



International Convention for the Protection of All Persons from Enforced Disappearance

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Summary record of the 259th meeting

Held at the Palais Wilson, Geneva, on Tuesday, 6 November 2018, at 3 p.m.

Chair: Ms. Janina

Contents

Consideration of reports of States parties to the Convention (*continued*)

Initial report of Portugal (continued)

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The meeting was called to order at 3 p.m.

Consideration of reports of States parties to the Convention (*continued*)

Initial report of Portugal (CED/C/PRT/1; CED/C/PRT/Q/1 and CED/C/PRT/Q/1/Add.1)

1. *At the invitation of the Chair, the delegation of Portugal took places at the Committee table.*
2. **Mr. Lopes da Mota** (Portugal), introducing the initial report of Portugal (CED/C/PRT/1) and the Portuguese delegation, said that civil society's involvement was of paramount importance in protecting and promoting human rights within the National Human Rights Committee. Indeed the Committee had participated in producing the country's report. Portugal, which had ratified all the core United Nations human rights treaties, greatly valued human dignity and had long been committed to eradicating enforced disappearances, a practice it utterly rejected, as reflected in its legislation and Constitution.
3. The country's courts and public prosecutor were independent from the State's powers, which guaranteed civil liberties and fundamental rights. Military and police activities were limited, inter alia, in crime prevention and repression. The armed forces had to abide by the Constitution and international instruments, while the security forces, under the supervision of independent bodies, had to adhere to the Constitution and respect fundamental rights, notably in the use of force and the application of deprivation of liberty. Indeed, the Constitution provided for a specific purpose and scope for the deprivation of liberty, while enshrining a range of fundamental rights, thus providing additional protection from enforced disappearance. Prison and detention centre personnel received regular human rights training.
4. The State was bound by the Convention, several provisions of which were directly applicable. Enforced disappearance was not subject to a statute of limitations and was qualified as a public crime and subject to criminal penalties appropriate to its seriousness. The State, its officials and agents could be held accountable for their actions and face sanctions if involved in enforced disappearance, while subordinates were safeguarded from the obligation to implement illegal orders.
5. Portugal had effective agreements with States not yet parties to the Convention and did not extradite persons if they risked being subject to the death penalty or life imprisonment, or if proceedings did not abide by the requirements of international instruments. Progress made in terms of new legislation included the 2015 Victims' Statute, which aimed to protect the most vulnerable victims of violent crime, including children, and offer them recourse to remedy.
6. The Convention remained highly relevant, given that the global phenomenon of enforced disappearances sadly persisted. There had been no enforced disappearances since the country's democratic transition in 1974. However, the preventive dimension of the Convention remained extremely important and Portugal would continue to encourage other States to ratify and implement the instrument.

Articles 1 to 3

7. **Mr. Ravenna** (Country Rapporteur) said that, due to a personal issue, Mr. Ayat, second country rapporteur, had been replaced by Mr. Decaux, to whom he was grateful for his contribution. He wished to receive clarification about the role the State party ascribed to State agents with regard to their actions or omissions in enforced disappearance, given that its legislation defined the crime consistent with article 8 of the Rome Statute of the International Criminal Court, which referred to political actors. Article 2 of the Convention, however, established the exclusive responsibility of State agents in the commission of enforced disappearance. Furthermore, while the Rome Statute of the International Criminal Court referred to crimes against humanity, that is, solely widespread or systematic attacks, under the Convention State parties were required to define enforced disappearance in their legislation as an isolated, autonomous crime that was not systematic in nature. Therefore, he wished to discover what steps the State party would take to incorporate individual cases

of enforced disappearance into its legislation. Indeed, enforced disappearances could happen in democracies, not only under dictatorships. In addition, the State party's report stated that while conventions were complied with, they remained subject to the Constitution. It would be useful to know, therefore, how the State party intended to strengthen its national legislation with regard to the definition of enforced disappearance in order to ensure that the Convention could be applied.

8. It would also be useful to clarify how a subordinate could disobey orders received from a superior, given that the State party's report indicated that a subordinate could disobey orders if he did so beforehand and in writing, which would, however, be impossible under a military regime.

9. **Mr. Decaux** (Country Rapporteur) said that he would like to congratulate Portugal for ratifying European and international conventions, for its exemplary punctuality since it had submitted its initial report in a timely fashion and for making the declarations in articles 31 and 32 of the Convention.

