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Contribution to the Committee against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 68 Session (11 Nov 2019 - 06 Dec 2019) in relation to the Seventh periodic report of Portugal¹

Presented by ODRI "Intersectional rights" - Office for the Defence of Rights and Intersectionality

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ODRI "*Intersectional rights*" - Office for the Defence of Rights and Intersectionality appreciates the opportunity to address the Committee against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in relation to their positive aspects and principal subjects of concern in the Republic of Portugal.

Foreword

The following report dialogues with the Seventh periodic report of Portugal (CAT/C/PRT/7) and the cluster of themes presented by the Committee in the LOIPR (CAT/C/PRT/QPR/7). We sincerely hope that this report will be helpful for the work of the CAT in the endeavour of the forthcoming constructive dialogue with the State of Portugal. ODRI authorizes the OHCHR to post this submission in the UN Treaty Body Database (<https://tbinternet.ohchr.org>). If additional information is required, ODRI may assist the Committee with ulterior submissions.

ODRI thanks the different stakeholders consulted for doing this report and for providing the generous information we have received and been entrusted to protect. Details related to the origin of the sources have been omitted to protect them. Moreover, taking into consideration the general practice of the CAT, all names (including the ones that have been on public records) have been secured, de-identified and anonymized, without compromising the reliability and objectivity of the information submitted.

A. Positive aspects

- Since the last Concluding observations of the Committee against Torture regarding Portugal (CAT/C/PRT/CO/5-6), ODRI would like to note that the State of Portugal has adopted provisions and measures to prevent torture and to provide redress to victims. We will list some of the encouraging highlights:
- The implementation of National Plans for Immigrant Integration since 2007;

¹ This report was made by Diego Ocampo, Marisa Paredes and Andrés Sifuentes.

- The implementation of the project entitled “Intercultural Mediation in the Public Services”;
- The amendment of the Asylum by Act 26/2014;
- The adoption of the Third and Fourth National Action Plan to Prevent and Combat Trafficking in Human Beings (2014-2017 and 2018-2021);
- The adoption of the Fifth National Plan for Gender Equality, Citizenship and Non-Discrimination 2014-2017;
- The adoption of the Victims’ Statute (Act No. 130/2015 of 4 September 2015), which amends the Code of Criminal Procedure and aims to strengthen the protection of the rights of victims and extend these rights to their relatives;
- The amendment (Act No. 142/2015 of 8 September 2015) made to the Act on the Protection of Children and Young People (Act No. 147/99 of 1 September 1999), which aims to reinforce the protection of children;
- The publication of a new anti-discrimination law, Law n. 93/2017.

These measures have the capacity to prevent and respond comprehensively to many risks of torture. Nevertheless, these outstanding positive measures to be effective are surrounded by some challenges that we believe could be addressed in the forthcoming session.

B. Definition of the offence of torture and appropriate penalties

The State of Portugal expressed by the State party report under LoIPR (CAT/C/PRT/7, para. 1-3) that maintains the same definition of torture under article 243. This definition set forth in article 243² (complemented by the aggravating circumstances of article 244³) remains incomplete to fulfil the obligations under articles 1 and 2 of the Convention against torture. Since the ratification of the Convention against Torture the definition of torture in Portuguese law **does not include clearly the motivation of discrimination** of any kind, required by article 1 of the Convention. In relation to this, we must recall that the Committee Against Torture has expressed that "the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture" (CAT/C/GC/2, para. 20). During the presentation of the Fourth Periodic Report, the Portuguese government explained that the discriminatory motive contained in the Convention against Torture, could fall under article 240⁴ of the Criminal Code that sanctions discrimination (CAT/C/SR.798,

² We are referring to this particular article: “Artigo 243.º Tortura e outros tratamentos cruéis, degradantes ou desumanos 1 - Quem, tendo por função a prevenção, perseguição, investigação ou conhecimento de infracções criminais, contra-ordenacionais ou disciplinares, a execução de sanções da mesma natureza ou a protecção, guarda ou vigilância de pessoa detida ou presa, a torturar ou tratar de forma cruel, degradante ou desumana para: a) Obter dela ou de outra pessoa confissão, depoimento, declaração ou informação; b) A castigar por acto cometido ou supostamente cometido por ela ou por outra pessoa; ou c) A intimidar ou para intimidar outra pessoa; é punido com pena de prisão de 1 a 5 anos, se pena mais grave lhe não couber por força de outra disposição legal. 2 - Na mesma pena incorre quem, por sua iniciativa ou por ordem de superior, usurpar a função referida no número anterior para praticar qualquer dos actos aí descritos. 3 - Considera-se tortura, tratamento cruel, degradante ou desumano, o acto que consista em infligir sofrimento físico ou psicológico agudo, cansaço físico ou psicológico grave ou no emprego de produtos químicos, drogas ou outros meios, naturais ou artificiais, com intenção de perturbar a capacidade de determinação ou nas actividades manifestação de vontade da vítima. 4 - O disposto no número anterior não abrange os sofrimentos inerentes à execução das sanções previstas no n.º 1 ou por ela ocasionados, nem as medidas legais privativas ou restritivas da liberdade.”. Available at: Diário da republica electronico Portugal <<https://dre.pt>>

