, conformément aux dispositions applicables de l'article 60, si aucune opposition n'a été déduite ou si la Cour n'a pas fait droit à la demande.

2. L'extrait mentionné à l'article 60 est remplacé par le mandat d'arrêt dûment exécuté.

CHAPITRE II

Extradition active

Article 69
Compétence et procédure

1. Il incombe au Ministre de la Justice de formuler la demande d'extradition, concernant une personne à l'encontre de laquelle il y a une procédure en cours devant un tribunal portugais, à l'Etat étranger sur le territoire duquel se trouve ladite personne.

2. La demande, dûment accompagnée de tous les éléments nécessaires, est transmise par les voies prévues dans le présent texte.

3. Il incombe à l'Office du Procureur Général de la République d'organiser le dossier sur demande du Ministère public près le tribunal respectif.

4. Le Ministre de la Justice peut solliciter à l'Etat étranger auquel il a présenté une demande d'extradition, la participation de l'État portugais à la procédure d'extradition, par l'intermédiaire d'un représentant désigné à cette fin.

Article 70
Réextradition

Les dispositions des paragraphes 4 et 5 de l'article 34 sont applicables corrélativement à la réextradition demandée par le Portugal.

Article 71
Divulgation internationale de la demande d'arrestation provisoire

1. Le mandat judiciaire de détention provisoire visant l'extradition est transmis à l'Office du Procureur Général de la République par le Ministère public près le tribunal compétent.

2. L'Office du Procureur Général de la République transmet le mandat au Bureau national de l'INTERPOL, communication étant faite au tribunal.

Article 72
Communication

Une fois l'extradition accordée, l'Office du Procureur Général de la République en fait part à l'autorité judiciaire qui l'a demandée.

CHAPITRE III

Dispositions finales

Article 73
Gratuité et vacances

1. Les procédures d'extradition sont gratuites, sans préjudice des dispositions des alinéas *b)* à *d)* du paragraphe 2 et de celles du paragraphe 4 de l'article 26.

2. Les procédures d'extradition ont un caractère urgent et se poursuivent même pendant les vacances.

CHAPITRE IV

Règles spéciales concernant la procédure simplifiée d'extradition

Article 74
Portée et finalités

Les dispositions du présent chapitre réglementent la procédure d'extradition, dans les cas où la personne réclamée y donne son consentement, conformément à la Convention relative à la procédure simplifiée de l'extradition entre les Etats membres de l'Union européenne, du 10 mars 1995.

Article 75
Autorité compétente et délais

1. La déclaration de consentement dans l'extradition est communiquée directement par le juge compétent à l'autorité requérante qui a sollicité la détention provisoire, dans un délai maximum de 10 jours après la détention.

2. Au cas où la personne à extrader déclarerait qu'elle consent à être remise à l'Etat requérant, le juge l'informe du sens de la renonciation à la règle de la spécialité, dans les cas où celle-ci est admissible, et des effets du consentement à une nouvelle extradition, ainsi que du moment et des termes où il peut le faire; tout ceci doit figurer au procès-verbal.

3. Le juge rend la décision qui homologue du consentement et procède à la communication dans un délai maximum de 20 jours après la date à laquelle le consentement a été donné, comme mentionné au paragraphe 1.

4. Au cas où il s'avérerait nécessaire, le juge sollicite à l'autorité requérante des informations complémentaires, en entendant à nouveau la personne détenue après l'obtention de ces informations, avant de rendre la décision.

5. Les délais prévus aux paragraphes 1 et 3 sont comptés à partir du moment de la déclaration du consentement, si celui-ci est donné après que le délai mentionné au paragraphe 1 se soit écoulé.

6. Sous réserve des dispositions du paragraphe précédent, lorsqu'une demande d'extradition est reçue, le consentement est donné conformément aux dispositions de l'article 54.

7. Les dispositions de l'article 40 sont corrélativement applicables.

8. Les dispositions des paragraphes précédents, pour ce qui est des délais et communications, sont applicables aux cas où le Portugal est l'Etat requérant.

CHAPITRE V

Mise en pratique de la Convention d'application de l'accord de Schengen au niveau interne

Article 76
Objet

Le présent chapitre vise à régler les dispositions de la Convention d'application de l'accord de Schengen pertinentes en matière d'extradition, en ce qui concerne les relations du Portugal avec les autres Etats qui appliquent également la Convention.

Article 77
Extradition passive

1. L'entité policière qui procède à la détention sur la base des indications introduites au Système d'information de Schengen (SIS) présente la personne détenue au Ministère public près la Cour d'appel compétente, aux termes de l'article 53.

2. La présentation de la personne détenue est accompagnée des éléments disponibles la concernant, mentionnés au paragraphe 2 de l'article 95 de la Convention d'application de l'accord Schengen, à savoir: l'indication de l'autorité d'où émane la demande d'arrestation; l'existence d'un mandat d'arrêt ou d'un acte ayant la même force, ou d'un jugement exécutoire; la nature et la qualification légale de l'infraction; la description des circonstances de la commission de l'infraction ainsi que les conséquences juridiques de l'infraction.

3. La décision judiciaire qui examine la régularité de l'arrêt et la décision qui homologue le consentement à l'extradition sont communiquées immédiatement à l'Office du Procureur Général de la République et au Bureau national SIRENE.

4. S'il n'y a pas de déclaration de la personne réclamée consentant à l'extradition, la situation est aussi communiquée à l'Office du Procureur Général

de la République, aux fins de formalisation de la demande d'extradition par l'autorité requérante.

Article 78
Extradition active

1. Aux fins des dispositions de l'article 95 de la Convention, l'autorité judiciaire prend toutes mesures nécessaires auprès du Bureau national SIRENE à l'intégration immédiate des données concernant la personne recherchée dans le Système d'information Schengen.

2. La communication d'un Etat partie à la Convention dont la personne réclamée a été localisée et détenue sur son territoire est d'immédiat transmise par le Bureau national SIRENE au tribunal qui a délivré le mandat et à l'Office du Procureur Général de la République, aux fins de formalisation de la demande d'extradition.

TITRE III

Transmission de procédures pénales

CHAPITRE I

Délégation de la poursuite pénale aux autorités judiciaires portugaises

Article 79
Principe

Sur demande d'un Etat étranger, il peut être engagé ou poursuivi au Portugal une procédure pénale pour un fait commis hors du territoire portugais, dans les conditions et aux effets prévus dans les articles qui suivent.

Article 80
Conditions spéciales

1. Pour qu'il puisse être exercé ou continuer au Portugal une poursuite pénale pour un fait commis hors du territoire portugais, il faut que, outre les

conditions générales prévues dans le présent texte, les conditions suivantes soient remplies:

a) Que le recours à l'extradition soit exclu;
b) Que l'Etat étranger donne des garanties qu'il ne poursuivra pas pénalement, pour le même fait, le suspect ou l'inculpé, au cas où celui-ci soit condamné définitivement par jugement d'un tribunal portugais;
c) Que la procédure pénale ait pour objet un fait qui constitue crime selon la loi de l'Etat étranger et la loi portugaise;
d) Que la peine ou la mesure de sûreté privatives de liberté correspondant au fait aient une durée maximum non inférieure à un an ou, s'agissant d'une peine pécuniaire, son montant maximum ne soit pas inférieur à la somme équivalente à 30 unités de compte procédural;
e) Que le suspect ou l'inculpé aient la nationalité portugaise ou, s'agissant d'étrangers ou d'apatrides, aient leur résidence habituelle sur le territoire portugais;
f) Que l'acceptation de la demande vise à servir les intérêts d'une bonne administration de la justice ou à favoriser la réinsertion sociale du suspect ou de l'inculpé, au cas où ils soient condamnés.

2. Il peut être aussi admis l'exercice ou la continuation d'une poursuite pénale au Portugal lorsque, remplies les conditions énoncées au paragraphe précédent:

a) Le suspect ou l'inculpé font l'objet d'une procédure pénale au Portugal pour un fait différent auquel correspond une peine ou mesure de sûreté de gravité égale ou supérieure à celles mentionnées à l'alinéa *d)* du paragraphe précédent et sa présence soit assurée en tribunal;
b) L'extradition du suspect ou de l'inculpé étranger ou apatride résidant habituellement au Portugal est refusée;
c) L'Etat requérant considère que la présence du suspect ou de l'inculpé ne peut être assurée devant ses tribunaux, pouvant l'être au Portugal;
d) L'Etat étranger estime qu'il n'est pas en mesure d'exécuter lui-même une éventuelle condamnation, même en ayant recours à l'extradition, et que l'Etat portugais est en mesure de le faire.

3. Les dispositions des paragraphes précédents ne s'appliquent pas si la réaction criminelle qui motive la demande relève de la compétence des tribunaux portugais en vertu d'une autre disposition relative à l'application de la loi pénale portugaise dans l'espace.

4. La condition mentionnée à l'alinéa *e)* du paragraphe 1 peut être dispensée dans les situations prévues au paragraphe 4 de l'article 32, lorsque les circonstances du cas le conseillent, notamment pour éviter que le jugement ne puisse avoir lieu soit au Portugal soit à l'étranger.

Article 81
Droit applicable

Au fait qui est l'objet d'une procédure pénale engagée ou poursuivie au Portugal, dans les conditions mentionnées à l'article précédent, s'applique la réaction criminelle prévue dans la loi portugaise, à moins que la loi de l'Etat étranger qui formule la demande soit plus favorable.

Article 82
Effets de l'acceptation de la demande par rapport à l'Etat qui la formule

1. L'acceptation, par l'Etat portugais, de la demande formulée par un Etat étranger implique la renonciation de ce dernier aux poursuites concernant le fait.

2. Une fois que la procédure pénale pour le fait est engagée ou poursuivie au Portugal, l'Etat étranger reprend son droit de poursuite pénale pour ce même fait après communication, aussitôt que le Portugal a certifié que l'inculpé est absent du territoire national.

Article 83
Déroulement de la demande

1. La demande formulée par l'Etat étranger est accompagnée de l'original ou, le cas échéant, d'une copie certifiée conforme de la procédure à transmettre, et est soumise à l'appréciation du Ministre de la Justice par le Procureur Général de la République.

2. Si le Ministre de la Justice considère la demande recevable, le dossier est transmis au tribunal compétent qui ordonne immédiatement la citation à comparaître du suspect ou de l'inculpé ainsi que, le cas échéant, de son conseil.

3. Si le suspect ou l'inculpé ne comparaissent pas, le tribunal vérifie si la citation a été faite par la forme légale et nomme un défenseur d'office, à défaut d'un conseil ou si celui-ci ne comparaît pas non plus; il en est dressé procès-verbal.

4. Le juge, soit d'office, soit à la demande du Ministère public, du suspect, de l'inculpé ou de son défenseur, peut ordonner que la citation mentionnée au paragraphe 2 soit de nouveau effectuée.

5. Le suspect, l'inculpé ou son défenseur sont invités à faire un exposé de leurs motifs favorables ou défavorables à l'acceptation de la demande; le Ministère public a la même faculté.

6. Si nécessaire, le juge procède ou fait procéder à toutes les diligences de preuve qui lui paraissent indispensables, soit de sa propre initiative, soit à la demande du Ministère public, du suspect, de l'inculpé ou de son défenseur, et il fixe un délai à cet effet non supérieur à 30 jours.

7. Terminées ces diligences ou épuisé le délai mentionné au paragraphe précédent, le Ministère public et le suspect ou inculpé peuvent se prononcer dans un délai de 10 jours et présenter les allégations jugées utiles.

8. Le juge statue sur la demande dans un délai de huit jours, cette décision étant susceptible de recours aux termes généraux.

9. En cours d'examen de la demande, le juge soumet l'inculpé à l'obligation de signaler son identité et son adresse sans préjudice d'une éventuelle adoption d'autres mesures de coercition et de garantie patrimoniale prévues dans le Code de procédure pénale.

Article 84

Effets de la décision sur la demande

Au cas où la demande serait reçue le juge, suivant les cas:

a) Ordonne la transmission du dossier à l'autorité judiciaire compétente aux fins d'introduction ou de poursuite d'une procédure pénale;

b) Ordonne tous les actes nécessaires à la poursuite de la procédure, si celle-ci relève de sa compétence.

Article 85

Validation des actes pratiqués à l'étranger

La décision judiciaire ordonnant la poursuite de la procédure pénale doit déclarer la validation des actes pratiqués dans la procédure transmise, comme

s'ils avaient été pratiqués devant les autorités judiciaires portugaises, sauf s'il s'agit d'actes inadmissibles au regard de la législation procédurale pénale portugaise qu'elle devra décrire en détail.

Article 86
Révocation de la décision

1. L'autorité judiciaire peut révoquer la décision, à la demande du Ministère public, du suspect, de l'inculpé ou de son défenseur lorsque, en cours d'examen de la procédure:

a) Elle constate l'existence d'un des motifs d'inadmissibilité de la coopération prévus dans ce texte;
b) Il ne peut être assuré la présence de l'inculpé à l'audience ou aux fins d'exécution du jugement imposant une réaction criminelle privative de liberté dans les cas où l'inculpé est absent du territoire national, prévus au paragraphe 2 de l'article 82.

2. Cette décision est susceptible de recours.
3. Le passage de la décision en force de chose jugée met fin à la juridiction de l'autorité judiciaire portugaise et entraîne le renvoi de la procédure à l'Etat étranger qui a formulé la demande.

Article 87
Communications

1. Sont communiquées à l'Autorité centrale, pour notification à l'Etat étranger qui a formulé la demande:

a) La décision sur l'admissibilité de la demande;
b) La décision qui révoque la décision précédente;
c) La décision prononcée dans la procédure;
d) Toute autre décision lui mettant fin.

2. La notification est accompagnée d'un extrait ou d'une copie certifiée conforme des décisions mentionnées au paragraphe précédent.

Article 88
Compétence territoriale

Sauf dans les cas où la compétence territoriale se trouve déjà définie, aux actes de coopération internationale prévus dans le présent chapitre s'appliquent les dispositions de l'article 22 du Code de procédure pénale.

CHAPITRE II

Délégation à un Etat étranger de l'introduction ou de la poursuite d'une procédure pénale

Article 89
Principe

L'exercice d'une procédure pénale ou la continuation d'une procédure engagée au Portugal, pour un fait qui constitue crime selon le droit portugais peuvent être déléguées à un Etat étranger qui déclare les accepter, dans les conditions prévues aux articles qui suivent.

Article 90
Conditions spéciales

1. Aux fins de délégation de l'exercice d'une poursuite pénale ou de sa continuation dans un Etat étranger, il faut que, outre les conditions générales prévues dans le présent texte, les conditions spéciales suivantes soient remplies:

a) Que le fait constitue crime au regard de la loi portugaise et de la loi de l'Etat en question;
b) Que la réaction criminelle privative de liberté ait une durée maximum non inférieure à un an ou, s'agissant d'une peine pécuniaire, que son montant maximum ne soit pas inférieur à la somme équivalente à 30 unités de compte procédural;
c) Que le suspect ou l'inculpé aient la nationalité de l'Etat étranger ou, en cas de nationaux d'un Etat tiers ou d'apatrides, qu'ils aient leur résidence habituelle sur le territoire de cet Etat;
d) Que la délégation vise à servir les intérêts d'une bonne administration de la justice ou à favoriser la réinsertion sociale en cas de condamnation.

2. Remplies les conditions énoncées au paragraphe précédent, la délégation peut aussi avoir lieu:

a) Lorsque le suspect ou l'inculpé sont en train de purger une condamnation dans l'Etat étranger pour un crime plus grave que celui commis au Portugal;

b) Lorsque le suspect ou l'inculpé résident habituellement sur le territoire de l'Etat étranger et en vertu de la loi de cet Etat leur extradition a été refusée, ou serait refusée en cas de demande;

c) Lorsque le suspect ou l'inculpé sont extradés vers l'Etat étranger en raison de faits différents et il y a lieu de croire que la délégation de la procédure pénale est susceptible de favoriser leur réinsertion sociale.

3. La délégation peut avoir encore lieu si, indépendamment de la nationalité de l'inculpé, l'Etat portugais considère que sa présence à l'audience de jugement ne peut être assurée, alors que cela est possible dans l'Etat étranger.

4. Exceptionnellement, la délégation peut avoir lieu, indépendamment de la condition requise d'une résidence habituelle, lorsque les circonstances du cas l'estiment nécessaires, notamment pour éviter que le jugement ne puisse avoir lieu soit au Portugal soit à l'étranger.

Article 91
Procédure de délégation

1. Le tribunal compétent pour connaître du fait, apprécie la nécessité de la délégation, sur demande du Ministère public, du suspect ou de l'inculpé, en audience contradictoire au cours de laquelle sont exposés les motifs qui justifient la demande ou le refus de cette forme de coopération internationale.

2. Le Ministère public, ainsi que le suspect ou l'inculpé peuvent répondre à la demande susmentionnée au paragraphe 1 dans un délai de dix jours, lorsqu'ils ne sont pas les requérants.

3. Après la réponse ou après que le délai de celle-ci se soit écoulé, le juge décide, dans un délai de huit jours, de la suite favorable ou défavorable de la demande.

4. Si le suspect ou l'inculpé se trouvent à l'étranger, ils peuvent, soit eux-mêmes, soit par l'intermédiaire de leur représentant légal ou avocat, demander la délégation de la poursuite pénale directement ou à travers une autorité de l'Etat étranger ou de l'autorité consulaire portugaise, qui l'achemineront vers l'Autorité centrale.

5. La décision judiciaire qui apprécie la demande est susceptible de recours.

6. La décision passée en force de chose jugée favorable à la demande détermine la suspension du délai de prescription, ainsi que la poursuite de la

procédure pénale entamée, sans préjudice des actes et diligences de caractère urgent, et est transmise, par l'intermédiaire du Procureur Général de la République, au Ministre de la Justice pour appréciation, accompagnée d'une copie de tous les procès-verbaux ayant été dressés.

Article 92
Transmission de la demande

La demande du Ministre de la Justice à l'Etat étranger est présentée par les voies prévues dans le présent texte.

Article 93
Effets de la délégation

1. Dès qu'acceptée, par l'Etat étranger, la délégation pour l'exercice ou la continuation d'une procédure pénale, aucune autre procédure pour le même fait ne peut être engagée au Portugal.

2. La suspension de la prescription de la procédure pénale se maintient jusqu'à ce que l'Etat étranger mette fin à la procédure, y compris l'exécution du jugement.

3. L'Etat portugais reprend toutefois son droit de poursuivre pénalement pour ce fait si:

a) L'Etat étranger l'informe ne pas pouvoir mener jusqu'à la fin la poursuite pénale qui lui a été déléguée;
b) Ultérieurement, il prend connaissance d'un motif qui, conformément au présent texte, empêcherait la demande de délégation.

4. Le jugement prononcé dans la procédure engagée ou poursuivie dans l'Etat étranger appliquant une peine ou une mesure de sûreté fait l'objet d'inscription au casier judiciaire et produit les mêmes effets que s'il avait été prononcé par un tribunal portugais.

5. Les dispositions du paragraphe précédent s'appliquent à toute décision qui, dans la procédure à l'étranger, lui met fin.

CHAPITRE III

Disposition commune

Article 94
Frais

1. Les frais dus éventuellement dans la procédure à l'étranger, avant l'acceptation de la demande de délégation par le Portugal, s'ajoutent aux frais de la procédure portugaise et sont perçus dans celle-ci sans lieu au remboursement à l'Etat en question.

2. L'Etat portugais informe l'Etat étranger des frais occasionnés par la procédure avant l'acceptation de la demande de délégation des poursuites par cet Etat, dont le remboursement n'est pas exigé.

TITRE IV

Exécution de jugements pénaux

CHAPITRE I

Exécution des jugements pénaux étrangers

Article 95
Principe

1. Les jugements pénaux étrangers ayant acquis force de chose jugée peuvent être exécutés au Portugal dans les conditions prévues par le présent texte.

2. La demande de délégation est formulée par l'Etat de condamnation.

Article 96
Conditions spéciales d'admissibilité

1. La demande d'exécution d'un jugement pénal étranger au Portugal n'est admissible que lorsque remplies, outre les conditions générales établies dans le présent texte, les conditions suivantes:

a) Le jugement condamne à une réaction criminelle pour un fait constitutif de crime pour lequel sont compétents les tribunaux de l'Etat étranger;

b) Si la condamnation est le résultat du jugement en l'absence du condamné, pourvu que celui-ci ait eu la possibilité légale de requérir un nouveau jugement ou de former recours contre la décision;
c) Ne contient pas des dispositions contraires aux principes fondamentaux de l'ordre juridique portugais;
d) Le fait n'est pas l'objet de poursuite pénale au Portugal;
e) Le fait est aussi considéré comme crime par la législation pénale portugaise;
f) Le condamné est un citoyen portugais ou un étranger ou apatride résidant habituellement au Portugal;
g) L'exécution du jugement au Portugal peut servir à favoriser la réinsertion sociale du condamné ou la réparation du dommage occasionné par le crime;
h) L'Etat étranger donne des garanties que, dès que le jugement aura été exécuté au Portugal, il considérera la responsabilité pénale du condamné éteinte;
i) La durée des peines ou mesures de sûreté imposées dans le jugement n'est pas inférieure à un an ou, s'agissant d'une peine pécuniaire, son montant n'est pas inférieur à une somme équivalant à 30 unités de compte procédural;
j) Le condamné y donne son consentement, en s'agissant d'une réaction criminelle privative de liberté.

2. Sans préjudice des dispositions du paragraphe précédent, un jugement étranger peut être aussi exécuté si le condamné est en train de purger au Portugal une condamnation pour un fait autre que celui établi dans le jugement dont l'exécution est demandée.

3. L'exécution d'un jugement étranger imposant une réaction criminelle privative de liberté est aussi admissible, même si les conditions prévues aux alinéas *g)* et *j)* du paragraphe 1 ne sont pas remplies, lorsque, en cas d'évasion vers le Portugal ou dans une autre situation où la personne s'y trouve, l'extradition du condamné aura été refusée pour les faits figurant dans le jugement.

4. Les dispositions du paragraphe précédent sont aussi applicables, moyennant accord entre le Portugal et l'Etat concerné, une fois entendue la personne en question, aux cas où il y a lieu à l'application d'une mesure d'expulsion ultérieure à l'accomplissement de la peine.

5. La condition mentionnée à l'alinéa *i)* du paragraphe 1 peut être dispensée dans des cas spéciaux, nommément, en raison de l'état de santé du condamné ou de tout autre motif d'ordre familial ou professionnel qui s'avère nécessaire.