10. He asked for further details about the composition of the National Human Rights Committee, an interministerial body that had prepared the State party's initial report in consultation with the Ombudsman. He wondered how consultations with non-governmental organizations (NGOs) had been conducted, in addition to encouraging them to send shadow reports; given the vibrancy of civil society in Portugal, it was regrettable that there had been no contributions from it. How could the national institutions and NGOs be further involved in constructive dialogue?

11. He asked whether the self-governing authorities of the Azores and Madeira were fully covered by the Convention and whether persons in those territories, including foreigners and migrants, enjoyed the same rights and guarantees under the Convention as those in the rest of the State party.

12. Noting the State party's assertion that the Convention was directly applicable except in the case of criminal law, but that the Convention required the adoption of legislation in such areas as on the status of children, he asked how the Convention could be directly invoked in all its dimensions without appropriate legislation to transpose it.

13. On the key issue of definition, while it was to be welcomed that Portugal had ratified the Rome Statute of the International Criminal Court in 2004, the effect on the State party's legislation of the lack of a definition of enforced disappearance as an autonomous crime in the Rome Statute was that the Convention was not fully covered. He asked for further information on how the State party ensured compliance with article 3 of the Convention, which was particularly important and innovative and allowed the definition of article 2 to be extended to acts committed by non-State actors. He asked how the full scope of article 4 was covered currently in Portuguese legislation, given the importance of a specific definition of the offence of enforced disappearance. With regard to the penalties for enforced disappearance, which ranged from 12 to 25 years of imprisonment, the lower end of that range might still appear rather severe for the offence of acting as an accomplice or being indirectly involved in a single case of enforced disappearance, and in the case of the specific mitigating and aggravating circumstances referred to in the Convention.

14. Noting that the provisions of article 8 of the Convention were without prejudice to article 5, and did not in fact refer to article 5 as the State party appeared to have understood (CED/C/PRT/1, para. 72), he pointed out that the intention was to provide that, aside from cases of crimes against humanity, any statute of limitations applied in respect of enforced disappearance must be appropriate to the level of seriousness of enforced disappearance as an autonomous crime. A statute of limitation was not applicable in all cases.

15. **Mr. Ravenna**, in the context of article 7 of the Convention, asked for further details on the range set out by the minimum and maximum sentences of imprisonment for the offence of enforced disappearance, namely 12 and 25 years respectively, in relation to individual cases of enforced disappearance as an autonomous crime and to cases that were systematic and classed as a crime against humanity. Regarding article 8 of the Convention, and bearing in mind the continuous nature of the offence of enforced disappearance, he asked the State party to confirm that the statute of limitations commenced from the moment

when the offence ceased. Regarding article 9 of the Convention, and noting the information provided by the State party on extraterritorial jurisdiction in relation to extradition, he requested further information on the way in which the State party established its competence to exercise its jurisdiction over the offence of enforced disappearance on its own territory. The State party's legislation failed to reflect the wide definition of victims that was provided for under article 15 of the Convention.

16. **Mr. Teraya**, with reference to the absolute prohibition of enforced disappearance under articles 18 and 19 of the Constitution (CED/C/PRT/1, para. 29), asked the State party to confirm that there was no imaginable situation in which the Government would have to resort to enforced disappearance. He asked for further details about the procedure under which an official who considered an order from his or her immediate superior to be illegal was required first to write to the superior: given that the superior could conceal that complaint, a more effective procedure would be for the subordinate to write directly to an independent body.

17. **Mr. Figallo Rivadeneyra** asked how the mechanism worked whereby military personnel could immediately be suspended from duties if the competent authority so decided, and which competent authority was responsible for that decision (CED/C/PRT/Q/1/Add.1, para. 62). While Act No. 144/99 on international cooperation provided for two reasons for refusing extradition — the possibility of the imposition of the death penalty or of a life sentence — it was his understanding that under Act No. 31/2004, regulating extradition for crimes against humanity, extraterritoriality could also be invoked with regard to extradition or transfer to the International Criminal Court. In the case of prosecution of individual cases of enforced disappearance, how would the principle of *aut dedere aut judicare* be applied in order to ensure effective remedy?

The meeting was suspended at 3.55 p.m. and resumed at 4.20 p.m.