³ We are referring to this particular article: “Artigo 244.º Tortura e outros tratamentos cruéis, degradantes ou desumanos graves 1 - Quem, nos termos e condições referidos no artigo anterior: a) Produzir ofensa à integridade física grave; b) Empregar meios ou métodos de tortura particularmente graves, designadamente espancamentos, electrochoques, simulacros de execução ou substâncias alucinatórias; ou c) Praticar habitualmente actos referidos no artigo anterior; é punido com pena de prisão de 3 a 12 anos. 2 - Se dos factos descritos neste artigo ou no artigo anterior resultar suicídio ou morte da vítima, o agente é punido com pena de prisão de 8 a 16 anos”. Available at: Diário da republica electronico Portugal <<https://dre.pt>>

⁴ We are referring to this particular article: “Artigo 240.º Artigo seguinte Discriminação e incitamento ao ódio e à violência 1 - Quem: a) Fundar ou constituir organização ou desenvolver actividades de propaganda organizada que incitem à discriminação, ao ódio ou à violência contra pessoa ou grupo de pessoas por causa da sua raça, cor, origem étnica ou nacional, ascendência, religião, sexo, orientação sexual, identidade de género ou deficiência física ou psíquica, ou que a encorajem; ou b) Participar na organização ou nas actividades referidas na alínea anterior ou lhes prestar assistência, incluindo o seu financiamento; é punido com pena de prisão de 1 a 8 anos. 2 - Quem, publicamente, por qualquer meio destinado a divulgação, nomeadamente através da apologia, negação ou banalização grosseira de crimes de genocídio, guerra ou contra a paz e a humanidade: a) Provocar atos de violência contra pessoa ou grupo de pessoas por causa da sua raça, cor, origem étnica ou nacional, ascendência, religião, sexo, orientação sexual, identidade de género ou deficiência física ou psíquica; b) Difamar ou injuriar pessoa ou grupo de pessoas por causa da sua raça, cor, origem étnica ou nacional, ascendência, religião, sexo, orientação sexual, identidade de

para. 11)⁵ along with the new normative framework against discrimination. Nonetheless, that crime has lenient sentences if compared with the envisaged for the crime of torture. We believe that the lack of a discriminatory motive in the national definition of torture has constrained the possibilities of justice and access to remedy for victims, particularly in the different cases documented by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the National Preventive Mechanism.

In that regard, ODRI draws the attention of the Committee of cases where of allegations of torture and ill treatment in Portugal that had discriminatory motives. For instance, there have been recorded cases of verbal abuse, racist behaviour and threats of ill-treatment by the police by law enforcement officials against Roma (CPT/Inf (2013) 35, p.26), facts that the government partially addressed in their responses⁶. The CPT during its periodic visit of 2016 found instances of ill-treatment targeted against Afro descendants to coerce confessions⁷. Even more, these institutions have found cases where medics and guards use indiscriminately restraints against persons with disabilities with psychiatric conditions deprived of liberty (CPT/Inf (2013) 35, p.19; CPT/Inf (2018) 6, paras. 40, 66, 122-124⁸; Centros Educativos. Cuidados de saúde mental. Contactos com o exterior (1/2019/MNP)⁹).

In addition, although, articles 243 and 244 of the Criminal Code cover any act of torture, **there is no specific mention of acts of torture committed by a third person at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**

ODRI would like to recall that on its General comment No. 2 (2008) on the implementation of article 2 of the Convention by States parties, the Committee against Torture stated that “serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity” (CAT/C/GC/2, para. 9). Taking into consideration that both the former and the current Criminal Code do not meet all the requirements to guarantee the coherence between national law and the Convention against Torture, ODRI respectfully suggests that the Committee recommends Portugal:

The Committee urges the State party to secure that the translated definition of torture contained in the new Criminal Code expressly covers, in theory and practice, all the elements of article 1 of the Convention. To prevent loopholes for impunity and to guarantee the effective compliance with article 2 of the Convention, the Committee recommends that the State party reviews its legislation and includes explicitly in the Criminal Code the element of the motivation of discrimination of any kind and to include in the definition the diverse involvement of public officials.

género ou deficiência física ou psíquica; c) Ameaçar pessoa ou grupo de pessoas por causa da sua raça, cor, origem étnica ou nacional, ascendência, religião, sexo, orientação sexual, identidade de género ou deficiência física ou psíquica; ou d) Incitar à violência ou ao ódio contra pessoa ou grupo de pessoas por causa da sua raça, cor, origem étnica ou nacional, ascendência, religião, sexo, orientação sexual, identidade de género ou deficiência física ou psíquica; é punido com pena de prisão de 6 meses a 5 anos”.