6. L'exécution du jugement a encore lieu, indépendamment de la vérification des conditions du paragraphe 1, lorsque le Portugal, aux termes du paragraphe 2 de l'article 32, a préalablement accordé l'extradition du citoyen portugais.

Article 97

Exécution de décisions prononcées par des autorités administratives

1. L'exécution de décisions finales prononcées dans les procédures en raison des infractions mentionnées au paragraphe 3 de l'article 1er est aussi possible, pourvu que l'intéressé ait eu la possibilité de former recours devant une instance juridictionnelle.

2. La transmission de la demande d'exécution est effectuée conformément aux dispositions des traités, conventions ou accords dont le Portugal est partie ou, à défaut, par l'intermédiaire de l'Autorité centrale, aux termes prévus dans ce texte.

Article 98

Limites de l'exécution

1. L'exécution du jugement étranger est limitée:

   a) À une peine ou mesure de sûreté emportant privation de liberté ou à une peine pécuniaire si, le cas échéant, sont trouvés au Portugal des biens du condamné suffisants pour garantir, en tout ou en partie, cette exécution;
   b) À la confiscation de produits, objets et instruments du crime;
   c) À une indemnité civile, figurant dans le jugement, si l'intéressé la demande.

2. L'exécution des frais de la procédure est limitée aux frais dus à l'Etat requérant.

3. L'exécution de la peine pécuniaire détermine sa conversion en escudos, selon le taux de change officiel à la date du prononcé de la décision de révision et confirmation.

4. Les sanctions accessoires et les mesures de sûreté d'interdiction de professions, activités et droits ne sont exécutées que dans les cas où elles peuvent avoir efficacité pratique au Portugal.

Article 99
Documents et déroulement de la demande

1. La demande est soumise, par l'Autorité centrale, à l'appréciation du Ministre de la Justice.

2. La demande est accompagnée d'un extrait ou d'une copie certifiée conforme du jugement à exécuter et, le cas échéant, d'une déclaration constatant le consentement du condamné, tel que prévu à l'alinéa *j)* du paragraphe 1 de l'article 96, ainsi que d'une information sur la durée de la détention provisoire subie ou de la durée de l'accomplissement de la sanction pénale, jusqu'à la date de la présentation de la demande.

3. Lorsque le jugement se rapporte à plusieurs personnes ou impose des réactions criminelles différentes, la demande est accompagnée d'un extrait ou d'une copie certifiée conforme de la partie du jugement à laquelle se rapporte spécifiquement l'exécution.

4. Si le Ministre de la Justice estime la demande recevable, il renvoie l'expédient, par l'intermédiaire du Procureur Général de la République, au Ministère public près la Cour d'appel compétente, aux termes de l'article 235 du Code de procédure pénale, afin que celui-là prenne toutes mesures nécessaires à ce qu'il soit engagé la procédure en révision et confirmation du jugement.

5. Le Ministère public requiert l'audition du condamné ou de son défenseur afin que ceux-ci se prononcent sur la demande, à moins que le consentement n'ait été déjà donné aux termes du paragraphe 1, ou qu'il n'ait lui-même formulé la demande de délégation de l'exécution à l'Etat de condamnation.

Article 100
Révision et confirmation du jugement étranger

1. La force exécutoire du jugement étranger dépend de révision et confirmation préalables, d'après les dispositions du Code de procédure pénale et des alinéas *a)* et *c)* du paragraphe 2 de l'article 6 du présent texte.

2. Lorsque le tribunal se prononce pour la révision et confirmation:

a) Il est lié par la matière de fait jugée prouvée dans le jugement étranger;

b) Il ne peut convertir une peine privative de liberté en une peine pécuniaire;

c) La décision de révision et confirmation ne peut, en aucun cas, aggraver la réaction imposée dans le jugement étranger.

3. En cas d'omission, d'obscurité ou d'insuffisance de la matière de fait, le tribunal demande tous les renseignements nécessaires, la confirmation étant refusée lorsqu'il n'est pas possible d'obtenir ceux-là.

4. La procédure de coopération réglée par le présent chapitre a caractère urgent et court même pendant les vacances.

5. Si la demande se rapporte à une personne qui est détenue, une décision est prise dans un délai de six mois, à compter de la date de réception de la demande au tribunal.

6. Si la demande se rapporte à l'exécution d'un jugement imposant une réaction privative de liberté dans les cas prévus au paragraphe 5 de l'article 96, le délai mentionné au paragraphe précédent est de deux mois.

7. En cas de recours, les délais mentionnés aux paragraphes 5 et 6 sont augmentés de trois et un mois respectivement.

Article 101
Droit applicable et effets de l'exécution

1. L'exécution d'un jugement étranger a lieu conformément à la législation portugaise.

2. Les jugements étrangers exécutés au Portugal produisent les mêmes effets que ceux conférés par la loi portugaise aux jugements prononcés par les tribunaux portugais.

3. L'Etat étranger qui demande l'exécution est seul compétent pour statuer sur un recours en révision contre le jugement à exécuter.

4. L'amnistie, le pardon générique et la grâce peuvent être accordés tant par l'Etat étranger que par l'Etat portugais.

5. Le tribunal compétent pour l'exécution met fin à celle-ci:

a) Lorsqu'il prend connaissance que le condamné a bénéficié d'une amnistie, d'un pardon générique ou d'une grâce ayant éteint la peine et les sanctions accessoires;

b) Lorsqu'il prend connaissance de l'introduction d'un recours en révision contre le jugement à exécuter ou de toute autre décision ayant pour effet d'enlever au jugement son caractère exécutoire;

c) Lorsque l'exécution observe la peine pécuniaire et le condamné a effectué le paiement à l'Etat requérant.

6. La grâce et le pardon générique partiels ou la substitution d'une peine par une autre sont pris en considération dans l'exécution.

7. L'Etat étranger doit informer le tribunal de l'exécution de toute décision qui, conformément aux dispositions du paragraphe 5, entraîne la cessation de l'exécution.

8. Le début de l'exécution au Portugal entraîne la renonciation de l'Etat étranger à l'exécution du jugement, sauf si le condamné s'évade, cas où cet Etat reprend son droit d'exécution; en s'agissant d'une peine pécuniaire, il reprend ce droit à partir du moment où il est informé de la non exécution, en tout ou en partie, de cette peine.

Article 102
Etablissement pénitentiaire pour l'exécution du jugement

1. Lorsque la décision portant confirmation du jugement étranger et imposant une réaction criminelle privative de liberté acquiert force de chose jugée, le Ministère public prend toutes mesures nécessaires à ce que le condamné soit conduit à l'établissement pénitentiaire le plus proche de son lieu de résidence ou de son dernier domicile au Portugal.

2. Lorsqu'il n'est pas possible de déterminer le lieu de résidence ou du dernier domicile de la personne condamnée, celle-ci sera conduite à un établissement pénitentiaire du district judiciaire de Lisbonne.

Article 103
Tribunal compétent pour l'exécution

1. Est compétent pour l'exécution du jugement révisé et confirmé le tribunal de l[ère] instance du lieu de résidence ou du dernier domicile du condamné au Portugal ou, au cas où il ne serait pas possible de les déterminer, celui du ressort de Lisbonne.

2. Les dispositions du paragraphe précédent ne portent pas atteinte à la compétence du tribunal d'application des peines.

3. Aux fins du paragraphe 1, la Cour d'appel ordonne l'envoi de la procédure au tribunal de l'exécution.

CHAPITRE II

Exécution des jugements pénaux portugais à l'étranger

Article 104
Conditions de la délégation

1. L'exécution d'un jugement pénal portugais peut être déléguée à un Etat étranger lorsque, en dehors des conditions générales prévues dans le présent texte:

a) Le condamné est national de cet Etat ou d'un Etat tiers ou apatride et a sa résidence habituelle sur le territoire de cet Etat;
b) Le condamné est un citoyen portugais résidant habituellement sur le territoire de l'Etat étranger;
c) Il n'est pas possible ou admissible d'obtenir l'extradition aux fins d'exécution du jugement portugais;
d) Il y a des raisons de croire que la délégation peut favoriser une meilleure réinsertion sociale du condamné;
e) Le condamné, en cas de réaction criminelle privative de liberté, après avoir été informé des conséquences de l'exécution à l'étranger, y donne son consentement;
f) La durée de la peine ou mesure de sûreté imposées par le jugement n'est pas inférieure à un an ou, s'agissant d'une peine pécuniaire, son montant n'est pas inférieur à 30 unités de compte procédural; cependant et moyennant accord avec l'Etat étranger, cette condition peut être dispensée en des cas spéciaux, notamment en raison de l'état de santé du condamné ou de tout autre motif d'ordre familial ou professionnel.

2. Remplies les conditions mentionnées au paragraphe précédent, la délégation est aussi admissible si le condamné est en train de purger une réaction criminelle privative de liberté dans l'Etat étranger pour un fait autre que celui ayant motivé la condamnation au Portugal.

3. L'exécution à l'étranger d'un jugement portugais imposant une réaction criminelle privative de liberté est aussi admissible, même si les conditions prévues aux alinéas *d)* et *e)* du paragraphe 1 ne sont pas remplies, lorsque le condamné se trouve sur le territoire de l'Etat étranger et l'extradition pour les faits figurant dans le jugement n'est pas possible ou est refusée.

4. Les dispositions du paragraphe précédent peuvent également être appliquées si les circonstances du cas le conseillent, moyennant accord avec l'Etat étranger, lorsque l'application de la peine accessoire d'expulsion a lieu.

5. La délégation est subordonnée à la condition de non aggravation, dans l'Etat étranger, de la réaction infligée par le jugement portugais.

Article 105
Application réciproque

1. S'appliquent, réciproquement, les dispositions des paragraphes 1, 2 et 4 de l'article 98, concernant les limites de l'exécution, et les dispositions des paragraphes 2 à 7 de l'article 101, concernant les effets de l'exécution.

2. Lorsqu'il n'y a pas au Portugal de biens suffisants pour garantir l'exécution intégrale de la peine pécuniaire, la délégation est admise pour ce qui est de la partie en faute.

Article 106
Effets de la délégation

1. L'acceptation, par l'Etat étranger, de la délégation de l'exécution entraîne la renonciation du Portugal à l'exécution du jugement.

2. Une fois la délégation de l'exécution acceptée, le tribunal déclare sa suspension dès la date du début de celle-ci dans cet Etat jusqu'à son exécution intégrale ou jusqu'à ce que ce dernier communique ne pas pouvoir être en mesure d'assurer cette exécution.

3. À l'acte de remise de la personne condamnée, l'Etat étranger est informé de la durée de la privation de liberté déjà purgée au Portugal ainsi que de la période qu'il reste à purger.

4. Les dispositions du paragraphe 1 ne font pas obstacle à ce que le Portugal récupère son droit d'exécution du jugement, dans les cas où le condamné s'évade ou, s'agissant d'une peine pécuniaire, à partir du moment où il a été informé de la non exécution, totale ou partielle, de cette peine.

Article 107
Procédure de délégation

1. La demande de délégation de l'exécution d'un jugement dans un Etat étranger est formulée au Ministre de la Justice par le Procureur Général de la République, soit sur demande de cet Etat, soit par l'initiative du Ministère public, soit à la demande du condamné, de *l'assistente* ou de la partie civile, dans ce dernier cas circonscrit à l'exécution de l'indemnisation civile figurant dans la décision.

2. Le Ministre de la Justice décide dans un délai de 15 jours.

3. Si le Ministre de la Justice considère la demande recevable, celle-ci est immédiatement transmise, par l'intermédiaire de l'Office du Procureur Général de la République, au Ministère public près la Cour d'appel, afin que celui-ci entame la poursuite respective.

4. Lorsque le consentement du condamné est nécessaire, il doit être donné devant ce tribunal sauf s'il se trouve à l'étranger; dans ce cas, le consentement peut être donné devant une autorité consulaire portugaise ou devant une autorité judiciaire étrangère.

5. Si le condamné se trouve au Portugal, le Ministère public demande qu'il soit notifié pour, dans un délai de dix jours, informer de ce qu'il estime pertinent, si ce n'est pas lui-même qui a formulé la demande.

6. Le défaut d'une réponse du condamné vaut consentement à la demande, fait dont il est informé à l'acte de notification.

7. Aux fins des paragraphes 4 et 6, il est expédié une commission rogatoire à l'autorité étrangère ou une lettre à l'autorité consulaire portugaise, un délai d'exécution étant fixé dans les deux cas.

8. La Cour d'appel effectue toutes les démarches qu'elle estime nécessaires à la décision, y compris, à cette fin, la présentation du dossier relatif au jugement condamnatoire si celui-ci ne lui a pas encore été transmis.

Article 108
Délais

1. La procédure de coopération réglementée dans le présent chapitre a un caractère urgent et a lieu même pendant les vacances.

2. Si la demande concerne l'exécution d'un jugement qui impose la peine privative de liberté, celle-là est décidée dans un délai de six mois, comptés à partir de la date de son introduction devant le tribunal, sauf dans les cas mentionnés à la deuxième partie de l'alinéa *f)* du paragraphe 1 de l'article 104, dont le délai est de deux mois.

Article 109
Présentation de la demande

1. La décision favorable à la délégation détermine la présentation de la demande par le Ministre de la Justice à l'Etat étranger, à travers l'Autorité centrale, accompagnée des documents suivants:

a) d'un extrait ou d'une copie certifiée conforme du jugement portugais, indiquant la date à laquelle il a acquis force de chose jugée;

b) D'une déclaration certifiant la durée de la privation de liberté déjà subie jusqu'à la présentation de la demande;
c) D'une déclaration constatant le consentement du condamné, dans les cas où il soit exigé.

2. Si l'autorité étrangère compétente pour l'exécution informe que la demande a été acceptée, l'Autorité centrale demande à être tenue informée de cette exécution jusqu'à ce qu'elle soit terminée.

3. L'information reçue aux termes du paragraphe précédent est transmise au tribunal de la condamnation.

CHAPITRE III

Destination des amendes et des choses saisies et mesures provisoires

Article 110
Destination des amendes et des choses saisies

1. Les sommes obtenues des peines pécuniaires à la suite de l'exécution d'un jugement étranger reviennent à l'Etat portugais.

2. Sur demande de l'Etat de condamnation, ces sommes peuvent lui être remises, dans la mesure où, dans les mêmes circonstances, le même procédé serait adopté à l'égard du Portugal.

3. Les dispositions des paragraphes précédents s'appliquent réciproquement au cas de délégation de l'exécution d'un jugement portugais dans un Etat étranger.

4. Les choses saisies à la suite d'une décision de confiscation reviennent à l'Etat d'exécution, mais à la demande de l'Etat de condamnation elles peuvent lui être remises lorsqu'elles revêtent un intérêt particulier pour cet Etat et il y a garantie de réciprocité.

Article 111
Mesures de coercition

1. À la demande du Ministère public, la Cour d'appel, dans la procédure en révision et confirmation du jugement étranger aux fins d'exécution d'une

réaction criminelle privative de liberté, peut soumettre le condamné qui se trouve au Portugal à une mesure de coercition qu'elle juge adéquate.

2. Si la peine de détention provisoire a été appliquée, celle-ci est révoquée à l'expiration des délais mentionnés aux paragraphes 4 et 5 de l'article 100, sans qu'une décision de confirmation n'ait été intervenue.

3. La détention provisoire peut être remplacée par une autre mesure de coercition, conformément à la loi de procédure pénale.

4. La décision concernant des mesures de coercition est susceptible de recours en général.

Article 112
Mesures provisoires

1. À la demande du Ministère public, le juge peut ordonner les mesures provisoires nécessaires à la conservation et maintien des choses saisies, en vue d'assurer l'exécution du jugement portant confiscation.

2. Cette décision est susceptible de recours, n'ayant pas d'effet suspensif le recours contre la décision qui ordonne ces mesures.

Article 113
Mesures provisoires à l'étranger

1. Avec la demande de délégation de l'exécution d'un jugement portugais dans un Etat étranger, il peut être demandé l'application de mesures de coercition à l'égard d'un condamné qui se trouve dans cet Etat.

2. Les dispositions du paragraphe précédent s'appliquent aux mesures provisoires destinées à assurer l'exécution des décisions de confiscation des choses.

CHAPITRE IV

Transfèrement des personnes condamnées

SECTION I

Dispositions communes

Article 114
Portée

Le présent chapitre réglemente l'exécution de jugements pénaux qui implique le transfèrement de la personne condamnée à une peine ou mesure privatives de liberté, lorsque le transfèrement est effectué sur demande de cette personne-là ou moyennant son consentement.

Article 115
Principes

1. Une fois remplies les conditions générales établies dans le présent texte et dans les articles qui suivent, toute personne condamnée à une peine ou soumise à une mesure de sûreté privative de liberté par un tribunal étranger peut être transférée vers le Portugal afin d'y purger les mêmes.
2. De même et aux mêmes fins, toute personne condamnée ou soumise à une mesure de sûreté privative de liberté par un tribunal portugais peut être transférée vers l'étranger.
3. Le transfèrement peut être demandé soit par l'Etat étranger, soit par l'Etat portugais; dans les deux cas, sur demande ou moyennant le consentement exprès de la personne intéressée.
4. Le transfèrement dépend, en outre, d'un accord entre l'Etat - dans lequel le jugement a été prononcé – qui a appliqué la peine ou mesure de sûreté et l'Etat auquel l'exécution est demandée.

Article 116
Informations fournies aux personnes condamnées

Les services pénitentiaires informent les personnes condamnées de leur faculté de pouvoir demander leur transfèrement aux termes du présent texte.

SECTION II

Transfèrement vers l'étranger

Article 117
Informations et documents à l'appui

1. Si la personne intéressée exprime le souhait d'être transférée vers un Etat étranger, l'Autorité centrale communique ce fait à cet Etat en vue d'obtenir son accord, et bien aussi les éléments suivants:

a) Le nom, la date de naissance, le lieu de naissance et la nationalité de ladite personne;
b) S'il y a lieu, son domicile dans cet Etat;
c) Un exposé des faits qui motivent le jugement;
d) la nature, la durée et la date du début de l'exécution de la peine ou de la mesure.

2. Sont également envoyés à l'Etat étranger les éléments ci-après:

a) Un extrait ou copie certifiée conforme du jugement et du texte des dispositions légales appliquées;
b) Une déclaration sur la durée de la peine ou mesure déjà subie, y compris les renseignements sur toute détention provisoire, remise de peine ou mesure et sur tout autre acte concernant l'exécution du jugement, ainsi qu'une information portant sur la durée de la peine qui reste à purger;
c) Une demande ou une déclaration constatant le consentement de la personne intéressée au transfèrement;
d) Si c'est le cas, tout rapport médical ou social sur la personne intéressée, sur son traitement au Portugal et toute recommandation pour la suite de son traitement dans l'Etat étranger.

Article 118
Compétence interne pour formuler la demande

1. Il incombe au Ministère public près le tribunal qui prononce le jugement, de sa propre initiative ou sur demande de la personne concernée, de donner suite à la demande de transfèrement.

2. La demande doit être présentée aussitôt que possible après que la décision aura acquis force de chose jugée, une fois le consentement de la personne concernée obtenu.

3. La demande, accompagnée de tous les éléments nécessaires, est envoyée par l'Office du Procureur Général de la République au Ministre de la Justice aux fins d'appréciation.

4. Si les circonstances du cas le conseillent, le Ministre de la Justice peut demander une information sur le bien-fondé de la demande à l'Office du Procureur Général de la République, aux services pénitentiaires et à l'Institut de Réinsertion Sociale, cette information devant être présentée dans un délai de 10 jours.

5. La personne intéressée dans le transfèrement est informée par écrit de toute décision prise à son égard.

Article 119
Demande présentée par l'Etat étranger et documents à l'appui

1. Si la personne a exprimé le souhait d'être transférée vers un Etat étranger, celui-ci doit envoyer la demande assortie des documents suivants:

a) Une déclaration certifiant que le condamné est un national de cet Etat ou y a sa résidence habituelle;
b) Une copie des dispositions légales dont résulte que les faits prouvés dans le jugement portugais constituent une infraction également punissable selon le droit de cet Etat;
c) Tout autre document d'intérêt pour l'appréciation de la demande.

2. Sauf dans le cas de rejet liminaire de la demande, sont envoyés à l'Etat étranger les éléments mentionnés à l'article 117, paragraphe 2.

Article 120
Décision sur la demande

1. Si le Ministre de la Justice estime la demande recevable, celle-ci est transmise, par l'Office du Procureur Général de la République, au Ministère public près la Cour d'appel du ressort de l'établissement pénitentiaire où se trouve la personne à transférer.

2. Le Ministère public prend les mesures nécessaires à l'audition, par le juge, de la personne à transférer; à cette fin, les dispositions du Code de procédure pénale doivent être observées à l'égard de l'interrogatoire de l'inculpé détenu.

3. Le tribunal statue sur la demande après s'être assuré que le consentement de la personne visée, aux fins de transfèrement, a été donné volontairement et en étant pleinement consciente des conséquences juridiques qui en découlent.

4. Est garantie la possibilité de vérification, par l'intermédiaire d'un agent consulaire ou d'un autre fonctionnaire désigné en accord avec l'Etat étranger, que le consentement a été donné dans les conditions prévues au paragraphe précédent.

Article 121
Effets du transfèrement vers un Etat étranger

1. Le transfèrement d'une personne vers un Etat étranger suspend l'exécution du jugement au Portugal.

2. Est exclue la possibilité d'exécution d'un jugement au Portugal, après le transfèrement de la personne intéressée, si l'Etat étranger communique que ce jugement a été considéré comme terminé par décision judiciaire.

3. Lorsque le tribunal applique l'amnistie, le pardon ou la grâce, l'Etat étranger en est informé par l'intermédiaire de l'Autorité centrale.

SECTION III

Transfèrement vers le Portugal

Article 122
Demande de transfèrement vers le Portugal

1. Si une personne condamnée ou soumise à une mesure de sûreté dans un Etat étranger exprime le souhait d'être transférée vers le Portugal, le Procureur Général de la République communique au Ministre de la Justice les éléments mentionnés à l'article 117 qui lui ont été envoyés par cet Etat-là, aux fins d'appréciation de la recevabilité de la demande.

2. Les dispositions du paragraphe précédent s'appliquent également dans les cas où la demande a été présentée par l'Etat étranger.

3. Le Ministre de la Justice peut demander une information sur le bien-fondé de la demande à l'Office du Procureur Général de la République, aux services pénitentiaires et à l'Institut de Réinsertion Sociale, cette information devant être présentée dans un délai de 10 jours.