18. **Ms. Ávila** (Portugal) said that the National Human Rights Committee had been established by the Government in 2010, serving as clear proof of the commitment of all government members to promoting and protecting human rights. Its cross-cutting work involved representatives of all government agencies, in areas including health and agriculture. The Ministry of Foreign Affairs chaired the Committee and was responsible for its executive secretariat. The Office of the Ombudsman was a permanent guest on the Committee, as it could not be a member as such; however, in practice, there was fruitful and intense cooperation between the two. The Government maintained a mailing list of members of civil society, in which any organization could request to be included, and email and social networks were used for communication. Such methods meant that contact could be maintained not just with the large organizations such as Amnesty International, but also with smaller organizations dealing with such issues as the rights of older persons. It was disappointing that no shadow report had been submitted by civil society, since such reports were useful to the Government. A draft of the initial report had been circulated to NGOs through the mailing list for their consideration and comment, following which a meeting had been held to discuss the draft. It was true that it was a challenge to involve civil society and encourage their participation. The State party had striven to demystify the process and to remind NGOs, especially the smaller ones, that extensive reports were not essential: information submitted by email was sufficient.

19. **Mr. Lopes da Mota** (Portugal) said that the autonomy of the Azores and Madeira did not extend to areas related to justice, the police or other State matters, so the application of the Convention was exactly the same there as elsewhere in the State party.

20. **Mr. Folgado** (Portugal) said that under Act No. 31/2004, enforced disappearance was defined as a crime against humanity, in line with article 5 of the Convention. The State party took the view that the conduct provided for in article 3 of the Convention — which reflected the obligation to achieve a result in bringing those responsible for crimes of enforced disappearance to justice and which extended the scope of enforced disappearance to cover acts committed without the support or acquiescence of the State — was encompassed by certain articles of the Criminal Code, notably under the crimes of abduction or kidnapping. The offence of enforced disappearance could therefore be investigated and covered for the purposes of prosecution under the heading of those two

crimes. In the case of systematic enforced disappearance, the statute of limitations was not applied, as per article 9 of Act No. 31/2004. Individual cases of enforced disappearance or those perpetrated without the acquiescence of the State were treated as crimes of abduction or killing, for which the term of limitation was long, between 10 and 15 years according to the circumstances of specific cases. The term could be extended in case of suspension or interruption, as provided for under articles 118 to 121 of the Criminal Code. The general rules of the Criminal Code were applicable in both situations with respect to the attempt, joint perpetration or incitement to commit such crimes. In the determination of the appropriate penalties, the Criminal Code provided for the consideration of aggravating or mitigating circumstances and the degree of intentionality and participation of those involved.

21. The crime of enforced disappearance as defined in article 9 of Act No. 31/2004 was not subject to a statute of limitations; in the case of enforced disappearance following abduction or kidnapping, articles 118 to 121 of the Criminal Code were applicable. Enforced disappearance was defined as a continuous offence under article 119 (2) (a) of the Criminal Code, meaning that the statute of limitations began only when the offence ceased to be committed.

22. **Ms. Homem** (Portugal), referring to the direct applicability of the Convention in the State party, said that international conventions were subordinate to the Constitution in the domestic legal framework. Article 8 (2) of the Constitution set out the arrangements for receiving international legislation. Certain rules of the Convention were directly applicable, however, and could therefore be applied by the competent authorities. In the case of criminal provisions and punishment, the State was required to intervene: offences needed to be defined in law through the adoption of legislation. Accordingly, the State was required to take specific measures in order for articles 24 and 25 of the Convention to be applicable. The domestic legal framework already provided for a number of measures, rules and internal provisions that safeguarded the State party's obligations under the Convention — for example, to protect victims of enforced disappearance, witnesses and their families, as well as police officers and members of the armed forces undertaking investigations — meaning that so far it had not been necessary to adopt further legislation to transpose the Convention.

23. The fundamental rights and freedoms enshrined in article 18 of the Constitution could only be restricted by law under the circumstances provided for in the Constitution. The provisions of such a law could not undermine the essential content of the Constitution.

24. **Ms. Vieira Neves** (Portugal) said that any act of enforced disappearance was prohibited in keeping with the fundamental rights and freedoms guaranteed by the Constitution. The State, like public and private entities, was bound to respect those rights and freedoms. Laws that laid down exceptions thereto had to be justified and were subject to certain limitations; no restriction could be placed on core fundamental rights and freedoms, for example. The State could not invoke the principle of proportionality to justify acts of enforced disappearance, since the right to personal liberty could only be restricted for the purposes provided for under criminal law.