⁵ “11. Mr. MARRECAS FERREIRA (Portugal) said that the definition of torture given in article 243 of the Portuguese criminal code was consistent with the first article of the Convention, and that its scope was sufficiently broad to include discrimination. Moreover, article 240 of the code, which referred only to racial discrimination, would henceforth be applicable to gender and sexual orientation. As to the distinction between torture and cruel or inhuman treatment, article 243 was consistent with the definition in article 3 of the European Convention on Human Rights, and it also specified that these acts must be committed by an agent of the state and must have the purpose of extracting a statement or information, punishing, or intimidating”. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSR.798&Lang=en.

⁶ The Government of Portugal replied to the European CPT that there was one case where “the GNR military personnel acted in a discriminatory way, namely forcing detained people to sing Gipsy Kings’ songs”. (CPT/Inf (2013) 36, p. 36-37) Available at: rm.coe.int/16806979c6.

⁷ Anti-torture committee urges Portugal to tackle police ill-treatment and the poor treatment of prisoners. <https://www.coe.int/en/web/cpt/-/anti-torture-committee-urges-portugal-to-tackle-police-ill-treatment-and-the-poor-treatment-of-prisoners>.

⁸ Available at: <https://rm.coe.int/168078e1c8>.

⁹ Available at: https://www.provedor-jus.pt/site/public/archive/doc/2019_02_28_9_REC_N_1_2019_MNP_DGRSP.pdf.

C. The principle of non-refoulement in practice and the perils of LGBTI asylum seekers

Since 1980, the State of Portugal has developed an asylum system to secure, in theory, the principle of non-refoulement. Asylum seekers and refugees have accessed to judiciary proceedings to review free of charge the denial of asylum by administrative bodies with the suspension of the order of removal. Moreover, victims of torture have accessed to a subsidiary protection status to secure their integrity on humanitarian grounds. According to data provided by the State, during the year of 2018, 1272 request for asylum were presented, with 286 cases with an affirmative response of asylum and 405 cases of subsidiary protection¹⁰. Furthermore, Portugal has accepted to the resettlement of refugees from neighbour countries under bilateral and regional agreements.

ODRI regrets that the government has expressed in the Seventh Periodic Report that “there is no information available” related to the number of appeals against expulsion decisions on the basis that applicants might be in danger of being subject to torture in their countries of destination, and the result of those appeals (CAT/C/PRT/7, para. 137). Despite the lack of disaggregated data of the cases submitted to revision by administrative and judiciary bodies, the team of ODRI has found, during the reporting period, ten (11) appeal cases related to the application of the principle of *non-refoulement* by the *Tribunal Central Administrativo Sul* related to denials by the *Serviço de Estrangeiros e Fronteiras (SEF)* and lower courts in Table 1:

Table 1. List of appeal proceedings of asylum proceedings that quote the principle of non-refoulement (Sep 2014 to Sep 2018)

Case Date of decision	Holding of decision
11440/14 09/25/2014	Appeal denied Court granted SEF request to transfer the asylum seeker to a country that “would apply a direct forcible return”. http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/f5ad113bb386155980257d63005f7f08?OpenDocument
11750/14 02/12/2015	Appeal denied Court refused to grant humanitarian subsidiary protection status to the appellant http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/d322ec51c9ca50bc80257df1004ab744?OpenDocument
13273/16 06/02/2016	Appeal granted Court ordered SEF to review of the request of asylum or subsidiary protection http://www.dgsi.pt/jtca.nsf/-/17AE096AA16945D580257FD400280001
2938/16.4BELSB 05/18/2017	Appeal granted Court annulled the proceedings by the lower court and ordered SEF a new exam of the asylum claims http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/dfb31014d80b4a328025813100339a5b?OpenDocument
409/17.0BELSB 08/30/2017	Appeal granted Court ordered SEF a new exam of the asylum claims considering the context in the country of origin of the appellant http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/38335812ea435b328025818e00560908?OpenDocument
394/17.9BELSB 12/06/2017	Appeal granted

¹⁰ Relatórios de Imigração Fronteiras e Asilo. Available at: <https://sefstat.sef.pt/Docs/Rifa2018.pdf>.

	Court reversed the decision and ordered SEF to grant subsidiary protection to the appellant http://www.dgsi.pt/jtca.nsf/-/91588DB772A4D9BB802581F500487AE5
1915/17.2BELSB 02/28/2018	Appeal granted Court reversed the denial and order a new exam of the case and the risks against the appellant and her child http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/ac9d8c585d41fdbe80258249004659eb?OpenDocument
2938/16.4BELSB 04/19/2018	Appeal denied Court refused to grant humanitarian subsidiary protection status to the appellant http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/f266b477f6e5b7ae80258278005064cb?OpenDocument
2163/17.7BELSB 03/15/2018	Appeal granted Court refused to remove the appellant to a third safe country http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/b16ddd32139ebe3780258264003840a7?OpenDocument&Highlight=0,país,terceiro,seguro
2019/17.3BELSB 04/05/2018	Appeal granted Court annulled the denial of asylum and subsidiary protection status to the appellant http://www.dgsi.pt/jtca.nsf/-/AD4BE51E16CF7EEB8025827200514A60
2749/16.7BELSB 04/19/2018	Appeal granted Court annulled the dismissal by lower courts related to the denial of asylum and subsidiary protection status to the appellant http://www.dgsi.pt/jtca.nsf/-/BDE419A9CE9BDEC78025828900328342