4. Les dispositions du paragraphe 5 de l'article 118 sont applicables de façon correspondante.

Article 123
Conditions spéciales du transfèrement vers le Portugal

1. Dès qu'acceptée la demande de transfèrement vers le Portugal, l'expédient respectif est envoyé par l'Office du Procureur Général de la République au Ministère public près la Cour d'appel du ressort du domicile indiqué par l'intéressé, aux fins de révision et confirmation du jugement étranger.

2. Dès qu'elle acquiert force de chose jugée, la décision en révision et confirmation du jugement étranger, l'Autorité centrale la communique à l'Etat qui a formulé la demande, aux fins d'exécution du transfèrement.

SECTION IV

Informations relatives à l'exécution et au transit

Article 124
Informations relatives à l'exécution

1. À l'Etat qui a demandé le transfèrement sont fournis tous les renseignements concernant l'exécution du jugement, nommément:

a) Lorsque, par décision judiciaire, celui-ci est considéré terminé;
b) Lorsque la personne transférée s'évade avant que l'exécution ne soit terminée.

2. Sur demande de l'Etat qui a requis le transfèrement, lui sera fourni un rapport spécial sur la forme et les résultats de l'exécution.

Article 125
Transit

Le transit, par le territoire portugais, d'une personne transférée d'un Etat étranger à un autre peut être autorisé à la demande de l'un de ces Etats; s'appliquent, de façon correspondante, les dispositions de l'article 43.

TITRE V

Surveillance des personnes condamnées ou libérées sous condition

CHAPITRE I

Dispositions générales

Article 126
Principes

1. La coopération pour la surveillance des personnes condamnées ou libérées sous condition résidant habituellement sur le territoire de l'Etat auquel cette coopération est demandée, est admise conformément aux dispositions des articles qui suivent.

2. La coopération prévue au paragraphe précédent vise à:

a) Favoriser la réinsertion sociale du délinquant moyennant l'adoption des mesures adéquates;

b) Surveiller son comportement en vue de l'éventuelle application d'une réaction criminelle ou de l'exécution de celle-ci.

Article 127
Objet

1. La coopération réglée par le présent titre peut consister dans l'une des modalités suivantes:

a) surveillance du délinquant;

b) Surveillance et éventuelle exécution du jugement; ou
c) Exécution intégrale du jugement.

2. Formulée une demande relative à l'une quelconque des modalités énoncées au paragraphe précédent, celle-ci peut être refusée en faveur d'une autre modalité s'avérant plus adéquate au cas concret, si la proposition est acceptée par l'Etat qui a formulé la demande.

Article 128
Qualité pour agir

La coopération dépend d'une demande de l'Etat dans lequel la décision a été prononcée.

Article 129
Double incrimination

L'infraction qui motive la demande de coopération doit être punissable par la loi de l'Etat qui la formule et par la loi de l'Etat auquel la demande est formulée.

Article 130
Refus facultatif

Dans le cas d'une demande adressée au Portugal, la coopération peut être refusée lorsque, en dehors des conditions générales établies par le présent texte:

a) La décision qui motive la demande résulte d'un jugement auquel l'inculpé était absent, la possibilité légale de demander un nouveau jugement ou de former recours contre le jugement ne lui ayant pas été garantie;
b) La décision est incompatible avec les principes qui président à l'application du droit pénal portugais, nommément si, en raison de son âge, l'auteur de l'infraction ne peut pas être soumis à une procédure pénale.

Article 131
Présentation de la demande au Portugal

1. La demande formulée au Portugal est soumise, par l'intermédiaire de l'Autorité centrale, à l'appréciation du Ministre de la Justice.

2. Le Ministre de la Justice peut demander des informations aux services compétents pour accompagner les mesures imposées par le jugement.

3. Si le Ministre de la Justice accepte la demande, l'Office du Procureur Général de la République la transmet au Ministère public près la Cour d'appel du ressort de la résidence de la personne visée, aux fins d'une décision judiciaire sur sa recevabilité.

Article 132
Informations

1. La décision sur la demande de coopération est immédiatement communiquée par l'Autorité centrale à l'Etat requérant et en cas de refus total ou partiel, il est fait mention du bien-fondé des motifs.

2. En cas d'acceptation de la demande, l'Autorité centrale informe l'Etat requérant de toute circonstance susceptible d'affecter l'accomplissement des mesures de surveillance ou l'exécution du jugement.

CHAPITRE II

Surveillance

Article 133
Mesures de surveillance

1. L'Etat étranger qui demande uniquement la surveillance fait connaître les conditions imposées au condamné et, s'il y a lieu, les mesures auxquelles celui-ci est tenu de se conformer pendant la période d'épreuve.

2. Acceptée la demande, le tribunal adapte, le cas échéant, les mesures prescrites à celles prévues dans la loi portugaise.

3. En aucun cas les mesures appliquées au Portugal ne peuvent aggraver par leur nature ou par leur durée celles prescrites dans la décision prononcée dans l'Etat étranger.

Article 134
Conséquences de l'acceptation de la demande

L'acceptation de la demande de surveillance entraîne les devoirs suivants:

a) Assurer la collaboration des autorités et des organismes qui, sur le territoire portugais, sont chargés de surveiller et d'assister les personnes condamnées;
b) Informer l'Etat requérant de toutes les mesures prises et de leur application.

Article 135
Révocation et cessation

1. Dans le cas où l'intéressé encourt la révocation de la décision de suspension conditionnelle, en raison d'une nouvelle poursuite ou d'une condamnation pour une nouvelle infraction, ou en manquant aux obligations qui lui ont été imposées, les renseignements nécessaires sont fournis d'office et au plus bref délai à l'Etat requérant.

2. Après la cessation de la période de surveillance, les renseignements nécessaires sont fournis à l'Etat requérant.

Article 136
Compétence de l'Etat qui formule la demande

L'Etat étranger qui formule la demande est seul compétent pour apprécier, compte tenu des renseignements et avis fournis, si la personne condamnée a satisfait ou non aux conditions qui lui ont été imposées et pour tirer de ses constatations les conséquences prévues par sa propre législation et il informe de sa décision à ce sujet.

CHAPITRE III

Surveillance et exécution du jugement

Article 137
Conséquence de la révocation de la suspension conditionnelle

1. Suite à la révocation de la décision de suspension conditionnelle dans l'Etat étranger et sur demande de cet Etat, l'Etat portugais acquiert compétence pour exécuter le jugement.

2. L'exécution a lieu conformément à la loi portugaise, après vérification de l'authenticité de la demande d'exécution et de sa conformité aux conditions fixées dans le présent texte, aux fins de révision et confirmation du jugement étranger.

3. L'Etat portugais doit adresser un document certifiant l'exécution.

4. Le tribunal remplace, s'il y a lieu, la réaction criminelle imposée dans l'Etat requérant par la peine ou mesure prévues dans la loi portugaise pour une infraction analogue.

5. Dans le cas prévu au paragraphe précédent, la peine ou mesure correspondra, autant que possible, quant à sa nature, à celle imposée dans la décision à exécuter, et elle ne peut excéder le maximum prévu par la loi portugaise ni aggraver, par sa nature ou par sa durée, la réaction criminelle imposée dans le jugement de l'Etat étranger.

Article 138
Compétence pour la libération conditionnelle

Le tribunal portugais est seul compétent en matière de libération conditionnelle.

Article 139
Mesures de grâce

L'amnistie, le pardon générique et la grâce peuvent être accordés tant par l'Etat étranger que par l'Etat portugais.

CHAPITRE IV

Exécution intégrale du jugement

Article 140
Disposition de renvoi

Au cas où l'Etat étranger demande l'exécution intégrale du jugement, les dispositions des paragraphes 2 à 5 de l'article 137 et celles des articles 138 et 139 sont corrélativement applicables.

CHAPITRE V

Coopération demandée par l'Etat portugais

Article 141
Régime

1. La demande formulée par le Portugal ayant été acceptée, l'Autorité centrale fait connaître le fait aux services compétents, aux fins de suivi des mesures imposées par le jugement, en vue d'établir des contacts directs avec les congénères étrangers.

2. Les dispositions des chapitres précédents sont applicables, avec les adaptations nécessaires, à la demande formulée par le Portugal.

CHAPITRE VI

Dispositions communes

Article 142
Contenu de la demande

1. La demande de coopération est formulée conformément à l'article 23 et doit contenir les informations prévues aux paragraphes qui suivent.

2. La demande de surveillance doit contenir:

a) La mention des raisons qui motivent la surveillance;
b) La spécification des mesures de surveillance décrétées;
c) Des renseignements sur la nature et la durée des mesures de surveillance dont l'application est requise;
d) Des renseignements sur la personnalité du condamné et sur sa conduite dans l'Etat requérant avant et après le prononcé de la décision de surveillance.

3. La demande de surveillance et exécution est accompagnée de la décision qui a imposé la réaction criminelle et de la décision constatant la révocation de la condition suspensive de la condamnation ou de son exécution.

4. Le caractère exécutoire de ces deux décisions est certifié selon les formes prescrites par la loi de l'Etat requérant.

5. Lorsque la décision à exécuter en remplace une autre sans reproduire l'exposé des faits, celle contenant cet exposé doit être jointe.

6. Au cas où il soit considéré que les renseignements fournis par l'Etat requérant sont insuffisants pour qu'il soit donné suite à la demande, un complément d'informations est demandé et il peut être fixé un délai à cet effet.

Article 143
Déroulement et décision de la demande

1. Aux demandes de coopération réglées par le présent titre, et à tout ce qui n'y est pas spécialement prévu, sont applicables, avec les adaptations nécessaires, les dispositions du titre IV relatives à l'exécution de jugements pénaux, en particulier en ce qui concerne l'appréciation du Ministre de la Justice, la compétence des tribunaux portugais et procédure respective et les effets de l'exécution.

2. Les dispositions relatives au consentement ne sont pas applicables aux cas où il s'agit uniquement d'une demande de surveillance.

3. Le Ministre de la Justice peut demander une information à l'Office du Procureur Général de la République et à l'Institut de Réinsertion Sociale en vue d'une décision sur la demande.

Article 144
Frais et dépens

1. À la demande de l'Etat requérant, seront perçus les frais et dépens de procédure occasionnés dans cet Etat, lesquels doivent être dûment indiqués.

2. En cas de perception, il n'est pas obligatoire de rembourser l'Etat requérant, à l'exception des honoraires d'experts qui ont été perçus.

3. Les frais de surveillance et d'exécution ne sont pas remboursés par l'Etat requérant.

TITRE VI

Entraide judiciaire en matière pénale

CHAPITRE I

Dispositions communes aux différentes modalités d'entraide

Article 145
Principe et domaine

1. L'entraide comprend la communication d'informations ainsi que d'actes de procédure et autres actes publics admis par le droit portugais, lorsque ceux-ci se révèlent nécessaires à l'exécution des finalités de la procédure, et encore les actes nécessaires à la saisie ou à la récupération d'instruments, objets ou produits de l'infraction.

2. L'entraide comprend nommément:

a) La notification d'actes et le dépôt de documents;
b) L'obtention de moyens de preuve;
c) Les fouilles, perquisitions et saisies et les expertises;
d) La notification et l'audition de suspects, inculpés, témoins ou experts;
e) Le transit de personnes;
f) Les renseignements sur le droit portugais ou étranger et ceux relatifs aux antécédents criminels des suspects, inculpés et condamnés.

3. Lorsque les circonstances le conseillent, moyennant accord entre le Portugal et l'Etat étranger ou l'entité judiciaire internationale, l'audition prévue à l'alinéa d) du paragraphe 2 peut être effectuée ayant recours aux moyens de télécommunication en temps réel, conformément à la législation procédurale pénale portugaise, sans préjudice des dispositions du paragraphe 10.

4. Dans le cadre de l'entraide, moyennant autorisation du Ministre de la Justice ou conformément à ce qui est prévu par accord, traité ou convention auxquels le Portugal est partie, il peut y avoir lieu à la communication directe de simples informations concernant des affaires de nature pénale entre les autorités portugaises et étrangères agissant en la qualité d'auxiliaires des autorités judiciaires.

5. Le Ministre de la Justice peut autoriser le déplacement en vue de la participation d'autorités judiciaires et d'organes de la police criminelle étrangères à des actes de caractère procédural pénal à être réalisés sur le territoire portugais.

6. La participation mentionnée au paragraphe précédent est admise exclusivement à titre d'assistance à l'autorité judiciaire ou à la police criminelle portugaises compétentes pour l'acte, dont la présence et la direction est toujours obligatoire, étant observées les dispositions de la loi procédurale pénale portugaise et, sous la condition de réciprocité, il en est dressé procès-verbal.

7. Les dispositions de l'article 29 s'appliquent à toute démarche de la compétence des autorités de police criminelle, effectuée dans les conditions et dans les limites définies dans le Code de procédure pénale.

8. La compétence mentionnée au paragraphe 5 peut être déléguée à l'Autorité centrale ou, lorsque le déplacement concerne exclusivement l'autorité ou l'organe de police criminelle, au directeur général de la Police judiciaire.

9. Les dispositions du paragraphe 5 sont applicables corrélativement aux demandes d'entraide formulées par le Portugal.

10. Les dispositions de cet article ne font pas obstacle à l'application des dispositions plus favorables d'accords, de traités ou de conventions auxquels le Portugal est partie.

Article 146
Droit applicable

1. La demande d'entraide adressée au Portugal est exécutée conformément à la loi portugaise.

2. Si l'Etat étranger le demande expressément, l'entraide peut être accordée conformément à la législation de cet Etat, lorsque celle-ci n'est pas incompatible avec les principes fondamentaux du droit portugais et n'entraîne pas de graves préjudices aux intervenants dans la procédure.

3. L'entraide est refusée si elle se rapporte à un acte non admis par la législation portugaise ou susceptible d'entraîner des sanctions de nature pénale ou disciplinaire.

Article 147
Mesures de coercition

1. Lorsque les actes visés à l'article 145 entraînent le recours à des mesures de coercition, ils ne peuvent être pratiqués que si les faits décrits dans la demande constituent une infraction aussi prévue dans le droit portugais et ils sont accomplis conformément à ce droit.

2. Les mesures de coercition sont admises, en outre, en cas de non punition du fait au Portugal, lorsque destinées à la preuve d'une cause d'exclusion de culpabilité de la personne contre laquelle la procédure pénale a été engagée.

Article 148
Interdiction d'utiliser les informations obtenues

1. Les informations obtenues aux fins d'utilisation dans la procédure indiquée dans la demande de l'Etat étranger ne peuvent être utilisées en dehors de cette procédure.

2. Exceptionnellement, et sur demande de l'Etat étranger ou de l'entité judiciaire internationale, le Ministre de la Justice, moyennant avis du Procureur Général de la République, peut consentir à l'utilisation de ces informations dans d'autres procédures pénales.

3. L'autorisation de consulter une procédure portugaise, accordée à un Etat étranger qui y intervient dans la qualité de lésé, est subordonnée aux conditions énoncées aux paragraphes précédents.

Article 149
Confidentialité

1. Sur demande d'un Etat étranger ou d'une entité judiciaire internationale, la demande d'entraide, son contenu et documents à l'appui, ainsi que la décision qui accorde l'entraide, restent confidentiels.

2. Si la demande ne peut être exécutée sans violation de la confidentialité, l'autorité portugaise en fait part à l'autorité intéressée afin que celle-ci décide si l'exécution doit ou non se poursuivre dans ces conditions.

CHAPITRE II

Demande d'entraide

Article 150
Qualité pour agir

Peuvent demander l'entraide les autorités ou entités étrangères qui, selon le droit de l'Etat concerné ou de l'organisation internationale respective, sont compétentes pour la poursuite.

Article 151
Contenu et documents à l'appui

En dehors des informations et documents mentionnés à l'article 23, la demande doit contenir les éléments suivants:

a) Dans le cas de notification, de la mention du nom et adresse du destinataire ou d'un autre local où il puisse être notifié, de sa qualité procédurale et de la nature du document à notifier;
b) Dans les cas de fouille, perquisition, saisie et remise d'objets ou valeurs et expertises, d'une déclaration certifiant que celles-ci sont admises par la loi de l'Etat requérant ou par le statut de l'entité judiciaire compétente;
c) De l'indication de certaines particularités de la procédure ou des conditions que l'Etat étranger ou entité judiciaire désire voir remplies, telles que la confidentialité et les délais d'exécution.

Article 152
Procédure

1. Les demandes d'entraide qui revêtent la forme de commission rogatoire peuvent être transmises directement entre les autorités judiciaires compétentes, sans préjudice du recours aux voies prévues à l'article 29.

2. La décision d'exécution des commissions rogatoires adressées aux autorités portugaises est de la compétence du juge ou du Ministère public, conformément à la législation procédurale pénale.

3. Après la réception d'une commission rogatoire qui n'est pas exécutée par le Ministère public, il lui est donné suite pour observations, aux fins de former opposition jugée pertinente à l'exécution.

4. L'exécution des commissions rogatoires est refusée dans les cas ci-après:

a) Lorsque l'autorité requise n'est pas compétente pour la mise en pratique de l'acte, sans préjudice de la transmission de la commission rogatoire à l'autorité judiciaire compétente, si celle-ci est portugaise;
b) Lorsque la demande s'adresse à un acte interdit par la loi ou qui est contraire à l'ordre public portugais;

c) Lorsque l'exécution de la commission rogatoire porte atteinte à la souveraineté ou à la sûreté de l'Etat;

d) Lorsque l'acte implique l'exécution d'une décision d'un tribunal étranger soumise à révision et confirmation si elle n'a pas été revue ou confirmée.

5. Les autres demandes, nommément celles relatives à l'envoi d'extraits du casier judiciaire, à la vérification de l'identité ou à la simple obtention d'informations, peuvent être transmises directement aux autorités et entités compétentes et, lorsque satisfaites, communiquées par la même voie.

6. Les dispositions du paragraphe 4 sont applicables, dûment adaptées, aux demandes qui revêtent la forme de commission rogatoire.

7. Les dispositions du paragraphe 3 sont corrélativement applicables aux commissions rogatoires adressées aux autorités étrangères, émises par les autorités judiciaires portugaises compétentes; ces commissions sont délivrées lorsqu'elles sont jugées nécessaires par ces entités aux fins de preuve de tout fait essentiel à l'accusation ou à la défense.

CHAPITRE III

Actes particuliers de l'entraide internationale

Article 153
Notification d'actes et dépôt de documents

1. L'autorité portugaise compétente procède à la notification des actes procéduraux et des décisions qui lui soient envoyées à cette fin par l'autorité étrangère.

2. Cette notification peut se faire par simple communication au destinataire par voie postale ou, si l'autorité étrangère le demande expressément, par toute autre forme compatible avec la législation portugaise.

3. La preuve de la notification est faite au moyen d'un document daté et signé par le destinataire ou d'une déclaration de l'autorité portugaise constatant le fait, la forme et la date de la notification.

4. La notification est réputée effectuée lorsque son acceptation ou rejet sont confirmés par écrit.

5. Si la notification ne peut pas se faire, l'autorité étrangère en est informée de ce fait ainsi que des motifs.

6. Les dispositions des paragraphes précédents ne font pas obstacle à la notification directe de la personne qui se trouve sur le territoire de l'Etat étranger, conformément à ce qui est prévu par accord, traité ou convention auxquels le Portugal est partie.

Article 154
Citation à comparaître

1. La demande de citation à comparaître d'une personne afin d'intervenir dans une procédure étrangère en la qualité de suspect, inculpé, témoin ou expert n'oblige pas le destinataire de la notification.

2. La personne notifiée est informée, à l'acte de notification, du droit de se refuser à comparaître.

3. L'autorité portugaise rejette la notification si celle-ci contient l'institution de sanctions ou lorsque ne sont pas garanties les mesures nécessaires à la sécurité de cette personne.

4. Le consentement à comparaître doit être fait par déclaration écrite librement prêtée.

5. La demande de notification indique les rémunérations et les indemnisations, ainsi que les frais de voyage et de séjour a accorder et doit être transmise avec une antécédence raisonnable, de sorte à être reçue jusqu'à 50 jours avant la date à laquelle la personne est tenue de comparaître.

6. En cas d'urgence, il peut être accordé dans la réduction du délai mentionné au paragraphe précédent.

7. Les rémunérations, indemnités et dépenses mentionnées au paragraphe 5 seront calculées en raison du lieu de résidence de la personne qui accepte de comparaître et selon les taux prévus par la loi de l'Etat sur le territoire duquel la démarche doit avoir lieu.

Article 155
Remise temporaire de détenus ou arrêtés

1. Toute personne détenue ou arrêtée au Portugal peut être remise temporairement à une autorité étrangère aux fins de l'article précédent, pourvu que cette personne y donne son consentement et que soient garantis le maintien de la détention et sa restitution aux autorités portugaises à la date par celle-ci fixée ou lorsque la présence de cette personne n'est plus nécessaire.

2. Sans préjudice des dispositions du paragraphe précédent, la remise n'est pas admise lorsque:

a) La présence de la personne détenue ou arrêtée est nécessaire dans une procédure pénale portugaise;
b) La remise est susceptible de prolonger sa détention provisoire;
c) Compte tenu des circonstances du cas d'espèce, l'autorité judiciaire portugaise considère la remise inconvéniente.

3. Les dispositions des paragraphes 1 et 2 de l'article 21 s'appliquent à la demande mentionnée dans cet article.

4. La période de temps que la personne demeure hors du territoire portugais compte aux effets de détention provisoire ou d'exécution de la réaction criminelle imposée dans la procédure pénale portugaise.

5. Si la peine imposée à la personne remise aux termes du présent article prend fin pendant qu'elle se trouve sur le territoire d'un Etat étranger, cette personne sera mise en liberté et reprendra le statut de personne non détenue aux fins des dispositions du présent titre.

6. Le Ministre de la Justice peut subordonner l'octroi de l'entraide à certaines conditions qu'il précisera.

Article 156
Transfèrement temporaire de détenus ou arrêtés aux fins d'enquête

1. Les dispositions de l'article précédent sont également applicables aux cas où, moyennant accord, une personne détenue ou arrêtée au Portugal est transférée vers le territoire d'un autre Etat, aux fins d'accomplissement de l'acte d'enquête dans la procédure portugaise.