25. **Ms. Morgado** (Portugal) said that all members of the armed forces were responsible for complying with the law and the Constitution, and officers were responsible for the actions of subordinates in compliance with their orders. Whether or not military personnel could refuse an order depended on the circumstances. Where subordinates harboured doubts as to the legality of a given order, they could request clarification in writing. If the order was to be carried out immediately, subordinates could request verbal confirmation from another hierarchical superior. Where that was not possible, subordinates were to comply with the order and seek clarification afterwards from an officer outside their chain of command. In the event that the order was illegal, the superior officer giving the order, and not the subordinate, would face punishment. In cases where compliance with an order would involve committing a crime, such as enforced disappearance, subordinates were under no duty to obey and would not face penalties for failing to comply. Moreover, a complaint could be made against the superior officer, which would be followed up with an investigation and disciplinary proceedings. Subordinates could not use the order as justification for perpetrating such crimes, however. If persons carrying out the orders were

unaware of the illegality of an order, an investigation would determine the respective responsibilities of the superior and/or the subordinate.

26. **Mr. Lopes da Mota** (Portugal) said that, under the Portuguese legal system, the Constitution took precedence over international treaties and conventions, which in turn prevailed over domestic law. Nonetheless, it was difficult to imagine a discrepancy arising between an international convention and the Constitution, given that the Constitution had been drafted in 1976 and incorporated provisions of the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitution provided that, should such a conflict arise, the Constitution should be interpreted in accordance with the Universal Declaration of Human Rights. It should also be noted that domestic law and the Constitution were subject to change. For example, the Constitution had been amended to allow for crimes that did not have a statute of limitations in order to comply with and ratify the Rome Statute of the International Criminal Court.

27. Portugal always refused international cooperation involving offences punishable with the death penalty or with a lifelong or indefinite prison term. However, the Portuguese authorities could allow extradition if the requesting State had given legally binding assurances that such penalties would not be imposed or enforced.

28. Many articles of the Convention were directly applicable in Portugal and could be invoked before the courts. The Government had considered the question as to whether enforced disappearance should be defined as an autonomous crime in cases where it did not constitute a crime against humanity, and had concluded that it did not need to. The definition of enforced disappearance already existed in the Criminal Code, which classified the perpetration of crimes by the authorities, police or the military, or the commission of crimes by groups or organizations, as aggravating circumstances. The penalties were flexible, with some crimes carrying a prison sentence of between 2 and 10 years, depending on the severity. The maximum limitation period for serious crimes such as abduction, trafficking and torture was 10 years. In practice, however, the period could be twice as long, given that it was suspended at certain stages of criminal proceedings, such as the investigation stage before a trial date had been set. There had been cases of abduction and kidnapping in the country, but none that related to enforced disappearance per se.

29. **Ms. Vieira Neves** (Portugal) said that article 5 of the Criminal Code allowed Portuguese law to be applied outside the national territory in certain situations, such as events that occurred on aircraft and ships under the Portuguese flag or that involved a minimum objective or subjective link with Portuguese territory. Contrary to what might have been construed from the State party's report, the principle of extraterritoriality did not apply solely in cases of judicial cooperation. All international cooperation and mutual legal assistance mechanisms permitted the application of Portuguese criminal law and the country also exercised jurisdiction through the principles of nationality and universality, among others.

30. **Ms. Costa Pereira** (Portugal) said that the requirements of article 9 of the Convention regarding the establishment of competence to exercise jurisdiction were covered by article 5 of the Criminal Code. Under that provision, Portuguese criminal law could be applied to acts committed outside the territory where the alleged perpetrator or victim was a Portuguese national. However, Portugal could only exercise extraterritorial jurisdiction where the perpetrator was located in Portugal, the offence in question was punishable under the law of the State where the offence had been committed, and extradition was permitted for the offence but had not been granted.

31. **Ms. Morgado** (Portugal) said that military personnel could be suspended from duty with immediate effect while under investigation in accordance with the Code of Military Justice. Suspension could also be ordered through the subsidiary application of the Code of Criminal Procedure for offences committed under the Criminal Code.