A common trend of the judicial proceedings of Table 1 is that the different magistrates identify as relevant law the 1951 Refugee Convention, article 3 of the European Convention on human rights and the European Union Directives. However, **the Tribunal dealing with these cases have not raised the applicability of the Convention against Torture and its article 3, despite that there are sections of the judicial proceedings that recognized the protection from torture.** This absence is no minor, since the threshold for proving asylum status in the Portuguese courts is higher (and in some instances different) than to prove the existence of substantial grounds for believing that a person would be in danger of being subjected to torture in the terms of article 3 of the Convention against Torture. Furthermore, **Portuguese jurisprudence has restricted the principle of non-refoulement to acts of persecution under the Refugee Convention, excluding cases of cruel, inhuman or degrading treatment or punishment and other irreparable harm that do not configurate torture, despite of the Asylum act has references to these cases.** However, ODRI considers that these decisions describe evolutive standards that are, in the last few years, miraculously linked with the jurisprudence of the CAT related to torture prevention and the principle of non-refoulement, such as the risk of torture should be present and real with substantial ground provided by the claimant.

Other coincidence is that all the judicial proceedings identified are related to the decisions by the *Serviço de Estrangeiros e Fronteiras (SEF)*¹¹. ODRI believes that this coincidence has an explanation: The law on asylum provides theoretically that asylum applications may be submitted to other bodies than the *Serviço de Estrangeiros e Fronteiras (SEF)* (such as border posts, police stations and military posts). **Nevertheless, in practice other bodies lack the necessary human, material and technical resources and protocols to correctly determine refugee status.** The lack of statistics and evidence provided by the State thwarts a complete analysis of the effective mechanisms for asylum seekers to procedures by the police and military posts.

¹¹ Folheto informação para Requerentes de Proteção Internacional em Portugal. Available at: <https://www.sef.pt/pt/Documents/Folheto%20Informação%20Proteção%20Internacional.pdf>.

Moreover, our sources tend to agree that asylum seekers **have found misfortunes** before the *Serviço de Estrangeiros e Fronteiras (SEF)* and lower courts (in few times revised by the *Tribunal Central Administrativo Sul*) in the determination of **asylum in the cases of torture with the acquiescence and omissions of State organs, and in the cases related to LGBTI individuals qualifying them as 'members of a particular social group' under the 1951 Refugee Convention**. A scholar has argued that LGBTI refugee claims have a lower success rate in Portugal, compared to other cases (Ferreira 2015: 417)¹².

A disappointing trend is that in the few cases related to LGBTI refugees, with the same evidence and facts, the administrative and judicial bodies have provided different responses to identical cases of determination of refugee status based on sexual orientation: in most cases personal circumstances are irrelevant, while in a few number of cases personal circumstances are necessary to determine refugee status¹³. According to a study by COC Netherlands and VU University Amsterdam, in cooperation with the Hungarian Helsinki Committee, LGBTI refugees have burden of proof difficult to meet, because “[t]he decisions identified in Portugal indicate that **seeking protection from police is always a requirement**. Information on whether that protection would be available to LGBTI individuals does not seem to be sought by the Portuguese authorities nor does this play any role in decision-making”¹⁴.

In a recent case, the SEF denied the asylum claims of a gay man that argued that would be assaulted by the police if returned to Russia: SEF rejected those claims expressing that those claims were not relevant for the asylum case. The Administrative Tribunal of the Lisbon Circuit followed the reasoning by SEF and declared inadmissible the case. **Fortunately, the superior court overturned the decision and granted the appeal an order a new evaluation of the claims giving importance to the declaration of the complainant**, along with the existence of a context that provide evidence related to foreseeable, personal, and real dangers and risks to the well-being of the complainant. Furthermore, the Court concluded, changing the continuous jurisprudence of denial. Therefore, the Tribunal concluded **in this exceptional case** that there were grounds of probable harm and persecution against the appellant, because the claimant was harassed in his country¹⁵.

Therefore, for instance, if we analyse the chances of having success before administrative and judicial bodies of this declaration of a young man before a health scholar: *“My family expelled me for being homosexual. In the streets was persecuted. One day they hit me a lot with sticks. See all these scars? I am very afraid. In my country, being homosexual is like having a disease”*¹⁶. SEF and lower courts would deny asylum to this claimant: both bodies would require evidence that the asylum seeker required protection of the State. And then, maybe if the case was filed before the same members of the Administrative Tribunal of the Lisbon Circuit, then the denial could be reversed if the court was convinced that the discriminatory acts qualified as an act or persecution against a gay man under the 1951 Refugee Convention. However, an easier path could be to take into consideration the personal and foreseeable risks of torture, and cruel, inhuman or degrading treatment or punishment and other irreparable harm under the Convention against Torture.