2. Les dispositions du paragraphe précédent s'appliquent corrélativement à la demande d'entraide adressée au Portugal.

Article 157
Sauf-conduit

1. La personne qui comparaît sur le territoire d'un Etat étranger aux termes et aux fins prévus dans les articles 154, 155 et 156 ne peut être:

a) Détenue, poursuivie, punie ni soumise à aucune autre restriction de sa liberté individuelle, pour des faits antérieurs à son départ du

territoire portugais autres que ceux établis dans la demande de coopération;

b) Forcée, sans son consentement, à faire des dépositions ou des déclarations dans une procédure autre que celle à laquelle se rapporte la demande.

2. L'immunité prévue au paragraphe précédent cesse lorsque la personne demeure volontairement sur le territoire de l'Etat étranger pendant plus de 45 jours après la date à laquelle sa présence a cessé d'être nécessaire ou, ayant quittée ce territoire, y retourne volontairement.

3. Les dispositions des paragraphes précédents sont applicables, de façon correspondante, à la personne résidant habituellement à l'étranger et qui rentre au Portugal à la suite d'une notification pour un acte de procédure pénale.

Article 158
Transit

1. Au transit d'une personne détenue dans un Etat étranger et tenue de comparaître dans un Etat tiers afin de participer à un acte ou démarche procédurale s'appliquent, de façon correspondante, les dispositions de l'article 43.

2. La détention de la personne en transit ne se maintient pas si l'Etat qui a autorisé le transfèrement demande entre-temps sa mise en liberté.

Article 159
Envoi d'objets, valeurs, documents ou procédures

1. Sur demande des autorités étrangères compétentes, les objets, en particulier les documents et valeurs susceptibles de saisie d'après le droit portugais, peuvent être mis à la disposition de ces autorités s'ils se révèlent d'intérêt à la prise d'une décision.

2. Les objets et valeurs provenant d'une infraction peuvent être restitués à leurs propriétaires, indépendamment d'une poursuite engagée dans l'Etat requérant.

3. Il peut être autorisé la transmission de procédures pénales ou autres, revêtant un intérêt fondé pour une procédure étrangère, invoqué dans la demande d'entraide, à condition qu'elles soient restituées dans le délai fixé par l'autorité portugaise compétente.

4. L'envoi d'objets, valeurs, procédures ou documents peut être ajourné si ceux-ci se révèlent nécessaires aux fins d'une procédure en cours.

5. Au lieu des procédures et documents demandés, peuvent être transmises des copies certifiées conformes; toutefois, si l'autorité étrangère demande expressément à recevoir les originaux, il est donné suite à cette demande dans toute la mesure du possible, compte tenu de la condition de restitution prévue au paragraphe 3.

Article 160
Produits, objets et instruments du crime

1. Sur demande de l'autorité étrangère compétente, peuvent être effectuées des démarches destinées à vérifier si l'un quelconque produit du crime invoqué se trouve au Portugal; il en est fait part des résultats de ces démarches.

2. L'autorité étrangère doit indiquer dans la demande les motifs pour lesquels elle considère que ces produits peuvent se trouver au Portugal.

3. L'autorité portugaise prend les mesures nécessaires à l'exécution de la décision du tribunal étranger déterminant la confiscation des produits du crime, étant observées, de façon correspondante, les dispositions du titre IV, dans la partie applicable.

4. Lorsque l'autorité étrangère communique son intention de demander l'exécution de la décision mentionnée au paragraphe précédent, l'autorité portugaise peut prendre les mesures permises par le droit portugais en vue de prévenir toute transaction, transmission ou disposition des biens qui sont ou peuvent être affectés par cette décision.

5. Les dispositions du présent article sont applicables aux objets et instruments du crime.

Article 161
Informations sur le droit applicable

1. Toute information sur le droit portugais applicable à une procédure pénale déterminée, demandée par une autorité judiciaire étrangère, est fournie par le Bureau de Documentation et Droit Comparé de l'Office du Procureur Général de la République.

2. Dans le cas d'une information sur le droit étranger, l'autorité judiciaire portugaise demande, à cet effet, la collaboration du Bureau mentionné au paragraphe précédent.

Article 162
Informations figurant au casier judiciaire

La communication directe de demandes concernant le casier judiciaire, mentionnée au paragraphe 5 de l'article 152, est adressée aux services d'identification criminelle.

Article 163
Renseignements sur les jugements

1. Des renseignements ou des extraits de jugements ou de mesures ultérieures peuvent être demandées, ainsi que toute autre information pertinente y afférente, en ce qui concerne les ressortissants de l'Etat requérant.
2. Les demandes effectuées aux termes du paragraphe précédent sont communiquées par l'intermédiaire de l'Autorité centrale.

Article 164
Clôture de la procédure de coopération

1. Lorsque l'autorité chargée de l'exécution de la demande la considère terminée, elle transmet le dossier et les documents y relatifs à l'autorité étrangère qui a formulé la demande.
2. Si l'autorité étrangère considère que l'exécution de la demande est incomplète, elle peut la renvoyer afin d'être complétée et indique les motifs de cette dévolution.
3. La demande est complétée si l'autorité portugaise entend faire droit aux raisons invoquées pour sa dévolution.

TITRE VII

Dispositions finales

Article 165
Délégation de compétences

Le Ministre de la Justice peut déléguer au Procureur Général de la République la compétence pour la pratique des actes prévus au paragraphe 1

de l'article 69, au paragraphe 6 de l'article 91, à l'article 92, aux paragraphes 1, 2 et 3 de l'article 107, aux paragraphes 3 et 4 de l'article 118 et au paragraphe 2 de l'article 141.

Article 166
Abrogation

Est abrogé le Décret-loi n° 43/91 du 22 janvier.

Article 167
Entrée en vigueur

Le présent texte entre en vigueur le 1er octobre 1999.

Approuvé en date du 24 juin 1999.

Le Président de l'Assemblée de la République, *António de Almeida Santos.*

Promulgué en date du 13 août 1999.
Publiez.

Le Président de la République, *Jorge Sampaio.*

Contresigné le 18 août 1999.

Le Premier Ministre, *António Manuel de Oliveira Guterres.*

INTERNATIONAL JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

LAW No. 144/99, OF 31 AUGUST *

* Hereinafter "this law".

LAW No. 144/99, of 31 August

Approves the law on international judicial co-operation in criminal matters *

In accordance with the provisions of Article 161, paragraph *c)* of the Constitution, the Assembly of the Republic enacts the following to be equal to a general law of the Republic:

PART I

General

CHAPTER I

Subject-matter, scope and general principles of international judicial co-operation in criminal matters

Article 1
Subject-matter

1. This law shall apply to the following forms of international judicial co-operation in criminal matters:

a) Extradition;
b) Transfer of proceedings in criminal matters;
c) Enforcement of criminal judgements;

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* Translation by Cândido Cunha, 2.11.99.

d) Transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty;
e) Supervision of conditionally sentenced or conditionally released persons;
f) Mutual legal assistance in criminal matters.

2. The provisions of paragraph 1 shall apply, as appropriate, to the co-operation between Portugal and any international judicial entities established within the framework of treaties or conventions that bind the Portuguese State.

3. The provisions of this law shall apply as subsidiary provisions to co-operation in matters pertaining *a)* to offences of a criminal nature, during the stage of the procedure that is conducted before an administrative authority, and *b)* to offences of a regulatory nature [1] that give rise to proceedings that are subject to review before a court of law.

Article 2
Scope

1. Enforcement of this law shall be subject to the protection of the interests of sovereignty, security, ordre public, or other, constitutionally defined, interests of the Portuguese Republic.

2. No right to compel any form of international co-operation in criminal matters shall derive from this law.

Article 3
Primacy of international treaties, conventions and agreements

1. The forms of co-operation mentioned in Article 1 above shall be carried out in accordance with the provisions of the international treaties, conventions and agreements that bind the Portuguese State and, where such provisions are non-existent or do not suffice, the provisions of this law.

2. The provisions of the Code of Criminal Procedure shall apply as subsidiary provisions.

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[1] In Portuguese: "ilícito de mera ordenação social".

Article 4
Principle of reciprocity

1. International co-operation in criminal matters, as provided for in this law, falls within the province of the principle of reciprocity.

2. Where circumstances so require, the Ministry of Justice shall demand an undertaking to the effect that reciprocity shall apply; within the limits set out in the provisions of this law, it may provide other States with such an undertaking.

3. The absence of reciprocity shall not prevent compliance with a request for co-operation where such co-operation:

a) Is seen to be advisable in view of the nature of the facts, or in view of the need to combat certain serious forms of criminality;
b) May contribute to the betterment of the situation of the person concerned or to his social rehabilitation;
c) May serve to shed light on facts endorsed to a Portuguese national.

Article 5
Definitions

For the purposes of this law:

a) "Suspect" means any person with respect to whom there are grounds to believe that that person committed or participated in the commission of a criminal offence;
b) "Defendant" means any person prosecuted or accused under criminal proceedings, or any person against whom investigations have been requested;
c) "Sentenced person" means
- Any person against whom a judicial decision has been taken that imposes a criminal reaction, and
- Any person against whom a judicial decision has been taken that recognises that person's guilt although the enforcement of the sanction is conditionally suspended, and
- Any person against whom a judicial decision has been taken that imposes a criminal sanction involving deprivation of liberty that is either conditionally suspended, in whole or in part, at the date of the sentence or at a later date, or replaced by a non-custodial measure;

d) "Criminal reaction" means any sanction or measure involving deprivation of liberty, any pecuniary sanction and any other non custodial sanction, including ancillary sanctions.

Article 6
Mandatory grounds for refusal

1. Requests for co-operation shall be refused:

a) Where the proceedings do not comply with the requirements laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or other relevant international instruments ratified by Portugal;
b) Where there are well-founded reasons for believing that co-operation is sought for the purpose of persecuting or punishing a person on account of that person's race, religion, sex, nationality, language, political or ideological beliefs, or his belonging to a given social group;
c) Where the risk exists that the procedural situation of the person might be impaired on account of any of the factors indicated in the preceding sub-paragraph;
d) Where the co-operation sought might lead to a trial by a court of exceptional jurisdiction or where it concerns the enforcement of a sentence passed by such a court;
e) Where any of the facts in question is punishable with the death sentence or with a sentence resulting in any irreversible injury of the person's integrity;
f) Where any of the offences in question carries a life-long or indefinite sentence or measure.

2. The provisions in sub-paragraphs *e)* and *f)* of the preceding paragraph shall not preclude co-operation:

a) Should the requesting State, by way of an irreversible decision that binds its courts or any other authority with powers to execute the sentence, have either
i) Commuted the death sentence or the sentence resulting in any irreversible injury of the person's integrity, or
ii) Withdrawn the life-long nature of the sentence or measure;

b) Where the co-operation sought is in the form of extradition for offences that, under the law of the requesting State, carry a life-long or indefinite sentence or measure involving deprivation of or restrictions to liberty, should the requesting State offer assurances that such a sentence or measure shall not be imposed or shall not be executed;

c) Should the requesting State accept the conversion of the sentence or the detention order, by a Portuguese court and under the Portuguese law applicable to the offence or offences for which the person was sentenced; or

d) Where co-operation is sought on the basis of the provisions of Article 1.1 *f),* on grounds that it will presumably be relevant for the purpose of preventing such sentences or orders to be rendered.

3. In assessing the sufficiency of the assurances mentioned in sub-paragraph *b)* of paragraph 2 above, account shall be taken, in the light of the law and practice of the requesting State, inter alia, of the possibility that the sentence is not executed, of a reconsideration of the situation of the person sought and his conditional release, as well as of the possibilities that pardon, amnesty, commutation of the sentence or similar measure be granted, as provided in the law of the requesting State.

4. A request for co-operation shall also be refused where reciprocity is not ensured, without prejudice to the provisions of Article 4. 3.

5. Where co-operation is refused on the grounds offered by the provisions of sub-paragraphs *d), e)* or *f)* of paragraph 1 above, the method of co-operation provided for in Article 32.5 shall apply.

Article 7
Refusal on grounds relating to the nature of the offence

1. A request for co-operation shall also be refused where the proceedings concern:

a) Any facts that, according to the concepts of Portuguese law, constitute a political offence or an offence connected with a political offence;

b) Any facts that constitute a military offence and do not constitute an offence under ordinary criminal law.

2. The following shall not be regarded as political offences:

a) Genocide, crimes against humanity, war crimes and serious offences under the 1949 Geneva Conventions;
b) The offences mentioned in Article 1 of the European Convention on the Suppression of Terrorism, opened to signature on 27 January 1977;
c) The acts mentioned in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 17 December 1984;
d) Any other offences that ought not to be regarded as political under the terms of an international treaty, convention or agreement to which Portugal is a Party.

Article 8
Discontinuation of criminal proceedings

1. Co-operation shall not be admissible where, either in Portugal or in another State in which criminal proceedings concerning the same facts have been initiated:

a) Either the proceedings ended with a final sentence of acquittal, or were otherwise definitively discontinued;
b) Either the sentence was carried out, or it cannot be carried out according to the law of the State in which it was passed;
c) The criminal proceedings were discontinued on any other grounds, unless an international convention provides that discontinuation of proceedings under such grounds does not prevent the requested State from engaging in co-operation.

2. The provisions of sub-paragraphs *a)* and *b)* of the preceding paragraph shall have no effect where the request by the foreign authority is made for purposes of the judicial review of a sentence and the grounds for such a review are identical to those that are provided for under Portuguese law.

3. The provisions of sub-paragraph *a)* of paragraph 1 above shall not preclude co-operation where the latter is sought for the purpose of re-opening proceedings, in accordance with the law.

Article 9
Concurrent admissibility and inadmissibility of co-operation

1. If the conduct attributed to the person against whom criminal proceedings are taken falls under several provisions of the Portuguese criminal law, the request for co-operation may be complied with only with respect to such offence or offences in respect of which the request is admissible, provided that the requesting State undertakes to abide by the conditions imposed.

2. However, co-operation shall not be granted if the conduct falls under several provisions of the Portuguese or the foreign criminal law, one of which concerns the conduct in its entirety and the nature of which excludes the possibility of co-operation.

Article 10
Minor offences

Co-operation may be refused where the minor importance of the offence does not justify it.

Article 11
Protection of confidentiality

1. In implementing a request for international co-operation submitted to Portugal, the provisions of the Code of Criminal Procedure and supplementary legislation concerning grounds of refusal to testify, seizure of property, telephone tapping, professional or State secrets, or any other cases in which confidentiality is protected, shall apply.

2. The provisions of the preceding paragraph shall apply to any information that according to the request, ought to be given by persons not involved in the foreign criminal proceedings.

Article 12
Applicable law

1. The following shall have legal effect in Portugal:

   a) Any facts that, under the law of the requesting State, interrupt or suspend time-limitation periods;

b) any complaint submitted in due time to a foreign authority, in cases where a complaint is regarded as a requirement under Portuguese law.

2. Where the Portuguese law alone regards the complaint as a requirement for prosecution and where the person entitled to complain objects, no criminal reaction shall be imposed or enforced in Portugal.

Article 13
Effect of arrest

1. Any period of remand in custody abroad as well as any arrest ordered abroad as a result of one or another of the forms of co-operation provided for in this law, shall be taken into account in the framework of the Portuguese proceedings or deducted from the sentence, under the terms of the Criminal Code, as if the deprivation of liberty had occurred in Portugal.

2. With a view to making it possible to take into consideration any period of remand in custody, as well as any period of sentence actually served, information as necessary shall be exchanged.

Article 14
Compensation

Portuguese law shall apply to compensation for illegal or unjustifiable deprivation of liberty, or for other damages suffered by the suspect or the accused person,

a) During proceedings initiated in Portugal as a consequence of a request for co-operation made to Portugal;
b) During proceedings initiated abroad as a consequence of a request for co-operation made by a Portuguese authority.

Article 15
Concurrent requests

1. If, for the same or for different facts, international co-operation is requested by two or more States, co-operation shall be afforded to the State

that, in view of the circumstances of the case, might better safeguard both the interests of justice and the interests of the social rehabilitation of the suspect, the accused or the sentenced person.

2. The provisions of the preceding paragraph:

a) In the cases covered by Article 1.2, shall cede against the rule according to which international jurisdiction shall have primacy over national jurisdiction;

b) Shall not apply to the form of co-operation mentioned in Article 1. 1.*f)*.

Article 16
Rule of speciality

1. No person who, as a consequence of international co-operation, appears in Portugal for the purpose of participating in criminal proceedings, either as a suspect an accused or a sentenced person, shall be proceeded against, sentenced or detained nor shall he be in any way restricted in his personal freedom, for any act committed prior to his presence on the national territory, other than the act or acts on the grounds of which the request for co-operation was made by a Portuguese authority.

2. No person who, in the same terms as above, appears before a foreign authority shall be proceeded against, sentenced, detained, nor shall he be in any way restricted in his personal freedom, for any act committed, or any sentence passed, prior to his leaving the Portuguese territory, other than those mentioned in the request for co-operation.

3. The surrender of a person to the requesting State as mentioned in the preceding paragraph shall not be authorised unless that State provides the necessary guarantees to the effect that the rule of speciality shall be complied with.

4. The immunity that results from the provisions of this Article shall cease to have effect:

a) Where it became possible for the person concerned to leave the Portuguese territory or the territory of another State, as applicable, and that person does not avail himself of that possibility within a period of 45 days, or that person voluntarily returns to one of the said territories;

b) Where the State that authorised the transfer, once the suspect, the accused or the sentenced person have been heard, consents to a derogation to the rule of speciality.

5. The provisions of paragraphs 1 and 2 above do not preclude the possibility of extending the co-operation previously sought, by way of a new request, to facts other than those on the grounds of which the original request was made; the new request shall be prepared or examined, as applicable, in accordance with the provisions of this law.

6. Any request made under the provisions of the preceding paragraph shall be accompanied by a document established by the competent authority, containing the statements made by the person who benefits from the rule of speciality.

7. Where the request is submitted to a foreign State, the document mentioned in the preceding paragraph shall be established before the "Tribunal da Relação" (court of appeal) that has jurisdiction over the area where the person who benefits from the rule of speciality resides or is staying.

Article 17
Special cases in which the rule of speciality does not apply

1. The immunity that results from the provisions of paragraphs 1 and 2 of Article 16 shall also cease to have effect in cases where a treaty, convention or international agreement to which Portugal is a Party does not make provision for the rule of speciality.

2. Where immunity ceases to have effect because the person concerned relinquishes it, such relinquishment must result from a personal statement, made before a judge, showing that the person expressed himself voluntarily and in full knowledge of the consequences thereof, assisted by counsel; counsel shall be appointed where the person has not chosen one.

3. Where the person concerned is called upon to testify in Portugal, further to a request submitted to Portugal or submitted by a Portuguese authority, the hearing shall be held before the "Tribunal da Relação" (court of appeal) that has jurisdiction over the area where the person concerned resides or is staying.

4. Without prejudice to the provisions of the preceding paragraph, where only after the surrender of the person the Portuguese authorities become aware of facts that took place before such surrender, the relinquishment by a person

who appears in Portugal as a result of co-operation requested by a Portuguese authority may only be produced within the framework of the proceedings that it relates to.

Article 18
Optional refusal of international co-operation

1. International co-operation may be refused if the facts that substantiate the request are the subject of criminal proceedings, or if they should or may be the subject of criminal proceedings for which a Portuguese judicial authority has jurisdiction.

2. International co-operation may also be refused if, in view of the circumstances of the case, granting the request might entail serious consequences for the person concerned on account of his age, health or other reasons of a personal nature.

Article 19
Non his in idem

Where a request for international co-operation is granted that carries delegation of competence over criminal proceedings to a foreign judicial authority, criminal proceedings shall neither be initiated nor continued in Portugal for the same facts that substantiated the request; neither shall a sentence, the enforcement of which has been delegated to a foreign judicial authority, be enforced in Portugal.

CHAPTER II

General rules of procedure

Article 20
Language to be used

1. Requests for co-operation shall be accompanied by a translation into the official language of the requested State, unless otherwise stipulated in a convention or agreement, or unless that State exempts from the need for a translation.

2. The provisions of the preceding paragraph shall also apply to the requests addressed to Portugal.

3. The decisions concerning the admissibility or the refusal of a request for co-operation shall be notified to the authority of the requesting State, accompanied by a translation into the official language of that State, save in the cases mentioned in paragraph 1 above.

4. The provisions of this Article shall also apply to the documents that accompany the request.

Article 21
Procedure

1. The "Procuradoria-Geral da República" (Attorney-General's Office) is hereby designated to be the Central Authority for the purpose of receiving and transmitting any requests for co-operation covered by this law, as well as for all communications relating thereto.

2. Any request for co-operation made to Portugal shall be forwarded to the Minister of Justice by the Attorney-General with a view to its admissibility being decided upon.

3. Any request for co-operation made by Portuguese authorities shall be forwarded to the Minister of Justice by the Attorney-General.

4. The provisions of paragraph 1 shall not prejudice direct contacts relating to requests for co-operation, as mentioned in Article 1.1.*f)*.

Article 22
Communication of requests

1. For the communication of requests, the use, where available, of adequate telematic means, including telefax, shall be permitted, subject to the authenticity, confidentiality and reliability of the data transmitted being assured and subject to an agreement between the requesting and the requested State.

2. The provisions of the preceding paragraph shall not prejudice the use of urgent channels as provided for in Article 29.2.

Article 23
Requests

1. Requests for international co-operation shall indicate:

   a) The requesting as well as the requested authorities, even if the indication of the latter may be in general terms;

b) The purpose of and the reasons for the request
c) The legal qualification of the facts on the grounds of which the request is made;
d) The identification of the suspect, the accused or the sentenced person, of the person whose extradition or transfer is requested, as well as the identification of the witness or the expert whose evidence is sought;
e) A description of the facts, including time and place, proportional to the importance of the co-operation requested;
f) The text of the legal provisions applicable in the requesting State;
g) Any relevant documents.

2. The authentication of the documents shall not be required.

3. The competent authority may require that a formally irregular or an incomplete request be modified or completed, without that precluding the possibility of taking provisional measures whenever such measures should not await the revised request.

4. The requirement mentioned in sub-paragraph *f)* of paragraph 1 above may be dispensed with where the form of co-operation requested is that which is mentioned in Article 1.1.*f)*.

Article 24
Admissibility

1. Any decision by the Minister of Justice that declares the request admissible shall not bind the judicial authorities.

2. Any decision that declares the request inadmissible must be motivated and may not be appealed against.

3. The decisions mentioned in the preceding paragraph must be communicated by the Central Authority to the national or foreign requesting authority.

Article 25
Municipal jurisdiction for international co-operation

1. The jurisdiction of the Portuguese authorities, both for requesting international co-operation and for executing a request made to Portugal shall be determined in accordance with the provisions of the following Parts.