¹² Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims. In: International Journal of Refugee Law, 2015, Vol. 27, No. 3, 411–432 doi:10.1093/ijrl/eev032 Advance Access publication July 29, 2015

¹³ See for instance the Senegalese cases 148B/08, 97C/08, 30C/10, 02717/16.9BEMDL, and the Angolan case 124T/09. Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe. Cases quoted by: https://www.coc.nl/wp-content/uploads/2013/11/Fleeing-Homophobia-report-EN_tcm22-232205.pdf

¹⁴ [pre-print version of Ferreira, Nuno (2016) Refugees and asylum seekers in Portugal: an assessment and the case of LGBTI individuals. Le Monde Diplomatique (Portuguese version) (111). pp. 11; COC et. Al. Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe, p. 30. Available at: https://www.coc.nl/wp-content/uploads/2013/11/Fleeing-Homophobia-report-EN_tcm22-232205.pdf.

¹⁵ Acórdão de 2018-04-19 (Processo n.º 2749/16.7BELSB). Available at: <http://www.dgsi.pt/jtca.nsf/-/BDE419A9CE9BDEC78025828900328342>.

¹⁶ Maria Cristina Santinho. Refugiados e Requerentes de Asilo em Portugal: Contornos Políticos no Campo da Saúde, p. 225. Available at: https://www.om.acm.gov.pt/documents/58428/179891/Tese48_paginacao_06_lr.pdf/700654fe-64e8-401d-9d8d-3b13b2da125c

Our sources consider that despite the significant number of claims related to sexual orientation and gender identity by the SEF and the Circuit Courts of Portugal, **SEF and judiciary officials require measure to ensure that LGBTI people have access to procedures sensitive to their specific protection needs, in conformity with article 3 of the Convention against torture. The only measure reported by the State in the periodic report is an important poster campaign “You are safe here” during the year of 2014 (CAT/C/PRT/7, para. 65).**

Figure 1: Campaign directed to LGBTI asylum seekers and refugees during 2014, endorsed by the State of Portugal and SEF



Available at: [https://ilga-portugal.pt/noticias/Noticias/asilo \(1\) \(1\).jpg](https://ilga-portugal.pt/noticias/Noticias/asilo (1) (1).jpg)

However, the lack of disaggregated statistics and the confidentiality of many proceedings, **obstructs a real assessment of the application of the principle of non-refoulement by administrative and judiciary bodies to LGBTI individuals.** In relation to this, ODRI recalls that the Committee Against Torture has expressed that "the protection of certain minority or marginalized individuals or populations at risk of torture is a part of the obligation to prevent torture or ill-treatment (CAT/C/GC/2, para. 21).

Finally, ODRI would like to note that the **Asylum Act of Portugal extends the coverage of primary healthcare for asylum seekers, refugees and victims of torture** (articles 35-A, 35-B, 52, 56, 60, 61, 73,

75 and 80 Asylum Act 27/2008 with amendments). Nevertheless, as has been found by studies¹⁷, in practice beneficiaries face several barriers to access to these services due to **the absence of reasonable accommodations, the persistence of stereotypes, and the lack of intercultural competencies by public officials**. Up to this date, the State of Portugal has not put in practice guidelines and procedures of identification of torture victims and others in need of international protection among asylum seekers and migrants.

Taking into consideration these advances and challenges, ODRI respectfully suggests that the Committee recommends Portugal:

The State party should:

(a) Continue to respect the principle of non-refoulement with respect to LGBTI asylum seekers and refugees through adequate and effective measures;

(b) Adopt laws and protocols on asylum that is consistent with international human rights standards and norms and is in accordance with article 3 of the Convention in cases related to cruel, inhuman or degrading treatment or punishment and other irreparable harm;

(c) Establish an individualized procedure through which any individual who raises concerns that he or she faces a real, personal risk of torture and ill-treatment if returned by the State party to another country can seek to remain in Portugal on the grounds that returning them would violate the country's non-refoulement obligation under the Convention;

(d) Provide training to all relevant officials in the State party on the principle of non-refoulement;

(e) Ensure that the authorities put in place measures to identify and provide redress to all survivors of torture and ill-treatment, including non-nationals, and provide them with adequate access to healthcare and psychological services;

D. Extraditions and diplomatic assurances

In the Seventh Periodic report, the State of Portugal has informed the Committee against Torture that “From 2015 to 2017, 194 persons were extradited from Portugal, mostly in execution of European Arrest Warrants” (CAT/C/PRT/7, para. 137). In contrast, ODRI regrets that the government has expressed in this report that “there is no information available” related to the number of appeals against extradition decisions on the basis that applicants might be in danger of being subject to torture in their countries of destination, and the result of those appeals (CAT/C/PRT/7, para. 137). Despite the lack of disaggregated data, the team of ODRI has selected, during the reporting period, six (06) appeal cases (three from the Supreme Court of Justice of Portugal and three from the Circuit Court of Lisboa) related to the application of the principle of *non-refoulement* during extradition procedures listed in Table 2:

¹⁷ Maria Cristina Santinho. Refugiados e Requerentes de Asilo em Portugal: Contornos Políticos no Campo da Saúde, p. 55. Available at: https://www.om.acm.gov.pt/documents/58428/179891/Tese48_paginacao_06_lr.pdf/700654fe-64e8-401d-9d8d-3b13b2da125c.

Table 2. List of appeal of extradition proceedings that quote the principle of non-refoulment (Sep 2015 to Apr 2019)

Case Date of decision Judicial organ	Holding of decision
65/14.8YREVR.S1 07/09/2015 Supreme Court of Justice	Annulment of extradition proceedings to Russia because extradition domestic proceedings had miscarriages of justice and violations of due process http://www.dgsi.pt/jstj.nsf/-/B04C4E3861D2868180257EFF005452C5
538/14.2YRLSB.S2 02/03/2016 Supreme Court of Justice	Confirmation of extradition to the Republic of Ukraine despite the allegations of the forced conscription of the appellant in the context of the hostilities in Donetsk http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/9d80b868c44b255c80257f4f00379d64?OpenDocument
74/16.2YREVR.S1 10/12/2016 Supreme Court of Justice	Annulment of extradition proceedings to Russia due to omissions by the domestic proceedings to determine the facts http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a9a77975fff64f9e802580e5003c0236?OpenDocument
546/17.1YRLSB-5 04/07/2017 Circuit Court of Lisboa	Ratification of the European arrest warrant by a tribunal of France of a foreigner that claimed to be a victim of torture in Sri Lanka. http://www.dgsi.pt/jtrl.nsf/-/96960C7C05DC8E108025813300466BA7
334/19.0YRLSB.L1-9 03/28/2019 Circuit Court of Lisboa	Confirmation of extradition to Brasil despite allegations of persecution due to the sexual orientation of the claimant http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c8642a5fed5cb1ca802583cc0052c004?OpenDocument
420/18.4YRLSB.L1-9 03/28/2019 Circuit Court of Lisboa	Confirmation of extradition to Belarus despite allegations of ill-treatment http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c8642a5fed5cb1ca802583cc0052c004?OpenDocument

A common trend is that **the Convention against Torture is quoted as relevant law** in the cases related to Belarus, Brazil and Russia during the reporting period. Even more, in the case related to Belarus, the Circuit Court of Lisboa take into consideration the recommendations of the Committee against Torture to assess the risks of torture and cruel, inhuman or degrading treatment or punishment or other irreparable harms. Despite these advancements, **ODRI is concerned that these references do not address fully the standards raised by the Committee against Torture**. Complainants in the two successful cases against Russia demonstrated that the proceedings in Portugal and in Russia were arbitrary and amounted to a denial of justice; a legal standard that is aligned with the jurisprudence of Committee against Torture.

However, **in the cases related to Belarus, Brazil, Sri Lanka and Ukraine judicial courts denied the allegations of the violation of the principle of non-refoulment, even though complainants gave specific information and evidence that indicated that there were some “real, personal and foreseeable risk of torture” if removed to those countries**. In the extradition to Belarus, the Circuit Court of Lisboa consider that the Concluding observations on the fifth periodic report of Belarus (CAT/C/BLR/CO/5) related to torture and ill-treatment were generic and did not assess the real risks

faced by the defendant¹⁸. In the case of Brazil, this year, the Circuit Court of Lisboa considered that the sexual orientation of the appellant did not constitute a circumstance to evaluate the extradition proceedings against him¹⁹, despite the fact of the allegations of the harassment of LGBTI individuals in the recent context in Brazil. Moreover, in the case of Sri Lanka, the Circuit Court of Lisboa agreed to the European arrest warrant ordered by a Court of Paris, without assuring that the extradited would continue his rehabilitation for the acts of torture he suffered. In the extradition to Ukraine, the Supreme Court of Justice of Portugal accepted the assurances presented by the requesting State, without consideration of the risks that the person extradited could be subjected to torture. However, the lack of disaggregated statistics, **obstructs a real assessment of the application of the principle of non-refoulement during extradition proceedings by the Superior Court of Portugal and the Circuit Court of Lisboa.**

Therefore, ODRI respectfully suggests that the Committee recommends Portugal:

The State party should:

(a) Ensure that all individuals subject to return or extradition have an opportunity for an effective and impartial review by an independent decision-making mechanism of any claims that they are at risk of being subjected to torture;

b) Refuse to accept diplomatic assurances in relation to the extradition of persons from its territory when these assurances are used as a loophole to undermine the principle of non-refoulement as set out in article 3 of the Convention, and when there are substantial grounds for believing that they would be in danger of being subjected to torture in that State;

(c) Compile and provide the Committee with detailed statistical data, disaggregated by country of origin, on the number of persons who have requested asylum or refugee status, and the outcomes of those applications, as well as the number of expulsions, deportations or extraditions that have taken place and the countries to which individuals were returned.