2. The provisions of the Code of Criminal Procedure, supplementary legislation thereto, as well as the legislation relating to offences of a regulatory nature [2] shall apply as subsidiary provisions.

Article 26
Expenses

1. As a general rule, the execution of a request for international co-operation shall be free of charge.

2. The requesting State or the requesting international judicial entity shall however bear the following expenses:

a) Compensation and remuneration, as well as travel and subsistence allowances, due to witnesses and experts;
b) Expenses incurred by reason of sending or handing over property;
c) Expenses incurred with the transfer of persons to the territory of that State or the seat of that entity;
d) Expenses incurred with the transit of persons coming from a foreign State or from the seat of that entity, en route to a third State or to the seat of that entity;
e) Expenses incurred with carrying out video-conferences at the request of third parties;
f) Other expenses deemed by the requested State to be of relevance on account of the human or technological means used.

3. For the purposes mentioned in sub-paragraph *a)* of the preceding paragraph, an advance payment may be made to a witness or an expert; such an advance shall be notified to the other party and reimbursed after the execution of the request.

4. The provisions of paragraph 2 above may be departed from by way of an agreement between Portugal and the relevant foreign State, or international judicial entity.

Article 27
Transfer of persons

1. Any transfer of persons arrested or sentenced to a sanction involving deprivation of liberty, where that transfer should be executed as a result of a

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[2] In Portuguese: "ilícito de mera ordenação social".

decision taken pursuant to the provisions of this law, shall be carried out by the Ministry of Justice, in agreement, as to the means of transport, the date, the hour and the place of surrender, with the authorities of the foreign State on whose territory the person concerned is, or to whose territory the person concerned should be transferred.

2. Transfer shall be carried out within the shortest possible delay as from the date of the decision ordering it.

3. The provisions of this Article, adapted as appropriate, shall apply to any transfer requested by any international judicial entity.

Article 28
Handing over of property or money

1. Where the request for co-operation concerns, exclusively or not, the handing over of property or money, these may be handed over only if they are not required for the purpose of producing evidence in connection with a criminal offence over which the Portuguese authorities have jurisdiction.

2. Handing over may be delayed; property and money may be handed over on condition that they are returned.

3. Any rights which bona fide third parties or legitimate owners or possessors may have over the property shall be preserved; any rights of the State that might result from the property being declared lost in its favour shall also be preserved.

4. If there is opposition to the handing over, property or money shall be handed over only subsequent to a final decision of the competent authority.

5. Where extradition is requested, the handing over as mentioned in paragraph 1 above may be executed even where extradition does not take place, notable because of the escape or death of the person sought.

Article 29
Urgent provisional measures

1. In case of urgency, the foreign judicial authorities may communicate with the Portuguese judicial authorities, either directly or through the International Criminal Police Organisation – INTERPOL or through central agencies designated to that effect, for the purpose of requesting provisional measures or measures that cannot be delayed; the request shall state the reasons for the urgency and shall be in accordance with the provisions of Article 23 above.

2. Requests shall be transmitted by post, by electronic means, by telegraph or by any other means allowing for a written record provided that it is admitted by the Portuguese law.

3. Where the Portuguese judicial authorities deem the request to be admissible, they shall execute it; however, where prescribed by this law, they must seek to obtain from the Minister of Justice, through the Central Authority, previous clearance – should that be possible – or ratification otherwise.

4. Where under this Article co-operation involves Portuguese and foreign authorities of a different nature, the request shall be channelled through the Central Authority.

Article 30
Final communications

1. Any final decision of a judicial authority to the effect of refusing a request for co-operation, shall be transmitted to the foreign requesting authority through the channels mentioned in Article 21 above.

2. Where a request for co-operation is executed, the judicial authority shall forward the respective documents, if applicable, to the foreign authority, in accordance with the provisions of Article 160.

PART II

Extradition

CHAPTER I

Extradition from Portugal

SECTION I

Requirements

Article 31
Purpose of and grounds for extradition

1. Extradition may be granted only for the purpose either of instituting criminal proceedings or of executing a sanction or measure involving deprivation of liberty, for an offence that the courts of the requesting State have jurisdiction to try.

2. For any such purpose, surrender of a person shall be possible only in respect of offences, including attempted offences, that are punishable under both the Portuguese law and the law of the requesting State by a sanction or measure involving deprivation of liberty for a maximum period of at least one year.

3. If the request for extradition includes several separate offences each of which is punishable under the Portuguese law and the law of the requesting State by deprivation of liberty, but of which one or some do not fulfil the condition mentioned in the preceding paragraph, extradition for the latter offences shall also be possible.

4. Extradition requested for the purpose of executing a sanction or measure involving deprivation of liberty may be granted only if the duration of the sentence that remains to be served is not less than four months.

5. The provisions of the preceding paragraphs, adapted as appropriate, shall apply to co-operation that carries with it the extradition or the surrender of any person to international judicial entities as mentioned in Article 1.2 above.

6. The provisions of this Article establishing limits shall not preclude extradition where conventions, treaties or agreements to which Portugal is a Party establish lower limits.

Article 32

Cases in which extradition is excluded

1. Extradition shall be excluded in the cases mentioned in Articles 6 to 8 above, as well as in the following cases:

a) Where the offence was committed on the Portuguese territory;
b) Where the person claimed is a Portuguese national, without prejudice to the provisions of the following paragraph.

2. The extradition of Portuguese nationals shall however not be excluded where:

a) Extradition of nationals is provided [3] for in a treaty, convention or agreement to which Portugal is a Party, and
b) Extradition is sought for offences of terrorism or international organised crime, and

[3] In Portuguese: "estabelecida"; literally: established.

c) The legal system of the requesting State embodies guarantees of a fair trial.

3. In the circumstances covered by the preceding paragraph, extradition may only take place for purposes of criminal proceedings and provided that the requesting State gives assurances that it will return the extradited person to Portugal for that person to serve in Portugal the sanction or measure eventually imposed on him, once the sentenced is reviewed and confirmed in accordance with the Portuguese law, unless the extradited person expressly refuses to be returned.

4. For the purpose of assessing the guarantees mentioned in sub-paragraph *c)* of paragraph 2 above, account shall be taken of the European Convention of Human Rights and other relevant international instruments ratified by Portugal, as well as the conditions under which protection is ensured against the situations mentioned in sub-paragraphs *b)* and *c)* of paragraph 1 of Article 6.

5. Where extradition is not granted on any of the grounds stated in paragraph 1 above or in sub-paragraphs *d), e)* or *f)* of paragraph 1 of Article 6, criminal proceedings shall be instituted for the offence on the grounds of which the request was made; the requesting State shall be asked to provide such information as is necessary. The judge may impose such provisional measures as he deems adequate.

6. The question of whether the person claimed is or is not a Portuguese national shall be examined at the time of the decision on the extradition request.

7. Special arrangements, within the framework of military or other alliances, may provide that offences under military law which are not offences under ordinary criminal law shall be extraditable offences.

Article 33
Offences committed in a third State

In the case of offences committed on the territory of a State other than the requesting State, extradition may be granted only if under identical circumstances Portugal would have had jurisdiction under Portuguese law, or if the requesting State can prove that the former State does not request the extradition of the person concerned.

Article 34
Re-extradition

1. The requesting State shall not be empowered to re-extradite to a third State a person surrendered to it by way of extradition.

2. The provisions of the preceding paragraph shall have no effect where:

a) Authorisation for re-extradition is requested and granted under the same terms as those established for an extradition request, after the person concerned having been heard, or

b) The extradited person, having been given the possibility to leave the territory of the requesting State, did not avail himself of that possibility within a period of 45 days or, having left it, voluntarily returned to it.

3. For the purposes of establishing the requirement set out in sub-paragraph *a)* of paragraph 2 above, a statement of the person concerned relating to his re-extradition may be requested.

4. The provisions of paragraph 1 above shall also have no effect where by virtue of a treaty, convention or international agreement to which Portugal is a Party, the consent of the requested State is not required. Where the person consents to his re-extradition, the provisions of the following paragraph shall apply.

5. Any statements of the person sought produced on account of the provisions of paragraphs 3 or 4 above, shall be taken before the "Tribunal da Relação" (court of appeal) that has jurisdiction over the area where the person resides or is staying. With respect to the provisions of paragraph 4 above, the formalities provided for in Article 17 shall be respected.

Article 35
Postponed surrender

1. Neither the fact that criminal proceedings are pending in a Portuguese court against the person claimed, nor the fact that that person is serving a sentence involving deprivation of liberty for an offence other than the offence on the grounds of which extradition is requested, shall prevent extradition from being granted.

2. In such cases, the surrender of the person claimed may be postponed until the proceedings terminate or the sentence is served.

3. The surrender of the person may also be postponed if it is established through medical expertise that that person suffers from an illness that puts his life in danger.

Article 36
Temporary surrender

1. Under the circumstances described in paragraph 1 of Article 35, the person claimed may be temporarily surrendered for the purpose of procedural

acts, in particular his trial, which the requesting State establishes cannot be postponed without it carrying serious prejudice, if the surrender does not in turn carry prejudice to the proceedings pending in Portugal and if the requesting State undertakes to return unconditionally the person concerned to Portugal once such procedural acts are terminated.

2. Where the person temporarily surrendered was serving a sentence, the enforcement of the latter shall be suspended as from the date of the surrender of the person to the requesting State and until the date of the surrender back of the person to the Portuguese authorities.

3. However, the duration of custody in the requesting State shall be deducted from the period that remains to be served in Portugal where such custody was not taken into consideration in that State.

4. Where surrender was postponed under the provisions of Article 35, for the purpose of the "Tribunal da Relação" (court of appeal) assessing the requirements mentioned in paragraph 1 above, the request for temporary surrender is processed by way of appending the file to that of the extradition request. The Tribunal da Relação shall seek an opinion both from the court under whose authority the person is, and the Minister of Justice.

Article 37
Conflicting requests

1. Where there are two or more requests for the extradition of the same person, decisions on which should have preference shall submit to criteria as follows:

a) Where the requests concern the same facts, the place where the offence was committed or the place where the main fact was carried out;

b) Where the requests concern different facts, the seriousness of the offence according to Portuguese law, the date of the request, the nationality or the place of residence of the person sought, as well as any other concrete circumstances such as the existence of a treaty or the possibilities of re-extradition between the different requesting States.

2. In the cases mentioned in paragraph 2 of Article 1, the provisions of the preceding paragraph shall cede against the rule according to which international jurisdiction shall have primacy over national jurisdiction.

3. The provisions of the preceding paragraphs shall apply, as appropriate, for purposes of maintaining anticipated arrest.

Article 38
Provisional arrest

1. In case of urgency the provisional arrest of the person sought may be requested as a preliminary to a formal extradition request.

2. Any decision on such a provisional arrest, or on the continuation of such an arrest, shall be taken in accordance with the Portuguese law.

3. Requests for provisional arrest shall: indicate the existence of either a detention order or a sentence against the person claimed; describe briefly the facts that amount to an offence; state when and where such offence was committed, the legal provisions that are applicable, as well as the available data concerning the identity, the nationality and the whereabouts of that person.

4. The provisions of Article 29 shall apply to the transmission of the request.

5. Provisional arrest shall be terminated if the request for extradition is not received within 18 days of the arrest; it may however be prolonged for up to 40 days of the arrest if the reasons given by the requesting State so justify.

6. Provisional arrest may be replaced by any other coercive measure in accordance with the provisions of the Code of Criminal Procedure.

7. The provisions of paragraph 5 above shall not prejudice re-arrest and extradition if a request is received subsequently.

8. The request for provisional arrest shall be examined only where no doubts arise as to the powers of the requesting authority and if the request contains such elements as are indicated in paragraph 3 above.

Article 39
Non requested provisional arrest

The criminal police authorities may arrest any person who, according to official sources, in particular INTERPOL, is wanted by competent foreign authorities for purposes of criminal proceedings or the purpose of serving a sentence, for any notoriously extraditable offence.

Article 40
Consented extradition

1. Any person who is under arrest with a view to being extradited, after having been informed of his right to a judicial procedure as provided for in

Articles 51 to 62, may state that he consents to his surrender to the requesting State or international judicial entity and thus relinquishes that right.

2. Such a statement shall be signed by the person sought and by his counsel or legal assistant.

3. The judge shall assess whether the requirements for granting extradition are met, shall hear the person sought in order to assess whether the statement was made of that person's free will and, if appropriate, shall ratify the statement and issue an order for the surrender of the person concerned, all being formally recorded in writing.

4. The statement, once ratified in accordance with the provisions of the preceding paragraph, shall be irrevocable.

5. The judicial decision of ratification of the statement shall, for all purposes, bear the legal value of a final decision in the extradition procedure.

6. Unless where a treaty, convention or agreement dispenses with a request for extradition, ratification shall not be considered before the Minister of Justice authorises the extradition procedure to continue.

Article 41
Coercive non custodial measures

Whilst the procedure is pending and until a final decision becomes unappealable, the provisions of paragraph 6 of Article 38 shall apply mutatis mutandis.

Article 42
Escape of the extradited person

Should any extradited person who escapes after surrender to the requesting State or international judicial entity and before the end of the criminal proceedings or before having served the sentence, return to Portugal, he shall again be arrested and surrendered to the same State or entity upon warrant from the competent authority of that State, save where violation of the conditions under which extradition was granted has occurred.

Article 43
Transit

1. Except for reasons of ordre public, transit of a person who is extradited from one to another foreign State, may be granted through the national territory

or air space, if the offence at stake is an extraditable offence according to Portuguese law.

2. Where the person concerned is a Portuguese national, transit shall be granted only where such conditions as would be required for the extradition of that person are met.

3. Authorisation for transit is granted on submission of a request by the interested State.

4. Should the transit take place by air transport with no landing on the national territory scheduled, communication from the State interested in the extradition shall suffice.

5. Should an unforeseen landing occur, the provisions of paragraph 3 above shall apply.

6. Whilst in transit, the person concerned shall be kept under arrest.

7. The request shall be addressed to the Minister of Justice through the channels provided for in this law; it shall identify the person in transit; the provisions of paragraph 3 of Article 38 shall apply mutatis mutandis.

8. A decision on the request must be taken within the shortest possible delay; that decision shall be immediately transmitted to the requesting State through the same channels used for the request.

9. The decision authorising the transit shall specify the conditions under which the transit will take place, as well as the authority that will supervise the transit.

SECTION II

Extradition procedure

Article 44
Requests

1. The request for extradition must include, other than the elements mentioned in Article 23:

a) Evidence to the effect that, under the concrete circumstances of the case, the person claimed is subject to the criminal jurisdiction of the requesting State;

b) Where applicable, evidence that any third State on whose territory the offence was committed does not claim the person for the same offence;

c) A formal undertaking to the effect that the person claimed shall neither *i)* be extradited to a third State, nor *ii)* be arrested with a view to being proceeded against to serve a sentence or for other purposes, for any offence committed prior to, or concomitantly with, the offence for which extradition is requested.

2. The following must be appended to the request for extradition:

a) The warrant of arrest of the person claimed, issued by the competent authority;
b) A certificate or an authenticated copy of the decision ordering the issue of the warrant of arrest, in the case of extradition with a view to criminal proceedings;
c) A certificate or an authenticated copy of the conviction and sentence, in the case of extradition for the purpose of serving a sentence, as well as a statement specifying the duration of the sentence left to be carried out, if that duration does not correspond to the duration stated in the sentence;
d) A copy of the relevant enactments relating to the conditions under which the person becomes immune by reason of lapse of time from prosecution or punishment, as applicable;
e) If applicable, a statement by the competent authority concerning any facts that, according to the law of the requesting State, have suspended or interrupted the counting of time;
f) A copy of the relevant enactments relating to the possibility of an appeal, or to the possibility of a new trial in case of a sentence rendered in absentia.

Article 45
Supplementary information

1. If the request for extradition is either not complete, or not accompanied by all the information that is necessary in order to take a decision, the provisions of paragraph 3 of Article 23 shall apply; a deadline for the reception of the missing elements shall be fixed, but may be prolonged if the requesting State gives good reasons.

2. If the information requested in accordance with the provisions of the preceding paragraph is not made available, the extradition procedure may be

discontinued at the end of the deadline, without prejudice to the possibility of the procedure being re-opened when such information is made available.

3. If the request concerns a person who is already arrested pending an extradition procedure, the discontinuation mentioned in the preceding paragraph entails the immediate release of that person; the provisions of paragraph 7 of Article 38 shall apply mutatis mutandis.

Article 46
Nature of the extradition procedure

1. The extradition procedure shall be of an urgent nature and shall consist of two stages, namely the administrative and the judicial stages.

2. The administrative stage of the procedure aims at an assessment of the extradition request by the Minister of Justice for the purpose of deciding on the basis of political reasons, or on discretionary grounds, taking into account the safeguards applicable, whether the request is admissible or not admissible.

3. The judicial stage rests under the exclusive competence of the "Tribunal da Relação" which, after having heard the person concerned, shall undertake a legal assessment of the form and substance of the facts in relation to the legal requirements, for the purpose of deciding whether extradition shall be granted or not; no evidence on the alleged conduct of the person claimed shall be taken into consideration.

Article 47
Participation of the requesting State in the extradition procedure

1. Any foreign State that so requests may participate in the judicial stage of the extradition procedure, through a representative appointed to that effect.

2. Where a request to participate in the procedure does not accompany the extradition request and should it be produced, it must be addressed to the "Tribunal da Relação" (court of appeal) via the Central Authority.

3. Any request to participate must be forwarded to the Minister of Justice with an opinion on its admissibility prepared by the Attorney-General' Office; the Minister shall decide on the admissibility of the request; the request may be refused if reciprocity is not ensured.

4. The participation aims at making it possible for the requesting State to have direct contact with the file, in conformity with the rules on the

confidentiality of the procedure, and provide the court with any information that the court may require.

Article 48
Administrative procedure

1. Upon receiving the extradition request, the Attorney-General's Office shall assess the formal aspects of the request and, where appropriate, within no more than 20 days, shall forward the request to the Minister of Justice, along with its opinion on its admissibility.

2. Within the 10 following days, the Minister of Justice shall take a decision upon the request.

3. If the request is declared inadmissible the procedure shall be discontinued and the communication mentioned in paragraph 3 of Article 24 shall be made.

4. The Attorney-General's Office shall take such measures as are necessary in order to ensure the surveillance of the person claimed.

Article 49
Judicial procedure: jurisdiction and appeals

1. The "Tribunal da Relação" on whose area of jurisdiction the person claimed resides or is found at the time of the request shall have jurisdiction to deal with the judicial procedure of extradition.

2. The criminal section of the "Tribunal da Relação" shall be empowered to take the final decision.

3. Only the final decision shall be open to an appeal; the criminal section of the "Supremo Tribunal de Justiça" (Supreme Court of Justice) shall be empowered to take a decision on the appeal.

4. Any appeal against a decision to grant extradition shall stay the execution of that decision.

Article 50
Beginning of the judicial procedure

1. Extradition requests that are declared admissible, along with any documents available and the decision taken, shall be forwarded to the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction over the request.

2. The public prosecutor shall, within 48 hours of receiving the file, take such steps as are necessary in order to initiate the judicial procedure.

Article 51
Introductory decision and arrest of the person claimed

1. Once the case referred to a chamber and within that chamber to a judge rapporteur, the procedure shall immediately be submitted to the latter who, within eight days, must produce a preliminary decision on whether the information available suffices and whether the request is viable.

2. If the judge rapporteur deems that the procedure should be discontinued, he shall submit the file and his written opinion to be examined for a period of five days by the other judges in chamber, the request being submitted to the chamber for decision at its next meeting.

3. If the case should proceed, the warrant of arrest of the person claimed shall be delivered to the public prosecutor who must promote its execution.

4. Should additional information be required, the competent authorities shall be instructed to keep the person claimed under surveillance, unless it is deemed necessary immediately to place that person under arrest on grounds that there are serious reasons for believing that the request will proceed.

Article 52
Duration of the arrest

1. The arrest of the person claimed shall be terminated and replaced by another coercive measure if the final decision of the "Tribunal da Relação" does not occur within 65 days of the date of the arrest.

2. Should no non-custodial coercive measure be adequate, the period mentioned in the preceding paragraph shall be prolonged for no longer than 25 days; a final decision must be taken within that period of time.

3. Without prejudice to the provisions of Article 40, the arrest shall continue where an appeal is made against the decision of the "Tribunal da Relação" ordering extradition; however, the period of arrest pending a decision on the appeal may not go beyond a period of 80 days from the date of the appeal.

4. Where a request for review is submitted to the Constitutional Court, the period of arrest pending a decision on the review may not go beyond a period of three months from the date of the request.

Article 53
Appearance of the person claimed

1. The authority that proceeds to the arrest of the person claimed shall, through the most expedite means that afford evidence in writing, immediately inform the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction over the request.

2. Within 48 hours of his arrest, the person claimed must appear before the public prosecutor for the purpose of being heard; any property seized shall accompany the person.

3. The judge rapporteur shall hear the person after having appointed a legal counsel for that person if the latter has not done it himself.

4. The person shall be personally summoned to the hearing and informed of his right to be assisted by both a legal counsel and an interpreter.

5. Where for one reason or another the arrest cannot be examined by the "Tribunal da Relação", the person must appear before public prosecutor attached to the court of first instance that has jurisdiction over the area of the seat of the "Tribunal da Relação" that has jurisdiction over the request.

6. In the case mentioned in the preceding paragraph, the hearing shall have as its sole purpose for the judge of the court of first instance to examine whether the arrest was legal and whether it may continue; the public prosecutor shall take whatever measures are necessary in order to ensure that the person appears in the first working day that follows.

Article 54
Hearing of the person claimed

1. In the presence of the public prosecutor and the legal counsel of the person claimed, and if necessary with the assistance of an interpreter, the judge rapporteur shall proceed to the identification of the person and shall inform him

- Of his right to object to his extradition,
- Of his right to consent to his extradition,
- Of the possibility opened to him to relinquish the benefits of the rule of speciality in accordance with the applicable treaty law.

2. If the person claimed declares that he consents to being surrendered to the requesting State, the provisions of paragraphs 2 to 5 of Article 40 shall

apply mutatis mutandis. If the person claimed declares that he objects to his extradition, the judge shall assess the reasons for the objection, should the person wish to state such reasons, and produce a written record of the hearing.