E. The National Preventive Mechanism

The *Provedor de Justiça*, the National Human Rights Institution (NHRI) of Portugal, has been designed as the National Preventive Mechanism (NPM) through the Council of Minister Resolution 32/2013 on May 2013. Despite the evidence provided by the State of Portugal in the Seventh periodic report (CAT/C/PRT/7, paras. 255-259 and 270), **up to this date, the National Preventive Mechanism does not enjoy the operational autonomy required for the normal performance of its work, since the NPM does not enjoy a separate mandate from the NHRI through a Secretariat.** Moreover, the NPM yet does not have the human, material and technical resources that it needs to function properly: the allocation of resources is dependent on the existing budget of the *Provedor de Justiça*. In addition, the

¹⁸ "II- As reservas e recomendações feitas pelo Comité das Nações Unidas Contra a Tortura, são genéricas e assemelham-se às que são feitas pelo mesmo organismo sobre os sistemas de justiça e prisional de muitos países, incluindo Portugal, e deles não resulta que concretamente ao Requerido não venham a ser garantidos os seus direitos, até porque a Bielorrússia deu formalmente essas garantias. Ora, conforme resulta da matéria de facto provada, no âmbito do processo para a concessão de asilo, e tendo o Requerido declarado que se deslocou por diversas vezes à Bielorrússia e, nessas deslocações nada lhe sucedeu, o que foi uma das razões para que lhe não fosse concedido o estatuto de refugiado, e não existindo assim, qualquer outra causa legal que viabilize o não cumprimento do mandado, deverá ser deferida a extradição do requerido para o seu País de origem". Link available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c8642a5fed5cb1ca802583cc0052c004?OpenDocument>.

¹⁹ "Efetivamente, não foram alegadas razões de saúde, familiares ou idade do requerido que tornem a extradição especialmente gravosa para ele. O requerido é apela para sua situação pessoal e familiar para viver com o seu namorado em Portugal (este cidadão brasileiro também tem cerca de um ano) em virtude de sua homossexualidade não ser bem aceita no Brasil e ter seu pai a quem veio conhecer e depois do perfume". Link available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c8642a5fed5cb1ca802583cc0052c004?OpenDocument>.

NPM faced “some difficulties in accessing non-traditional places of deprivation of liberty, such as psychiatric institutions and social institutions, especially those run by private companies” (CAT/OP/PRT/1, para. 24), due to the constitutional limits of the mandate of the *Provedor de Justiça* over non-state actors. These limitations have been acknowledged by the Committee on Enforced Disappearances (CED/C/PRT/CO/1, para. 10-11) and the Subcommittee on the Prevention of Torture during its visit in May 2018 (CAT/OP/PRT/1, para. 14-15). Despite the constraints, the NPM has been essential in the prevention of torture assessing the conditions of migrant centres, psychiatric facilities, military quarters, police stations, educational spaces and prisons.

Taking into consideration the advances and the challenges, ODRI respectfully suggests that the Committee recommends Portugal:

The State party should take the necessary steps to ensure that the national preventive mechanism, under the Provedor de Justiça, is provided with the necessary financial, material and human resources to effectively and independently carry out fully its mandate, with autonomy.

F. Use of coercive measures in psychiatric health care

The pending amendments to the Mental Health Act 36 and the ineffectiveness of the Guidelines on restraint 021/2011 have enabled an environment of the continued widespread use in psychiatric and mental health institutions of restraints and other coercive methods, the ill treatment of persons with disabilities (including the forced confinement without the fundamental safeguards). The Mental Health Act 36 maintains a compulsory internment regime that contravenes the Convention against Torture and the Convention on the Rights of Persons with Disabilities, as has been acknowledged by the State of Portugal during the visit of the SPT (CAT/OP/PRT/1, para. 35). The use of restraints and other limitations have been acknowledged by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Subcommittee on the Prevention of Torture (SPT) during its visits. The CPT evidenced instances of restraint in the psychiatric unit of Caxias Prison Hospital and the Psychiatric Hospital of Santa Cruz do Bispo Prison (CPT/Inf (2018) 6, para. 122-130), while the SPT lamented that the “authorization of physical restraint is not re-evaluated for years”, being commonly used (CAT/OP/PRT/1, paras. 35-36).

Therefore, ODRI respectfully suggests that the Committee recommends Portugal:

- a) The State party should adopt the necessary measures to eradicate discriminatory exceptions whereby persons with disabilities are subject to risks of torture during forced internment;*
- b) Promote psychiatric care aimed at preserving the dignity of patients, both adults and minors, and continue its efforts to end the unjustified use of coercive force, including by further amending the Mental Health Act 36 and other legislation;*
- c) Ensure that non-consensual psychiatric treatment, if applied at all, is only used in exceptional cases as a measure of last resort, for the shortest possible period of time and when absolutely necessary to protect the health or life of the person concerned, only if he or she is unable to give consent and under independent review;*

G. Exclusion of evidence obtained by illegal means

The Constitution of Portugal upholds the exclusion of evidence obtained through torture in article 32.8. The Procedural Penal Code reaffirms this guarantee in articles 126.2 and 129. The jurisprudence in Portugal has clarified that this exclusionary clause is applicable every time there are reasonable grounds to believe that evidence was produced with the coercion of individuals²⁰.

However, during its 2016 periodic visit, the CPT received many allegations of ill-treatment during apprehension and police custody. Detainees were commonly slapped, punched and kicked to their bodies and heads, or beaten with batons. **The CPT observed that the resort to ill-treatment is usually directed to obtain confessions and it is targeted in a discriminatory manner against persons of African descent (specially nationals and foreigners)**²¹. The CPT concluded that “that infliction of ill-treatment particularly against foreign nationals, including for the purpose of obtaining confessions, **cannot be considered an infrequent practice**”²². The government replied to the findings of the CPT, suggesting that the General Inspectorate of Home Affairs (also known as IGAI-Inspeção Geral da Administração Interna) investigated these cases, and terminated those inquiries without explanation of the results²³. In the seventh periodic report, the State of Portugal described the functions of IGAI (CAT/C/PRT/7, para.6, 246-254). However, the State has not provided examples of complaints leading to prosecutions related to coercion during interrogations and that judges are reported to not always take seriously the affirmations of persons deprived of their liberty that their confessions were obtained under torture. Investigations do not cover the conduct of superiors in the prevention, investigation and sanction of the allegations of acts committed by their subordinates. ODRI believes that the practices of ill-treatment of citizens by elements of security forces and services and the defective investigations contravene articles 2, 14, 15 and 16 of the Convention against torture.

Taking into consideration the advances and the challenges, ODRI respectfully suggests that the Committee recommends Portugal:

- a) *The State party should take measures to ensure that confessions obtained from criminal suspects through torture or ill-treatment are not accepted in practice as evidence of guilt and are declared null and void.*
- b) *Ensure that prompt and impartial investigations are carried out into such cases, so that persons convicted based on coerced evidence are afforded a new trial and adequate redress and the perpetrators are prosecuted and punished, including under the principle of command responsibility;*

²⁰ See for instance case 9184/15.2T8STB.E1 before the Tribunal da Relação de Évora, and case 470/17.8GBVLN.G1 before the Tribunal da Relação de Guimarães.

²¹ “10. As was the case in 2012, the majority of persons met by the delegation stated that they had been correctly treated by law enforcement officials both at the time of their apprehension and while in police custody. However, the CPT’s delegation received a considerable number of allegations of ill-treatment. The alleged ill-treatment related to the time of apprehension, after the persons concerned had been brought under control, and prior to arrival at police detention facilities as well as to the time spent in the police station, apparently as a means to make the suspects confess to particular crimes or in order to punish them for the alleged crime committed. The ill-treatment consisted primarily of slaps, punches and kicks to the body and/or head as well as, on occasion, the use of batons or sticks. The delegation also observed a number of cases of excessively tight handcuffing with detainees still bearing clear marks on their wrists from the cuffs several weeks after they had been arrested. It should be noted that **the delegation heard in particular many allegations of ill-treatment made by persons of color, both Portuguese citizens and foreign nationals; in addition to physical violence, they alleged that police officers (PSP and GNR) insulted them verbally**”. CPT/Inf (2018) 6 Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 7 October 2016. Available at: rm.coe.int/168078e1c8.

²² CPT/Inf (2018) 6 Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 7 October 2016, para. 12. Available at: rm.coe.int/168078e1c8.

²³ CPT/Inf (2018) 7 Response of the Portuguese Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Portugal from 27 September to 7 October 2016, p.5. Available at: rm.coe.int/168078e1c8.

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About ODRI

ODRI “Intersectional rights” - Office for the Defence of Rights and Intersectionality is a Lima-based NGO established in 2017. It is an apolitical and non-confessional. Among its principal goals is the introduction of intersectional approaches and the mainstreaming of the Sustainable Development Goals. To fulfil this goal ODRI currently submits reports assessing the respect of human rights in certain countries to United Nations Treaty Bodies and Special Procedures, and other fora. To see other contributions presented to the treaty bodies, you can visit our last submissions:

CEDAW. Contribution to the Committee on the Elimination of All Forms of Discrimination against Women in relation to the consideration of the State report of Mozambique (73 Session (01 -19 Jul 2019))https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MOZ/INT_CEDAW_CSS_MOZ_35248_E.docx

CCPR. Contribution to the Human Rights Committee in relation to the adoption of the List of issues prior to the Fifth periodic report of Korea (8 to 26 July, 2019)
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KOR/INT_CCPR_IC_S_KOR_34929_E.docx

CED. Submission in view of the upcoming consideration of the List of issues in relation to the report submitted by Peru regarding the implementation of the International Convention for the Protection of All Persons from Enforced Disappearances at its 15th Session (05 Nov 2018 - 16 Nov 2018)
https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/PER/INT_CED_ICO_PER_32073_S.pdf