3. If the possibility is opened to the person claimed to relinquish the benefits of the rule of speciality, as mentioned in paragraph 1 above, a verbatim account of the information provided on the rule of speciality shall be written into the record of the hearing, along with the statements of the person; the provisions of paragraphs 2 to 5 of Article 40 shall apply *mutatis mutandis*.

4. The information mentioned in the preceding paragraph shall also be written into the record of the hearing, if under the applicable treaty law it is still possible for the person, after his surrender, to relinquish the benefits of the rule of speciality before the authorities of the requesting State.

5. Both the public prosecutor and the legal counsel may suggest questions for the judge, if he deems the questions appropriate, to put to the person.

6. The provisions of paragraphs 3 and 4 shall also apply to re-extradition.

Article 55
Objections of the person claimed

1. After the hearing of the person claimed, the file shall be entrusted to his legal counsel who may, within eight days, present in writing the person's objections to the extradition request, along with the reasons for the objections, and indicate ways and means of evidence compatible with the Portuguese law; the number of witnesses, however, cannot be in excess of 10.

2. Only the following grounds for objection shall be admitted:

- The person detained claims not to be the person claimed, or
- The person detained claims that one or more requirements for extradition have not been met.

3. Once the objections are put forward in writing, or once the time-limit for that procedure has expired, the file shall be submitted for a period of no longer than five days to the public prosecutor; the latter may put forward requests as he deems fit, subject to the limit on the number of witnesses as indicated in paragraph 1 above.

4. If property is seized, both the person claimed and the public prosecutor may put forward their views on the matter.

5. The ways and means of producing evidence that were indicated by the parties may, not later than the day before their being produced, be replaced by other ways and means, if such replacement does not entail any adjournment.

Article 56
Producing of evidence

1. Any steps requested or taken at the initiative of the judge, in particular steps taken in order to decide on the property seized, must be done within 15 days, in the presence of the person concerned, his counsel, an interpreter if necessary and the public prosecutor.

2. After the production of evidence, the public prosecutor and the counsel may each hold the file for a period of no longer than five days. They may produce submissions.

Article 57
Final decision

1. Where the person concerned has not objected in writing, or after the submissions have been produced in conformity with the provisions of paragraph 2 of Article 56, the judge shall have a period of ten days to examine the file and shall then forward it to each of the other two judges in chamber, for their examination, for a period of five days.

2. The file shall then be submitted to the next session of the chamber, with priority over other matters pending, for final decision; the final decision shall be taken according to the provisions of ordinary criminal procedure.

Article 58
Appeal

1. Both the public prosecutor and the person concerned shall enjoy the right to make an appeal within ten days of the decision.

2. The request for the appeal shall include submissions or otherwise the appeal shall be dismissed.

3. The other party shall have ten days to reply to the appeal.

4. The file shall be forwarded to the "Supremo Tribunal de Justiça" as soon as that reply is received or as soon as the ten days' time-limit is over.

Article 59
Decision on the appeal

1. Once the file is referred to one of the chambers of the criminal section of the "Supremo Tribunal de Justiça", the judge rapporteur shall have a period

of ten days to prepare a draft decision. The file shall then be forwarded simultaneously to all the other judges in chamber, for eight days.

2. As soon as the file has been examined by all the judges, it shall be submitted to the next session of the chamber, with priority over other matters pending; not more than three days after the decision on the appeal becomes final, the file shall be returned to the "Tribunal da Relação".

Article 60
Surrender of the person

1. A certificate of the final decision ordering the extradition shall be required and shall be the only document required in order to surrender the person claimed.

2. Once the decision to extradite becomes final, the public prosecutor shall transmit that decision to the Ministry of Justice for the purposes stated in Article 27, and inform the Attorney-General's Office; the date of the surrender shall not be fixed later than 20 days after the date in which the decision to extradite became final.

Article 61
Time-limit for the surrender

1. The person concerned shall be removed from the Portuguese territory at the date that is fixed in accordance with the provisions of Article 60.

2. Should no-one show up to receive the person at that date, he shall be set free 20 days after that date.

3. That time-limit may be extended for another 20 days, inasmuch as the particular circumstances of the case so require, if reasons of force majeur, notably illness as described in paragraph 3 of Article 35 prevent surrender within that time-limit.

4. Any new request for the extradition of a person whose surrender did not take place within the time-limit mentioned in paragraph 2 above, or within any extension of that time-limit, may or may not be examined.

5. Once the person is surrendered, both the court and the Attorney-General' Office shall be informed.

SECTION III

Special procedural rules for cases of provisional arrest

Article 62
Powers

1. The judge mentioned in Article 51 above shall be empowered to order the provisional arrest; he shall not produce such an order unless he is satisfied with the authenticity, the regularity and the admissibility of the request; the warrant of arrest shall be handed over to the public prosecutor.

2. The authority who arrests the person shall bring him before the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction over the request, for the purposes of the person being heard and of a decision being taken to the effect of ratifying or not the arrest and allowing or not its continuation; such a decision must be taken within a period of no more than 48 hours after the arrest.

3. The Attorney-General's Office shall be immediately informed of any provisional arrest; where provisional arrest should terminate according to the provisions of paragraph 5 of Article 38, an order for the release of the person shall be given.

4. The provisions of paragraphs 5 and 6 of Article 53 shall apply *mutatis mutandis*.

Article 63
Time-limits

1. Once the extradition request of a person provisionally arrested is received, the procedure provided for in Article 48 shall be completed within 15 days.

2. If the Minister of Justice deems the request to be admissible, it shall immediately be forwarded, via the Attorney-General, to the public prosecutor.

3. The arrest of the person shall terminate and be replaced by another coercive measure if the request is not submitted to court within 60 days of the date of the arrest.

4. The file shall immediately be referred to one of the chambers in the "Tribunal da Relação"; the time-limits mentioned in paragraphs 1 and 2 of Article 51 shall be reduced to three days; the time-limit mentioned in paragraph 1 of Article 52 shall run as from the date of receipt of the request by the court.

5. Any decision by the Minister of Justice to the effect of refusing the request shall immediately be transmitted in accordance with the provisions of paragraph 2 above, for the purpose of releasing the arrested person.

Article 64
Non requested provisional arrest

1. Any authority who proceeds to an arrest according to the provisions of Article 39, shall bring the person before the public prosecutor of the "Tribunal da Relação" situated in the district where the person was arrested; the public prosecutor shall take steps for the hearing of the person, in accordance with paragraph 2 of Article 62.

2. If the arrest is upheld, it shall immediately be brought to the attention of both the Attorney-General's Office and, through the quickest channels, the foreign authority concerned; the latter shall be requested to inform urgently whether it will submit an extradition request; it shall also be requested to conform with the time-limits provided in paragraph 5 of Article 38.

3. The arrest shall be terminated after 18 days unless a reply is received to the question mentioned in the preceding paragraph, and it shall be terminated after 40 days if a positive reply is received but not followed by an extradition request.

4. The provisions of paragraphs 5 and 6 of Article 53 and those of Article 63 shall apply *mutatis mutandis*.

Article 65
Non-custodial coercive measures

The "Tribunal da Relação" shall be competent to decide upon any non-custodial coercive measures where such measures may apply under the provisions of Articles 38 and 64.

SECTION IV

Second surrender of a previously extradited person

Article 66
Arrest of the extradited person following his escape

1. The warrant of arrest mentioned in Article 42 shall be forwarded to the Central Authority through the channels mentioned in this law, and shall

contain or be accompanied by such information as is necessary in order to establish that the person concerned has previously been extradited from Portugal and has since escaped, before the end of the criminal proceedings against him, or before having served the sentence assigned to him.

2. The warrant of arrest shall be forwarded to the public prosecutor attached to the "Tribunal da Relação" which dealt with the extradition procedure; the public prosecutor shall provide for the implementation of the request.

Article 67
Implementation of the request

1. Once the implementation of the request has been requested, the judge, if he is satisfied that the request is regular and that the person in question is the same person that was previously extradited, shall make an order for implementation of the request.

2. Within eight days from the date of the arrest, the person concerned may object in writing to his being surrendered to the requesting State, on grounds that the requesting State violated the conditions under which extradition had been granted, indicating the nature of his evidence; the number of witnesses offered to substantiate his claim cannot exceed five.

3. If there is objection, the provisions of paragraphs 3 and 5 of Article 55 and the provisions of Articles 56 and 57, shall apply *mutatis mutandis*.

4. Any appeal against the decision on the request shall be dealt with according to the provisions of Articles 58 and 59.

Article 68
Second surrender of a previously extradited person

1. In accordance with the provisions of Article 60, the public prosecutor shall take such measures as are necessary in order to ensure the second surrender of the previously extradited person, where there has been no objection or as soon as the objections have been set aside, as applicable.

2. The warrant of arrest as executed shall replace the certificate mentioned in Article 60.

CHAPTER II

Extradition to Portugal

Article 69
Powers and procedure

1. The Minister of Justice shall be empowered to request the extradition to Portugal of any person against whom there are criminal proceedings pending in Portugal, from the foreign State on whose territory that person is.

2. The request and the accompanying documents shall be transmitted through the channels provided for in this law.

3. The Attorney-General's Office shall be empowered to organise the file on the basis of a request from the public prosecutor attached to the court in which the proceedings are pending.

4. The Minister of Justice may request to the foreign State to which extradition was requested that the Portuguese State, through a representative appointed to that effect, be allowed to participate in the extradition procedure.

Article 70
Re-extradition

The provisions of paragraphs 4 and 5 of Article 34 are applicable mutatis mutandis to re-extradition requested by Portugal.

Article 71
International circulation of the request for provisional arrest

1. The judicial warrant for provisional arrest with a view to extradition must be forwarded by the public prosecutor attached to the competent court, to the Attorney-General's Office.

2. The Attorney-General's Office must forward the warrant to the National Bureau of INTERPOL and inform the court accordingly.

Article 72
Notification

Once extradition is granted, the Attorney-General's Office shall notify that to the judicial authority that requested it.

CHAPTER III

Final provision

Article 73
Legal costs; judicial recess

1. Extradition procedures shall be free of costs, save the provisions of paragraph 2, sub-paragraphs *b)* to *d),* and paragraph 4 of Article 26.

2. Extradition procedures shall be regarded as urgent and shall not stop during the periods of judicial recess.

CHAPTER IV

Special rules concerning simplified extradition

Article 74
Scope and purpose

The provisions of this Chapter aim at regulating extradition procedures in which the person claimed consents to his extradition, in conformity with the Convention on Simplified Extradition Procedure between the Member States of the European Union of 10 March 1995.

Article 75
Competent authority and time-limits

1. Any statement of consent to being extradited must be transmitted by the competent judge to the authority that requested the provisional arrest, not later than ten days after the arrest.

2. Where the person consents to being extradited, the judge must explain to him the meaning and consequences of him relinquishing the benefits of the rule of speciality, should that be admissible, and the effects of consent to re-extradition, as well as the time and terms in which such consent may be given; all shall be recorded in writing.

3. Not later than 20 days after the date of the consent mentioned in paragraph 1, the judge must decide whether or not to ratify any consent given pursuant to the provisions of paragraph 2.

4. Before deciding, if necessary, the judge may request from the requesting authority any supplementary information and hear again the person arrested once he will have received that information.

5. The time-limits mentioned in paragraphs 1 and 3 above shall run as from the time of the statement of consent if the latter was given after expiration of the time-limit mentioned in paragraph 1 above.

6. Without prejudice to the provisions of the preceding paragraph, when a request for extradition is received, consent may be expressed only in accordance with the provisions of Article 54.

7. The provisions of Article 40 shall apply *mutatis mutandis*.

8. The provisions of this Article concerning time-limits and notifications shall apply to all cases in which Portugal is the requesting State.

CHAPTER V

Municipal application of the Convention applying the Schengen Agreement

Article 76
Purpose

The provisions of this Chapter aim at regulating the application of the provisions concerning extradition included in the Convention [4] applying the Schengen Agreement, in the relations between Portugal and the other States that also apply that Convention.

Article 77
Extradition from Portugal

1. Any police authority that arrests a person on the basis of indications introduced in the Schengen Information System (SIS) shall bring the person before the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction under the terms of Article 53.

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[4] Of 19 June 1990.

[5] Of 19 June 1990.

2. The person arrested shall be accompanied by any available elements referring to that person as mentioned in paragraph 2 of Article 95 of the Convention[5] applying the Schengen Agreement in particular the identity of the authority that requested the arrest, the existence or not of a warrant of arrest or equivalent, or a sentence, the nature and legal qualification of the offence, the description of the circumstances in which the offence was committed and the legal consequences of the offence.

3. Any judicial decision that assesses the validity of the arrest and any decision that ratifies the person's consent to be extradited must be communicated immediately to the Attorney-General's Office and the National Bureau of SIRENE.

4. Where there is no statement to the effect that the person claimed consents to his extradition, that fact is equally communicated to the Attorney-General's Office for the purpose of promoting that the extradition request be formalised by the requesting authority.

Article 78

Extradition to Portugal

1. For the purposes of Article 95 of the Convention, the judicial authority must take steps with the National Bureau of SIRENE with a view to the immediate inclusion in the SIS of the data concerning the person sought.

2. Any notification by a State Party to the Convention that the person sought has been found and arrested on its territory must immediately be communicated by the National Bureau of SIRENE to the court that issued the warrant and to the Attorney-General's Office with a view to the extradition request being formalised.

PART III

Transfer of criminal proceedings

CHAPTER I

Delegation of competence in criminal proceedings in favour of the Portuguese judicial authorities

Article 79

Principle

At the request of a foreign State, under the conditions and with the effects set out in the following Articles, proceedings may be taken or continued in Portugal for an offence committed outside the Portuguese territory.

Article 80
Specific requirements

1. Criminal proceedings may be taken or continued in Portugal for an act committed outside the Portuguese territory, subject to the general requirements provided for in this law, as well as the specific requirements that follow:

a) Recourse to extradition is excluded;
b) The foreign State must have provided guarantees that it shall not take proceedings against the person concerned, for the same facts, if a final judgement is rendered by a Portuguese court in respect of the same person and for the same facts;
c) The facts for which criminal proceedings are requested must amount to an offence under both the law of the foreign State and under Portuguese law;
d) The maximum period of the punishment, or the measure, involving deprivation of liberty that is applicable with respect to the facts must be at least one year, or the maximum level of the pecuniary sanction involved must be at least the equivalent of 30 units of account in criminal procedure;
e) The person concerned must be a Portuguese national, or otherwise must have his habitual residence in Portugal;
f) Acceptance of the request must be justified in terms of either the interest of good administration of justice or a better chance of rehabilitation of the person concerned should that person be sentenced.

2. Should the requirements laid down in the preceding paragraph be met, criminal proceedings may also be taken or continued in Portugal if:

a) Criminal proceedings have already been instituted in Portugal against the same person for other facts, the latter being punishable with deprivation of liberty of at least one year, and the presence of the person before the court is guaranteed;
b) The person concerned is an alien or a stateless person habitually resident in Portugal and his extradition has been refused;
c) The requesting State deems that the presence in court of the person concerned cannot be ensured in that State but can be ensured in Portugal;

d) The requesting State deems that circumstances do not allow for the execution of an eventual sentence in that State, even through extradition, and circumstances allow for the execution of an eventual sentence in Portugal.

3. The provisions of the preceding paragraphs shall have no effect if the criminal reaction on the grounds of which the request was made already falls under the jurisdiction of the Portuguese courts by virtue of any other legal provision concerning the territorial jurisdiction of Portuguese courts.

4. The requirement of sub-paragraph *e)* of paragraph 1 may be dispensed with in the cases described in paragraph 4 of Article 32, if the circumstances of the case so require, in particular in order to avoid a situation where the trial cannot be held neither in Portugal nor abroad.

Article 81
Applicable law

The criminal reaction provided in the Portuguese law shall be applicable to the act for which criminal proceedings are taken or are continued in Portugal under the conditions mentioned in the preceding Article, save if the law of the requesting State is more favourable.

Article 82
Effects in the requesting State

1. The acceptance by Portugal of a request made by a foreign State implies that the latter relinquishes the proceedings for the same facts.

2. Once criminal proceedings are taken or continued in Portugal, the requesting State, after having been duly notified that the person left the Portuguese territory, regains the right to prosecute that person for the same facts.

Article 83
Procedure

1. The request made by the foreign State shall include the original or an authenticated copy of the criminal file, if it exists; it shall be submitted by the Attorney-General to the Minister of Justice.

2. Should the Minister of Justice decide that the request is admissible, he shall forward the file to the competent court; the latter shall summon the person concerned to appear in court and, if applicable, shall notify his counsel.

3. If the person does not appear in court, the court shall make sure that the summons were legally carried out and, if the person is not represented by a counsel or, if represented, the counsel did not appear either, shall appoint a counsel; every such step shall be recorded in writing.

4. The judge may, ex officio or at the request of the public prosecutor, the person concerned or that person's counsel, order that the summons and notifications mentioned in paragraph 2 above shall be repeated.

5. The person concerned, or his counsel, shall be invited to state reasons for or against the acceptance of the request; the public prosecutor shall enjoy the same right.

6. If necessary, the judge, at his own initiative or at the request of the public prosecutor, the person concerned or his counsel, shall take such steps as he deems indispensable with a view to the producing of evidence; for this purpose he will fix a time-limit not in excess of 30 days.

7. Once such steps have been taken or once that time-limit has expired, the file shall be handed for examination, first to the public prosecutor, then to the person concerned; each shall be given ten days to produce submissions in writing.

8. The judge shall then give his decision within the eight following days; the decision may be appealed against.

9. Whilst the procedure provided for in this Article runs, the judge may decide to adopt any provisional coercive measures, including financial guarantees, provided for in the Code of Criminal Procedure.

Article 84
Effects of the decision with respect to the request

Where the decision is in favour of the request, the judge, as appropriate, either:

a) Forwards the file to the judicial authority that is competent to take or continue proceedings, or

b) Takes steps to continue the proceedings if it is within his powers to do so.

Article 85
Validation of the procedural steps taken abroad

The judicial decision to the effect of continuing the foreign criminal proceedings automatically gives the same validity to the procedural steps taken abroad, as those taken before a Portuguese judicial authority, save where such steps would be considered inadmissible under the terms of the Portuguese criminal procedure law.

Article 86
Revocation of the decision

1. At the request of the public prosecutor, the person concerned or his counsel, the judicial authority may revoke the decision if, while the proceedings are pending:

a) Any of the grounds justifying inadmissibility that are provided for in this law come to the knowledge of the parties;
b) The presence of the person concerned at his trial cannot be ensured, or the presence of that person for the purpose of carrying out a sentence involving deprivation of liberty in the cases mentioned in paragraph 2 of Article 82 in which the person left the Portuguese territory, cannot be ensured.

2. Such a decision shall be open to an appeal.
3. Once such a decision becomes enforceable, it puts an end to the jurisdiction of the Portuguese judicial authority and implies the return of the criminal file to the requesting State.

Article 87
Notification

1. The following shall be communicated to the Central Authority for the purpose of being notified to the requesting State:

a) The decision on the admissibility of the request;
b) The decision to quash the former;

c) The judgement passed;
d) Any other decision that terminates the proceedings.

2. Notification shall be accompanied by a certificate or an authenticated copy of the decision that is notified.

Article 88
Territorial jurisdiction

The provisions of Article 22 of the Code of Criminal Procedure shall apply to the acts of international co-operation provided for in this Chapter, save the cases in which the question of territorial jurisdiction is already settled.

CHAPTER II

Delegation of competence in criminal proceedings in favour of a foreign State

Article 89
Principle

The power to take criminal proceedings, or to continue criminal proceedings pending in Portugal, for an act that constitutes an offence under Portuguese law may be delegated to a foreign State that accepts it, subject to the requirements laid down in the following Articles.

Article 90
Specific requirements

1. Delegation in favour of a foreign State of the powers to take or to continue criminal proceedings shall be subject to the general requirements provided for in this law, as well as the specific requirements as follows:

a) The facts must be an offence under both the Portuguese law and the law of the other State;
b) The maximum period of the punishment, or the measure, involving deprivation of liberty that is applicable must be at least one year,

or the maximum level of the pecuniary penalty involved must be at least the equivalent of 30 units of account in criminal procedure;

c) The person concemed must either be a national of the foreign State involved or, if he is either a national of a third State or a stateless person, must have his habitual residence in that former State;

d) The delegation of powers must be justified in terms of either the interests of good administration of justice or a better chance of rehabilitation of the person concemed should that person be sentenced.

2. Should the requirements laid down in the preceding paragraph apply, delegation of powers may also take place if:

a) The person concemed is serving a sentence in the foreign State, for an offence which is more serious than the offence committed in Portugal;

b) The person concemed has his habitual residence in a foreign State and the extradition of that person, either cannot be obtained for reasons pertaining to the national law of that State, or was requested and refused by that State;

c) The person concemed has been extradited to the foreign State for an offence other than the offence under consideration and it is deemed that the delegation of powers allows for a better chance of rehabilitation of that person.

3. The delegation of powers may also take place, regardless of the nationality of the person concemed, if the Portuguese authorities deem that the presence of that person in court for his trial in Portugal cannot be ensured, whilst his presence in court for his trial in the foreign State can be ensured.

4. Exceptionally, the delegation of powers may also take place regardless of the requirement relating to habitual residence, if the circumstances of the case so require, in particular in order to avoid a situation where the trial cannot be held neither in Portugal nor abroad.

Article 91
Procedure for the delegation of powers

1. At the request of either the public prosecutor or the person concemed, and after adversarial proceedings during which reasons for and against the use of this form of intemational co-operation may be given, the court which has

jurisdiction over the facts involved shall assess the need for the delegation of powers.

2. The public prosecutor or the person concerned, as appropriate, shall each be given a period of ten days within which they may react to the request mentioned in paragraph 1.

3. After such reaction or after the period of ten days, the judge shall take a decision within eight days, granting or refusing the request.

4. If the person concerned is on the territory of a foreign State, he may request the transfer of proceedings, either before an authority of that State, or before the Portuguese consular authority; the request may be made by the person concerned, by a person who legally represents him or by his counsel.

5. The judicial decision shall be open to an appeal.

6. Any final decision to grant the request shall have the effects of suspending the time-limitation period and discontinuing the proceedings, without prejudice of any urgent measures eventually required; that decision shall be forwarded by the Attorney-General to the Minister of Justice, along with a certified copy of the file, for the purpose of being examined by the latter.

Article 92
Communication of requests

The request from the Minister of Justice to the foreign State shall be transmitted through the channels provided for in this law.

Article 93
Effects of the delegation of powers

1. Once the delegation of powers to take or to continue criminal proceedings has been accepted by a foreign State, no new proceedings shall be taken in Portugal for the same facts.

2. The time-limitation period under Portuguese law shall be suspended until termination of the proceedings in the foreign State, including the enforcement of the sentence, if any.

3. Portugal shall, however, re-acquire the right to take proceedings for the same facts if, either:

a) The foreign State involved sends notification that it cannot conclude the proceedings transferred to it, or

b) Any reason is disclosed that, according to this law, would have prevented the request for delegation from being granted.

4. Any judgement involving a sanction or a measure, rendered in a foreign State upon proceedings that were transferred to that State, shall be recorded in the Portuguese criminal records and have the same effects as if it had been rendered by a Portuguese court.

5. The provision of the preceding paragraph shall apply to any decision that terminates the criminal proceedings in the foreign State.

CHAPTER III

Common provisions

Article 94
Legal costs

1. Any legal costs due for proceedings abroad, before the transfer of such proceedings to Portugal, shall add to the legal costs due for the proceedings continued in Portugal and shall be claimed together with latter; such costs shall not be reimbursed to the foreign State concerned.

2. Portugal shall inform the foreign State of the amount of legal costs due for the proceedings, before the latter are transferred to that State; Portugal shall not require the reimbursement of such legal costs.

PART IV

Enforcement of criminal judgements

CHAPTER I

Enforcement of foreign criminal judgements

Article 95
Principle

1. Final and enforceable foreign criminal judgements may be enforced in Portugal under the conditions laid down in this law.

2. The request for delegation must be made by the sentencing State.

Article 96
Specific requirements

1. Any request for the enforcement in Portugal of a foreign criminal judgement shall be admissible only subject to the general requirements provided for in this law, as well as the following requirements:

a) A sentence imposing a criminal reaction must have been rendered for an offence in respect of which the foreign State has jurisdiction;
b) If the sentence was pronounced during a trial in the absence of the sentenced person, the later must have been given the legal possibility of requesting a new trial or introducing an appeal;
c) The enforcement of the sentence must not run counter to the fundamental principles of the Portuguese legal system;
d) The facts involved must not be the subject of criminal proceedings in Portugal;
e) The facts involved must amount to a criminal offence under Portuguese law;
f) The sentenced person must be a Portuguese national, or otherwise must have his habitual residence in Portugal;
g) The enforcement of the sentence in Portugal must be justified in terms of a better chance of, either the rehabilitation of the sentenced person, or compensation for damages caused by the offence;
h) The sentencing State must have provided guarantees that, once the sentence has been enforced in Portugal, it shall consider the criminal liability of the person concerned to be extinguished;
i) The term to be served under the sentence must not be less than one year or, in case of a pecuniary sanction, it should correspond at least to the equivalent of 30 units of account in criminal procedure;
j) Where the sentence involves deprivation of liberty, the sentenced person must give his consent.

2. Without prejudice to the provisions of the preceding paragraph, a foreign judgement may also be enforced in Portugal if the person concerned is already serving in Portugal a sentence for any offence other than the offence for which the foreign judgement was passed.

3. The enforcement in Portugal of a foreign sentence involving deprivation of liberty shall also be admissible, even where the requirements provided for in paragraph 1, sub-paragraphs *g)* and *j)* above are not met, if, in case of escape to Portugal or other situation in which the person is present in Portugal, the extradition of the person concerned, for the offence for which he was sentenced, has been refused.

4. The provisions of the preceding paragraph shall also apply, subject to an agreement between Portugal and the foreign State concerned, once the person concerned has been heard, to the cases in which expulsion will be imposed once the sentence has been served.

5. The requirement provided for in paragraph 1, sub-paragraph *i),* may be dispensed with in special cases, notably where the health of the sentenced person, or reasons pertaining to his family or his profession, so dictate.

6. The enforcement of the sentence may however take place, notwithstanding the requirements provided for in paragraph 1, when Portugal, in accordance with the provisions of paragraph 2 of Article 32, will have previously extradited a Portuguese national.

Article 97
Execution of decisions taken by administrative authorities

1. Final decisions taken in proceedings for offences as mentioned in paragraph 3 of Article 1 may also be enforced, where the person concerned was given the possibility of appealing to a judicial authority.

2. The communication of requests shall be made according to the provisions of treaties, conventions or agreements to which Portugal is a party or, otherwise, through the Central Authority in accordance with the provisions of this law.

Article 98
Limits to the enforcement

1. The enforcement of a foreign judgement shall be limited to:

   a) The enforcement of a sentence involving deprivation of liberty and, subject to property belonging to the sentenced person having been found in Portugal, the enforcement of a sentence involving the payment of a sum of money;

b) The confiscation of proceeds, objects or instrumentalities of the offence;
c) The enforcement of any decision concerning civil law compensation should the claimant request it.

2. Any order to the effect of exacting the legal costs shall be limited to the costs due to the requesting State.

3. The enforcement of a sentence involving the payment of a sum of money implies the conversion of the amount thereof into escudos at the rate of exchange ruling at the day when the decision reviewing and confirming the sentence was taken.

4. Ancillary sanctions and disqualifications shall be enforced only if enforcement can have practical effects in Portugal.

Article 99
Documents and procedure

1. The request must be submitted by the Central Authority to the Minister of Justice for examination.

2. The request must be accompanied by a certificate or an authenticated copy of the judgement to be enforced, the statement of consent of the person concerned where the provisions of sub-paragraph *j)* of paragraph 1 of Article 96 apply, as well as information concerning the length of provisional arrest or the length of the sentence already served.

3. If the judgement concerns rnore than one person or imposes several criminal reactions, the request shall be accompanied by a certificate or an authenticated copy of that part of the judgement in respect of which enforcement is sought.

4. Should the Minister of Justice deem the request admissible, the file must be forwarded via the Attorney-General to the public prosecutor attached to the competent "Tribunal da Relação" in accordance with the provisions of Article 235 of the Code of Criminal Procedure, for the public prosecutor to promote the implementation of the procedure concerning review and confirmation of the judgement.

5. The public prosecutor shall request that the sentenced person, or his counsel, be heard and state their views on the request, unless consent has already been given by that person or unless the original request for the delegation of powers to enforce came from that person.

Article 100
Review and confirmation of foreign judgements

1. Foreign judgements shall be enforceable only after they are reviewed and confirmed, according to the provisions of the Code of Criminal Procedure and the provisions of sub-paragraphs *a)* and *c)* of paragraph 2 of Article 6 of this law.

2. When deciding on the review and confirmation of a foreign judgement, the court

a) Shall be bound by the findings as to the facts, insofar as they are deemed to be proved by the foreign judgement;
b) Shall not convert a sanction involving deprivation of liberty into a pecuniary sanction;
c) Shall in no circumstances aggravate the sanction imposed by the foreign court.

3. If the court deems that the facts are not clear, or are insufficient, or that there are facts that are missing, it shall request the necessary supplementary information; confirmation of the judgement shall be denied where the information mentioned in the preceding paragraph is not possible to obtain.

4. The co-operation procedures provided for in this Chapter shall be of an urgent nature and shall not be interrupted during periods of judicial recess.

5. Where the request concerns a person under arrest, a decision must be taken within six months of the date in which the request reached the court.

6. Where the request concerns the enforcement of a sentence involving deprivation of liberty, in the cases mentioned in paragraph 5 of Article 96, the delay provided for in the preceding paragraph shall be shortened to two months.

7. If an appeal is made, the delays mentioned in paragraphs 5 and 6 above shall be extended respectively by three months and one month.

Article 101
Applicable law; effects of enforcement

1. Foreign judgements shall be enforced in conformity with the Portuguese law.

2. Foreign judgements enforced in Portugal shall produce the same effects that the Portuguese law accords to judgements rendered by Portuguese courts.

3. Only the foreign State that requests the enforcement of a sentence shall have the right to decide on any application for review of that sentence.

4. Both the foreign State and Portugal may exercise the right of amnesty, pardon or commutation.

5. The court which is empowered to enforce the judgement shall end the enforcement:

a) As soon as it comes to its knowledge that the sentenced person was granted amnesty, pardon or commutation in such a way as to justify the end of the enforcement of the sentence and the ancillary sanctions;

b) Where it comes to its knowledge that an application was lodged for review of the sentence or of any other decision, if that application might result in a decision that renders the sentence unenforceable;

c) If it concerns a pecuniary sanction and the sentenced person pays the amount of the sanction in the requesting State.

6. Partial pardon, commutation and the substitution of the sanction with an alternative sanction shall be taken into consideration.

7. The foreign State must inform the court of any of the facts mentioned in paragraph 5 above that might result in the enforcement being discontinued.

8. As soon as enforcement begins in Portugal, the requesting State must relinquish its right to enforce the same judgement; the right of enforcement shall however revert to the latter State *a)* where the sentenced person escapes and *b)* where that State is informed that the sentence, if it involves the payment of a sum of money cannot be totally or partially enforced.

Article 102
Prison in which the sanction shall be enforced

1. When a decision to the effect of confirming the foreign sentence becomes final and enforceable, and if that decision involves deprivation of liberty, the public prosecutor shall take measures to ensure that the person is brought to the prison which is closest to the person's place of residence in Portugal, or to his latest place of residence in Portugal.

2. If it is not possible to identify that person's place of residence in Portugal, or his latest place of residence in Portugal, he shall be taken to one of the prisons situated in the judicial area of Lisbon.

Article 103
Court competent for the enforcement

1. The court of first instance of the judicial area where the sentenced person has his residence in Portugal, or where he had his latest residence in Portugal, shall be empowered to enforce the sentence, as reviewed and confirmed; should it not be possible to identify any such residence, the court of first instance of Lisbon shall be thus empowered.

2. The provisions of the preceding paragraph shall apply without prejudice to the specific powers of the "Tribunal de Execução de Penas" (court of supervision of the enforcement of sanctions).

3. For the purposes of the provisions of paragraph 1 above, the "Tribunal da Relação" shall forward the file to the court which is empowered to enforce the sentence.

CHAPTER II

Enforcement abroad of Portuguese criminal judgements

Article 104
Requirements

1. The powers to enforce a Portuguese criminal judgement may be transferred to a foreign State only if, other than the general requirements provided for in this law:

a) The sentenced person is either a national of that State, or a national of a third State with his habitual residence in the former State, or yet a stateless person with his habitual residence in the former State;
b) The sentenced person is a Portuguese national with his habitual residence in that State;
c) It is not possible or advisable to obtain the extradition of the person concerned for the purpose of enforcement of the Portuguese sentence;
d) There are good reasons to believe that the transfer will provide better chances for the rehabilitation of the person concerned;
e) The sentenced person, once informed of the consequences of the transfer of enforcement, consents to it;

f) The period of the punishment or measure is not shorter than one year or, where the sentence is a pecuniary sentence its amount is not shorter than the equivalent of 30 units of account in criminal procedure; however, upon agreement with the foreign State concerned, this requirement may be dispensed with, in special cases, notably having regard to the health of the sentenced person or family or professional reasons.

2. Where the requirements provided for in the preceding paragraph, as applicable, are met, transfer shall also be admissible if the person concerned is serving a sentence involving deprivation of liberty in the foreign State for facts other than those for which he was sentenced in Portugal.

3. The enforcement abroad of a Portuguese sentence involving deprivation of liberty shall also be admissible, even where the requirements provided for in paragraph 1, sub-paragraphs *d)* and *e)* above are not met, if the sentenced person is present on the territory of the foreign State and extradition for the facts mentioned in the sentence is not possible or has been refused.

4. Upon agreement with the foreign State concerned and where the circumstances of the case point in that direction, the provisions of paragraph 3 may also apply to the execution of ancillary sanctions of expulsion.

5. Transfer shall be made subject to the proviso that the foreign State shall not aggravate the sanction imposed.

Article 105
Provisions applicable

1. The provisions of paragraphs 1, 2 and 4 of Article 98 concerning limits to the execution, and the provisions of paragraphs 2 to 7 of Article 101 concerning the effects of the execution, shall apply mutatis mutandis.

2. Where the sentenced person does not have enough property in Portugal to guarantee the full enforcement of a sanction involving the payment of a sum of money, transfer of the enforcement of the remaining part of the sanction shall be admissible.

Article 106
Effects of the transfer

1. The acceptance by a foreign State of the powers to enforce the Portuguese judgement shall involve that Portugal relinquishes its powers to enforce it.

2. Where the foreign State accepts to enforce the Portuguese judgement, the court shall discontinue the enforcement as from the date of the beginning of enforcement in that State, until enforcement is concluded or until that State informs that enforcement became impossible.

3. At the time of the surrender of the sentenced person, the foreign State shall be informed both of the duration of the deprivation of liberty already served in Portugal and the duration of deprivation of liberty that remains to be served.

4. The provisions of paragraph 1 above shall not preclude Portugal from recuperating its powers to enforce the judgement where the sentenced person escapes or, where the sanction imposed is a pecuniary sanction, as from the time when Portugal is informed that the sanction, or part of it, was not enforced.

Article 107
Procedure

1. Requests for the transfer of enforcement to a foreign State must be submitted to the Minister of Justice by the Attorney-General, at the previous request of either that State, the public prosecutor, the sentenced person; the "assistente" [6] or the party claiming damages it may also be submitted by the public prosecutor, at his initiative or at the request of the sentenced person, the "assistant" or a party claiming damages; requested by parties clairning damages shall be limited in scope to the execution of that part of any sentence that imposes the payment of damages.

2. The Minister of Justice must take a decision within a period of time not longer than 15 days.

3. Should the Minister of Justice deem the request admissible, he shall immediately forward the file, via the Attorney-General's Office, to the public prosecutor attached to the "Tribunal da Relação" for him to implement the applicable procedure.

4. Where the consent of the sentenced person is necessary, such consent, if given, must be given before that court, unless the person is abroad, in which case consent may be given before a Portuguese consular authority or before a foreign judicial authority.

5. If the sentenced person is present in Portugal and the request for transfer did not originate in him, the public prosecutor shall request that the person be notified of his right to state his views within ten days.

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[6] Party with an established interest in the procedure that, on its own right, sustains the prosecution.

6. Should the sentenced person abstain from stating his views, his silence shall be deemed to mean acquiescence with the request; the notification mentioned in paragraph 5 shall warn the person accordingly.

7. For the purposes mentioned in paragraphs 4 and 6 above, a letter rogatory shall be forwarded to the foreign authority or an official communication shall be sent to the Portuguese consular authority; in either case, a time-limit shall be fixed.

8. The "Tribunal da Relação" may take such steps as it deems necessary in order to be in a position to take a decision, including requesting the submission of the criminal file relating to the sentence.

Article 108
Time-limits

1. The co-operation procedures regulated in this chapter shall be regarded as urgent and shall not stop during the periods of judicial recess.

2. Where the request concerns the enforcement of a sentence involving deprivation of liberty, it must be decided within six months from the date in which it was registered in the court, save the cases mentioned in the second part of sub-paragraph *f)* of paragraph 1 of Article 104 in which the time-limit is two months.

Article 109
Outgoing requests

1. Following any decision in favour of the transfer, a request shall be forwarded by the Minister of Justice, through the Central Authority, to the foreign State, accompanied by the following documents:

a) A certificate or an authenticated copy of the Portuguese sentence, mentioning the date as from which it became enforceable;
b) A statement mentioning the duration of the deprivation of liberty already served until the date of the request;
c) The text of the consent of the person concerned, if applicable.

2. Where the competent foreign authority notifies that the request is accepted, the Central Authority shall request to be kept informed of the enforcement until it is completed.

3. Any information received, such as provided for in the previous paragraph, shall be forwarded to the court which rendered the sentence.

CHAPTER III

Proceeds of fines, confiscated property and provisional measures

Article 110
Proceeds of fines and confiscated property

1. The proceeds of any fines imposed by foreign sentences enforced in Portugal shall revert to the Portuguese State.

2. If however the sentencing State so requires, such proceeds may be rendered to it on the condition that under the same circumstances reciprocity would apply.

3. The provisions of both preceding paragraphs shall apply mutatis mutandis where the enforcement of a Portuguese sentence is transferred to a foreign State.

4. Property confiscated shall revert to the State of enforcement, but may however be remitted to the sentencing State if it so requires, if the property is of special interest to it and if reciprocity is ensured.

Article 111
Coercive measures

1. At the request of the public prosecutor and in the framework of the procedure for the review and confirmation of a foreign judgement for the purpose of enforcement of a sentence involving deprivation of liberty, the "Tribunal da Relação" may decide to impose on the sentenced person such coercive measures as it deems fit, if that person is in Portugal.

2. Where provisional arrest is the coercive measure imposed, the measure shall be ended after expiration of the time-limits provided for in paragraphs 4 and 5 of Article 100, if by that time the decision of confirmation is still not forthcoming.

3. Provisional arrest may in such a case be replaced by another coercive measure, in conformity with the law of criminal procedure.

4. Any decision concerning coercive measures shall be open to an appeal.

Article 112
Provisional measures

1. At the request of the public prosecutor, the court may decide to impose such provisional measures as it deems necessary in order to ensure the possibility of enforcing a sentence where the safe-keeping of property is at stake.

2. Any decision taken upon such a request shall be open to an appeal; appeals against decisions imposing such measures shall not suspend the implementation thereof.

Article 113
Provisional measures taken abroad

1. The request for transfer of the enforcement of a Portuguese judgement to a foreign State may be accompanied by a request that coercive measures be taken with respect to the sentenced person, should the latter be on the territory of that State.

2. The provisions of the preceding paragraph shall also apply to any provisional measures aimed at ensuring the possibility of enforcing a sentence where the safekeeping of property is at stake.

CHAPTER IV

Transfer of sentenced persons

SECTION I

Common provisions

Article 114
Scope

This Chapter applies to the enforcement of criminal judgements where such enforcement carries with it the transfer of a person sentenced to a sanction or measure involving deprivation of liberty and where the transfer results from the person's request or

Depends on the person's consent.

Article 115
Principles

1. If the general requirements provided for in this law and in the following articles are met, any person sentenced by a foreign court to a sanction or a

measure involving deprivation of liberty may be transferred to Portugal in order to serve the sentence imposed on him.

2. In the same way and for the same purposes, any person sentenced in Portugal to a sanction or measure involving deprivation of liberty may be transferred to the territory of a foreign State.

3. The transfer may be requested either by a foreign State or by Portugal, in both cases provided that it is either at the request or with the express consent of the sentenced person.

4. The transfer is also subject to the existence of an agreement between the State in which the person was sentenced and the State to which the transfer should be requested.

Article 116
Information to sentenced persons

The prison administration shall inform all foreign persons sentenced in Portugal of their right to request their transfer in conformity with this law.

SECTION II

Transfer out

Article 117
Information and supporting documents

1. Where the person concerned expresses his interest in being transferred to a foreign State, the Central Authority shall so inform that State with a view to obtaining its agreement; that information shall include:

a) Name, date and place of birth, and nationality of the person concerned;
b) His address in that State, where applicable;
c) A statement of the facts upon which the sentence was based;
d) The nature and duration of and date in which the person started serving the sanction or measure.

2. The following information shall also be forwarded to the foreign State:

a) A certificate or an authenticated copy of the sentence and of the text of the legal provisions that apply to the case;

b) A statement indicating the duration of the sanction or measure that was already served, duration of provisional arrest, reduction of the sentence and any other facts pertaining to the enforcement of the sentence;

c) A statement on the consent of the person concerned to be transferred;

d) If applicable, any medical or social report relating to the person concerned and in particular to any medical treatment undergone by that person in Portugal and any recommendations as to the continuation of such treatment.

Article 118
Powers

1. The public prosecutor attached to the court that rendered the sentence shall be empowered, at his initiative or at the request of the sentenced person, to implement any request for transfer.

2. Requests for transfer must be forwarded as soon as the sentence becomes enforceable.

3. Requests shall be forwarded by the Attorney-General's Office to the Minister of Justice for examination.

4. Where the circumstances of the case so justify, the Minister of Justice may request an opinion from the Attorney-General's Office, the prison administration and the Institute for Social Rehabilitation; the opinions requested shall be produced within 10 days.

5. The person concerned shall be informed in writing of all the decisions taken subsequent to the request.

Article 119
Request and supporting documents

1. Where a person expressed to a foreign State the wish to be transferred, that State should forward, with the request, the following documents:

a) A statement indicating that the sentenced person either is a national of that State or has his habitual residence on its territory;

b) A copy of the legal provisions from which it can be assumed that the facts upon which the Portuguese sentence was based also amount to a punishable offence in that State;

c) Any other pertinent documents.

2. The information listed in paragraph 2 of Article 117 shall be forwarded to the foreign State, save if the request is summarily rejected.

Article 120
Decision

1. Where the Minister of Justice deems the request to be admissible, it shall be forwarded by the Attorney-General's Office to the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction in the area of the prison where the person concerned is.

2. The public prosecutor shall take steps to ensure that the person concerned is heard by the judge; the provisions of the Code of Criminal Procedure relating to the hearing of arrested persons shall apply.

3. The "Tribunal da Relação" shall take a decision on the request, after having determined that the person concerned, fully knowledgeable of the legal consequences thereof, voluntarily consented to his transfer.

4. A consular agent or any official appointed with the agreement of the foreign state shall be granted the possibility of verifying whether or not the consent was given in conformity with the provisions of the preceding paragraph.

Article 121
Effects of transfer

1. The transfer of the person to a foreign State shall have the effect of suspending the enforcement of the sentence in Portugal.

2. Portugal may no longer enforce the sentence after the person has been transferred if the foreign State communicates that a judicial decision has deemed the sentence as having been fully enforced.

3. Where any court applies a measure of amnesty, pardon or commutation, the foreign State shall be informed accordingly through the Central Authority.

SECTION III

Transfer in

Article 122
Request

1. Where a person sentenced in a foreign State expresses his wish to be transferred to Portugal, the Attorney-General shall forward to the Minister of

Justice the information mentioned in Article 117 that he will have received from that State for the purpose of the Minister examining the admissibility of the request.

2. The provisions of the preceding paragraph shall also apply in the cases in which the request comes from the foreign State.

3. The Minister of Justice may request an opinion from the Attorney-General's Office, the prison administration and the Institute for Social Rehabilitation; the opinions requested shall be produced within 10 days.

4. The provisions of paragraph 5 of Article 118 shall apply *mutatis mutandis*.

Article 123
Specific requirements

1. Once a request for transfer to Portugal is accepted, the file shall be forwarded through the Attorney-General's Office to the public prosecutor at the "Tribunal da Relação" which has jurisdiction in the place of residence indicated by the person concerned, in order to engage a procedure of revision and confirmation of foreign sentence.

2. When the judicial decision on the review and confirmation of the foreign sentence becomes enforceable, that decision shall be transmitted by the Central Authority to the requesting State for the purpose of the transfer being carried out.

SECTION IV

Information concerning the enforcement and transit

Article 124
Information on the enforcement

1. All information concerning the enforcement of the sentence shall be transmitted to the requesting State; that information shall include:

a) The date on which enforcement of the sentenced has been completed, as decided upon by way of a judicial decision;
b) If applicable, notice of the escape of the person concerned prior to the sentence having been fully enforced.

2. At the request of the State that requested the transfer, a special report on the way in which enforcement took place and the results thereof, shall be forwarded to it.

Article 125
Transit

Authorisation for the transit through the Portuguese territory of a person being transferred from one State to another may be granted, at the request of any such State; the provisions of Article 43 shall apply mutatis mutandis.

PART V

Supervision of conditionally sentenced or conditionally released offenders

CHAPTER I

General

Article 126
Principles

1. International co-operation with a view to the supervision of conditionally sentenced or conditionally released offenders habitually resident on the territory of the State to which such co-operation is requested, shall be admissible under the terms of the provisions of the Articles that follow.

2. Co-operation as mentioned in the preceding paragraph shall aim at:

a) Facilitating the social rehabilitation of the offender through the adoption of adequate measures;

b) Supervising the behaviour of the person concerned with a view either to order a criminal reaction on that person or to enforce a criminal reaction already ordered.

Article 127
Subject-matter

1. Co-operation provided for in this Part may consist in one of the following modalities:

a) Supervision of the sentenced person;

b) Supervision and eventual enforcement of the sentence, or
c) Full enforcement of the sentence.

2. Where a request for co-operation under one of the above-mentioned modalities is received, it may be refused and one of the other modalities, if deemed to be more adequate, proposed in its stead; such a counter-proposal shall have no effect unless it is accepted by the requesting State.

Article 128
Competence

Co-operation shall be made subject to a request from the State on whose territory the judgement was rendered.

Article 129
Double incrimination

The offence with respect to which the request for co-operation is made must be punishable under both the law of the requesting and the requested State.

Article 130
Optional refusal

Notwithstanding the general requirements provided for in this law, co-operation requested to Portugal may be refused if:

a) The decision with respect to which the request is made was taken in absentia and there was no legal possibility to have a new trial or for an appeal;
b) That decision is not compatible with the underlying principles of the Portuguese criminal law, notably if in view of the age of the person concerned, that person shall not have been subject to criminal proceedings in Portugal.

Article 131
Request

1. Any request made to Portugal shall be submitted by the Central Authority to the Minister of Justice.
2. The Minister of Justice may request an opinion from any agency that is empowered to follow the measures imposed in the sentence.

3. If the Minister of Justice accepts the request, the Attorney-General's Office shall forward it to the public prosecutor attached to the "Tribunal da Relação" that has jurisdiction in the area of the residence of the person concerned for obtaining a judicial decision on the admissibility of the request.

Article 132
Information

1. The decision on the request for co-operation shall be immediately communicated by the Central Authority to the requesting State and, in case of total or partial refusal, reasons shall be given.

2. Where the request is accepted, the Central Authority shall also communicate to the requesting State any circumstances that might affect either the implementation of the supervision measures or the enforcement of the sentence.

CHAPTER II
Supervision

Article 133
Supervision measures

1. The foreign State that requests no more than supervision shall inform the Portuguese authorities of the conditions imposed on the offender and, if applicable, of the supervisory measures with which the latter must comply during the period of probation.

2. Where the request is accepted, the prescribed supervisory measures shall, if necessary, be adapted by the court to the measures provided for in the Portuguese law.

3. In no case may the supervisory measures applied by Portugal, as regards either their nature or their duration, be more severe than those prescribed in the decision taken in the foreign State.

Article 134
Consequences of accepting a request

Acceptance of a request for supervision shall carry the following duties:

a) To ensure co-operation between the authorities and bodies responsible, on the Portuguese territory, for supervising and assisting offenders;

b) To inform the requesting State of all measures taken and their implementation.

Article 135
Revocation and expiration

1. Should the offender become liable to revocation of the conditional suspension of his sentence either because he has been prosecuted or sentenced for a new offence, or because he has failed to observe the prescribed conditions, the necessary information shall be supplied to the requesting State automatically and without delay.

2. When the period of supervision expires, the necessary information shall be supplied to the requesting State.

Article 136
Powers of the requesting State

The requesting foreign State shall alone be competent to judge, on the basis of the information and comments supplied to it, whether or not the offender has satisfied the conditions imposed upon him, and, on the basis of such appraisal, to take any further steps provided for in its own legislation; it shall inform the Portuguese authorities of its decision.

CHAPTER III

Supervision and enforcement of sentences

Article 137
Consequences of revocation of the conditional suspension of the sentence

1. After revocation of the conditional suspension of the sentence by the foreign State, Portugal shall become empowered to enforce the said sentence, upon an application by that State.

2. The enforcement shall take place in accordance with the Portuguese law, after verification of the authenticity of the request for enforcement and its compatibility with the terms of this law concerning the revision and confirmation of foreign sentences.

3. Portugal shall transmit to the requesting State a document certifying that the sentence has been enforced.

4. The court shall, if need be, substitute for the penalty imposed in the requesting State, the penalty or measure provided for by Portuguese law for a similar offence.

5. In the cases mentioned in the preceding paragraph, the nature of the substitute sanction or measure shall correspond as closely as possible to that of the original decision, without however exceeding the maximum penalty provided for by the Portuguese law, nor may it be longer or more severe than that imposed by the foreign State.

Article 138
Powers with respect to conditional release

The Portuguese court alone shall be empowered to grant the offender conditional release.

Article 139
Amnesty, pardon and commutation

Amnesty, general pardon and commutation may be granted either by the foreign State or Portugal.

CHAPTER IV

Full enforcement of the sentence

Article 140
Applicable provisions

Where the foreign State requests the full enforcement of the sentence, the provisions of paragraphs 2 to 5 of Article 137 and Articles 138 and 139 shall apply *mutatis mutandis*.

CHAPTER V

Co-operation requested by Portugal

Article 141
Applicable provisions

1. Once a request made by Portugal is accepted, the Central Authority shall so inform the authorities responsible for following the implementation of the measures imposed in the sentence with a view to them establishing direct contacts with their foreign counterparts.

2. The provisions of the preceding Chapters shall apply, mutatis mutandis, to the requests for co-operation made by Portugal.

CHAPTER VI

Common provisions

Article 142
Contents of the request

1. Requests for co-operation shall be prepared and organised in accordance with both the provisions of Article 23 and the specific requirements listed in the following paragraphs.

2. Requests for supervision shall include:

a) The reasons for supervision;
b) A description of the supervisory measures prescribed;
c) The nature and duration of the supervisory measures the application of which is requested;
d) Information about the character of the offender and his behaviour in the requesting State before and after the date of the decision imposing supervision.

3. Requests for supervision and enforcement shall be accompanied by the decision imposing a criminal reaction and the decision to revoke conditional suspension of the pronouncement or enforcement of sentence.

4. The enforceable nature of both decisions shall be certified in the manner prescribed by the law of the requesting State.

5. Where the decision to be enforced has replaced an earlier one and does not contain a recital of the facts of the case, the decision containing such recital shall also be attached.

6. If it is considered that the information supplied by the requesting State is insufficient for the purposes of granting the request, additional information shall be requested; a time-limit for receipt of such information may be fixed.

Article 143
Procedure and decision

1. The provisions of Part IV relating to the enforcement of criminal judgements, in particular those concerning examination of requests by the Ministry of Justice, jurisdiction of the Portuguese courts, procedure and effects of enforcement, shall apply mutatis mutandis to requests of co-operation as provided for in this Part.

2. The provisions relating to the consent of the person concerned shall not apply to cases where a request for supervision alone is at stake.

3. The Minister of Justice may request an opinion to the Attorney-General's Office or the Institute for Social Rehabilitation before deciding on the request.

Article 144
Expenses and legal costs

1. Upon application of the requesting State, expenses incurred with, and legal cost resulting from the procedure in that State, if duly indicated, shall be collected.

2. Where expenses or costs are collected, refund to the requesting State shall not be mandatory, save experts' fees.

3. Supervision and enforcement expenses incurred shall not be refunded by the requested State.

PART VI

Mutual legal assistance in criminal matters

CHAPTER I

Provisions common to different forms of assistance

Article 145
Principle and scope

1. Assistance shall include: the communication of information; the service of writs; communication of procedural steps or other public law acts admitted by Portuguese law if they are necessary for the purposes of criminal proceedings; as well as steps that are necessary to seize or recover proceeds from, objects of or instrumentalities of an offence.

2. Assistance shall include in particular the following:

a) The notification of deeds and the service of documents;
b) The procuring of evidence;
c) Searches, seizure of property, experts examination and analysis;
d) The service of writs to and hearing of suspects, accused persons, witnesses or experts;
e) The transit of persons;
f) The communication of information on Portuguese law or the law of a foreign State, as well as the communication of information relating to the judicial record of suspect, accused or sentenced persons.

3. Where the circumstances of the case so require, subject to an agreement between Portugal and a foreign State or an international judicial entity, any hearings as mentioned in sub-paragraph *d)* of paragraph 2 above may take place by using telecommunication means in real time, in accordance with Portuguese criminal procedure law and without prejudice to the provisions of paragraph 10 ahead.

4. Within the framework of assistance in criminal matters, either upon authorisation of the Minister of Justice or in conformity with the provisions of any agreement, treaty or convention to which Portugal is a Party, direct communication of information relating to criminal matters may be established between Portuguese and foreign authorities that assist judicial authorities.

5. The Minister of Justice shall be empowered to authorise the participation of foreign judicial authorities and foreign criminal police authorities in criminal proceedings that take place on Portuguese territory.

6. Participation as mentioned in the preceding paragraph shall be authorised only if reciprocity applies and where its purpose is to assist a Portuguese judicial authority or a Portuguese criminal police authority; under the authority and in the presence of such an authority; the provisions of the Portuguese criminal procedure law shall apply; all must be recorded in writing.

7. The provisions of Article 29 above shall apply to any measures that come under the competence of the criminal police authorities where such measures are undertaken under the conditions and within the limits provided for in the Code of Criminal Procedure.

8. The powers mentioned in paragraph 5 above may be delegated upon the Central Authority or, where the participation sought is that of a foreign criminal police authority, upon the Director General of the "Polícia Judiciária" (criminal police organisation).

9. The provisions of paragraph 5 shall apply *mutatis mutandis* to requests for assistance submitted by Portugal.

10. The provisions of this Article shall not prejudice the application of more favourable provisions in agreements, treaties or conventions to which Portugal is a party.

Article 146
Applicable law

1. Requests for assistance addressed to Portugal shall be carried out in conformity with the Portuguese law.

2. However, where the foreign State so requests, the assistance sought may be given in conformity with the law of that State, if such is not incompatible with the fundamental principles of Portuguese law and if it does not carry serious prejudice to the parties involved.

3. Requests for assistance shall be refused where the assistance sought implies measures that are banned under Portuguese law or might carry penal or disciplinary sanctions.

Article 147
Coercive measures

1. Where any of the measures mentioned in Article 145 above imply the resort to coercive measures, such measures shall be carried out only if the

facts mentioned in the request amount to an offence under Portuguese law and if the measures are carried out according to Portuguese law.

2. However, coercive measures shall be admitted even where the facts are not punishable under Portuguese law, if such measures aim at procuring or producing evidence to the effect of excluding the responsibility of the person against whom the criminal proceedings run.

Article 148
Prohibition to use information obtained

1. Any information obtained in order to be used within the criminal proceedings mentioned in the foreign State's request shall not be otherwise used.

2. At the request of a foreign State or an international judicial entity, the Minister of Justice, after having sought the opinion of the Attorney-General, may exceptionally authorise that information to be used in the framework of other criminal proceedings.

3. Any authorisation given to a foreign State to consult a Portuguese criminal proceedings file within the framework of which that State is an injured party, shall be made subject to the conditions mentioned in the preceding paragraphs.

Article 149
Confidentiality

1. Upon application of a foreign State or an international judicial entity, the request for assistance, its purpose, the measures taken upon the request, as well as the documents involved, shall be kept confidential.

2. If the assistance requested cannot be carried out without unveiling information thereupon, the Portuguese authority shall invite the interested authority to confirm or annul its request for assistance.

CHAPTER II

Request for assistance

Article 150
Powers

Any foreign authority or entity that has powers to take criminal proceedings under the law of the State or the International Organisation involved, may request assistance.

Article 151
Contents of the request and supporting documents

Other than the documents and statements mentioned in Article 23 above, requests shall include, as applicable:

a) The name, address and capacity of the person to whom the writ or the document should be serviced, as well as specification of the nature of such document;
b) A statement to the effect of certifying that search, seizure or handing of property, as requested, are admissible under the law of the requesting State;
c) Any reference to particulars of the proceedings or to requirements, including time-limits and confidentiality, that the foreign State or judicial entity wishes to be met.

Article 152
Procedure

1. Requests for assistance that take the form of letters rogatory may be transmitted directly between competent judicial authorities, without prejudice to the possibility of using the channels mentioned in Article 29.

2. In accordance with the criminal procedure law, the judge or the public prosecutor shall be empowered to take decisions to the effect of executing letters rogatory.

3. Where a letter rogatory is received that should not be executed by the public prosecutor, the public prosecutor shall be given the possibility to state his opinion.

4. The execution of letters rogatory shall be refused in the following cases:

a) Where the requested authority is not empowered to execute the measures sought, without prejudice of the transmission of the letter rogatory to the competent judicial authority if such authority is a Portuguese authority;
b) Where the measures sought are forbidden by law or contrary to the Portuguese "ordre public";
c) Where the execution of the letter rogatory offends the sovereignty or the security of the State;
d) Where the measures imply the execution of a decision of a foreign court, and that decision must have previously been reviewed and confirmed and that decision has not been reviewed and confirmed.

5. Other requests, in particular requests relating to criminal records, to the verification of the identity of a person and mere requests for information, may be directly forwarded to the competent authorities or entities and, once complied with, the result communicated back through the same channels.

6. The provisions of paragraph 4 above shall apply *mutatis mutandis* to requests that do not take the form of a letter rogatory.

7. The provisions of paragraph 3 above shall apply mutatis mutandis to letters rogatory addressed by any competent Portuguese judicial authority to any foreign authorities; letters rogatory shall be issued in every instance where any competent Portuguese judicial authority deems that such is necessary in order to obtain evidence of any fact that is essential either to the prosecution or to the defence.

CHAPTER III

Special forms of international assistance

Article 153
Service of documents

1. The Portuguese authorities shall service any judicial decisions, as requested by a foreign authority.

2. Service may be carried out by simple transmission of the documents to the person by post or, where the foreign authority expressly so requests, by any other manner if consistent with the Portuguese law.

3. Proof of service shall be given either by means of a document dated and signed by the person served or by means of a statement made by the Portuguese authority indicating the manner in which the documents were served and the date.

4. Documents shall be deemed to be serviced when they are accepted, as well as when they are refused in writing.

5. If documents cannot be served as requested, the foreign authority shall be informed of the reasons thereof.

6. The provisions of this Article shall not prejudice direct service to any person who is present on the territory of a foreign State, in accordance with the provisions of any agreement, treaty or convention to which Portugal is a party.

Article 154
Summons to appear

1. Suspect or accused persons, witnesses or experts who are summoned to appear for the purposes of foreign criminal proceedings, service of which has been requested, may fail to appear.

2. When the summons are served, the person concerned shall be informed of his right not to appear.

3. The Portuguese authority shall refuse to service any summons where the person concerned is threatened with sanctions or where the safety of the person concerned is not safeguarded.

4. Consent to appear, if it is given, shall be freely given by way of a written statement.

5. Requests shall indicate the allowances and remunerations, as well as the travelling and subsistence expenses, to be paid out; they ought to be transmitted reasonably in advance so that they can be received 50 days at least before the date at which the person should appear.

6. In urgent cases, the time-limits indicated in the preceding paragraph may be shortened.

7. The allowances, remunerations and expenses mentioned in paragraph 5 above shall be calculated as from the place of residence of the person concerned and shall be at the rates provided for in the law of the State where the hearing is intended to take place.

Article 155
Temporary surrender of persons in custody

1. A person arrested or imprisoned in Portugal may be temporarily surrendered to an authority of a foreign State for the purposes mentioned in the

preceding Article, provided that that person consents, that his remaining in custody is guaranteed and that he shall be returned within the period stipulated by the Portuguese authorities or when his presence in that State is no longer necessary.

2. Without prejudice to the provisions of the preceding paragraph, surrender shall be refused if:

a) The presence of the person concerned is necessary at criminal proceedings pending in Portugal;
b) It is liable to prolong the provisional arrest of the person concerned;
c) Regarding the circumstances of the case, the Portuguese judicial authority does not deem surrender to be convenient.

3. The provisions of sub-paragraphs 1 and 2 of Article 21 shall apply to the requests mentioned in this Article.

4. The time during which the person remains out of Portugal shall be taken into consideration for the purposes of provisional arrest or sentence imposed in Portugal.

5. If the sentence imposed on the person surrendered expires while that person is on the territory of a foreign State, that person shall be set free and shall as from that moment enjoy such rights as enjoy the persons who are not under custody.

6. The Minister of Justice may grant the assistance requested subject to specified requirements.

Article 156

Temporary transfer of persons in custody for purposes of investigation

1. The provisions of Article 155 shall apply to cases in which, upon agreement, a person arrested or imprisoned in Portugal may be temporarily transferred to the territory of another State for purposes of investigation in the framework of Portuguese criminal proceedings.

2. The provisions of the preceding paragraph shall apply *mutatis mutandis* to requests of assistance submitted to Portugal.

Article 157

Safe conduct

1. Any person appearing on the territory of a foreign State under the terms and for the purposes of the provisions of Articles 154, 155 or 156 above:

a) Shall not be arrested, prosecuted, punished or subjected to any other restriction of his personal liberty in respect of any act ante-

rior to his departure from the Portuguese territory other than those mentioned in the request for co-operation;

b) Shall not be under an obligation to accept to be heard or make a statement at proceedings other than those mentioned in the request.

2. The immunity provided for in paragraph 1 above shall cease when the person voluntarily remains in the territory of the foreign State for more than 45 days from the date when his presence is no longer required or, having left that territory, voluntarily returned to it.

3. The provisions of the preceding paragraphs shall apply *mutatis mutandis* to any person habitually resident in a foreign State who comes to Portugal as a result of a summons to appear for purposes of criminal proceedings.

Article 158

Transit

1. The provisions of Article 43 shall apply *mutatis mutandis* to the transit of any person who is under custody in a foreign State and who must appear in the territory of a third State in order to take part at criminal proceedings.

2. Custody of a person in transit shall not remain if the State that authorised the transfer requests the person to be set free.

Article 159

Handing over of property, valuables, documents or files

1. At the request of the competent foreign authorities, any property, in particular documents or valuables, the seizure of which is consistent with the Portuguese law, may be put at the disposal of those authorities if they are relevant to the criminal proceedings.

2. Any proceeds from an offence may be returned to their owners regardless of criminal proceedings having been instituted in the requesting State.

3. Criminal files or other records which are of importance to criminal proceedings pending in a foreign State may be handed over to the competent authorities of that State, provided that they shall be returned within the time-limit fixed by the competent Portuguese authorities.

4. The handing over of any property, valuables, documents or criminal files may be delayed if they are required in connection with pending criminal proceedings.

5. Authenticated copies of the documents or files requested may be handed over instead of the originals; however, should the foreign authority expressly request the transmission of originals, the request shall as far as possible be complied with if the condition for their restitution provided in paragraph 3 above is met.

Article 160
Proceeds, objects and instrumentalities

1. At the request of a competent foreign authority, steps may be taken in order to trace the proceedings of an allegedly committed offence; the results thereof shall be communicated to the requesting authority.

2. The foreign authority must state the grounds on which it deems that such proceedings might be located in Portugal.

3. The Portuguese authority shall take such steps as are necessary in order to enforce any decision of a foreign court imposing the confiscation of proceeds from an offence; the provisions of Part IV shall apply *mutatis mutandis*.

4. When the foreign authority communicates its intention to request the enforcement of any decision as mentioned in the preceding paragraph, the Portuguese authority may take such steps as are consistent with the Portuguese law in order to prevent any dealing in, transfer or disposal of property which at a later stage shall be, or may be, the subject of that decision.

5. The provisions of this Article also apply to objects and instrumentalities of an offence.

Article 161
Information on the law applicable

1. Any information requested by a foreign judicial authority and relating to the provisions of Portuguese law that are applicable in the framework of criminal proceedings shall be given by the Bureau for Documentation and Comparative Law of the Attorney-General's Office.

2. Any Portuguese judicial authority requiring information on foreign law shall request such collaboration as is necessary from the Bureau mentioned in the preceding paragraph.

Article 162
Information from criminal records

Direct communication of requests relating to criminal records, as mentioned in paragraph 5 of Article 152, shall be addressed to the criminal identification services.

Article 163

Information about criminal judgements

1. Information about or copies of criminal judgements, as well as information about measures taken after criminal judgements or any other relevant information relating to any of those may be requested in respect of nationals of the requesting State.

2. Any requests submitted under the provisions of the preceding paragraph must be channelled through the Central Authority.

Article 164

End of the procedure

1. The authority in charge of executing a request shall forward the file and other documents to the requesting foreign authority as soon as it deems that the request has been fully complied with.

2. If, however, the foreign authority does not deem that the request has been fully complied with, it may return the file, provided that it states its reasons.

3. Should the Portuguese authority deem that such reasons are valid, it shall comply with the request.

PART VII

Final provision

Article 165

Delegated powers

The powers conferred upon the Minister of Justice by the following provisions of this law may be delegated upon the Attorney-General: paragraph 1 of Article 69, paragraph 6 of Article 91, Article 92, paragraphs 1, 2 and 3 of Article 107, paragraphs 3 and 4 of Article 118, paragraph 2 of Article 141.

Article 166

Repeals

The provisions of Decree-Law no. 43/91, of 22 January are hereby repealed.

Article 167

Entry into force

This law shall enter into force on the first day of October 1999.

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Marta Santos Pais

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LEGISLAÇÃO PORTUGUESA

A correspondência relativa a este Boletim deverá ser enviada a

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