32. **Mr. Carrilho** (Portugal) said that the same essential principles and regulations followed by the law enforcement services also applied to the military and the security forces.

33. **Mr. Folgado** (Portugal) said that, where the Portuguese authorities had refused extradition based on any of the grounds provided for in articles 6, 7, 8 or 32 of Act No. 144/99 of 31 August for enforced disappearance offences as defined in article 3 of the Convention, namely those such as kidnapping and abduction committed by private individuals, the requested person could be prosecuted by the Portuguese authorities in accordance with article 32 (5) of that law, which met the *aut dedere aut judicare* obligation.

34. **Mr. Lopes da Mota** (Portugal) said that the country had ratified a great number of international conventions, which had posed difficulties insofar as the Criminal Code had to undergo frequent amendments and care had to be taken to ensure the coherence of the Code. Existing provisions were examined to determine whether the crime had in effect been covered previously in order to avoid duplication, since elements of different crimes often overlapped. The Code already contained a definition of victim as required by the Convention and further information in that regard would be provided during the next meeting.

35. **Mr. Ravenna** said that he welcomed the delegation's confirmation that military justice was merely administrative in nature. The Committee's concern, as set out in the Convention, related to orders given by superiors that involved criminal acts. The incorporation of a clause into the military justice framework that established that there was no duty to follow orders given by one's superior when such orders were illegal helped to ensure the accountability of superiors and also to make it easier to resist illegal orders given by superiors.

36. He further welcomed the clarification that, owing to the hierarchy of laws within the Portuguese legal system, while some provisions of the Convention could be invoked directly, the imposition of sentences under the Criminal Code required the adoption of specific national legislation.

37. Regarding the extraterritorial jurisdiction of Portugal, he would like to know whether the State party prosecuted crimes of enforced disappearance on the basis of vicarious, or representational, jurisdiction.

38. **Mr. Decaux**, noting that the complex nature of the Portuguese legal system made it difficult to understand the application of treaties such as the Convention, said that the added value of the Convention was that it provided for the establishment of enforced disappearance as a stand-alone crime, rather than a complex crime encompassing many elements. He urged the State party to consider introducing enforced disappearance as an autonomous crime.

39. **Mr. Lopes Da Mota** (Portugal) said that, as part of the revision of the military justice system in the early 2000s, military justice had been made to apply in a very limited manner to crimes that were strictly military in nature. Any other crimes carried out by the military were referred to the ordinary courts. The establishment of sentences was exclusively the remit of the parliament. Military judges did exist, but they had an advisory function only. In the Supreme Court and in appeals courts, three military judges — one each from the army, air force and navy — provided guidance regarding the operation and rationale of the military. There had been very few cases tried in which the main suspect or defendant was a member of the military.

40. As to the direct application of the Convention, a person could bring proceedings, claiming to be a victim of crimes defined in the Convention and request protection, in which case the State would be obliged to act on the basis of the Convention.

41. On the issue of extraterritorial jurisdiction, Portugal adhered to the principle of universal jurisdiction over certain crimes; for other crimes, it exercised the principle of active or passive personality, as both had equal standing in the Criminal Code. It did not have universal jurisdiction over certain crimes for practical reasons: if neither the perpetrator nor the victim of a given crime naturally fell under Portuguese law, it would be difficult to identify the Government's interest in exercising universal jurisdiction over the case. In acts of enforced disappearance, however, the State party had an interest on the basis of either the victim's or the perpetrator's nationality; therefore, it applied

extraterritorial jurisdiction in the same way as if the crime had been committed on Portuguese territory.

42. **Ms. Morgado** (Portugal) said that, in accordance with the Constitution, the duty to obey a superior's orders existed only to the extent that those orders did not require the commission of a crime; that rule applied to all civil servants. Military courts were to be established only in times of war, to try crimes of a strictly military nature. After the end of a war, any military courts that had been established would continue to operate until they had tried all the cases under their jurisdiction. With regard to the military judges that acted as advisers to the ordinary courts, she wished to specify that they were always generals in rank and never in active service, in order to guarantee their independence as judges.

43. **Ms. Vieira Neves** (Portugal) said that, with regard to extraterritorial jurisdiction, Portugal prosecuted crimes on the basis not of "representational" jurisdiction, but rather of "complementary" jurisdiction. Since Portuguese law was also applicable in the cases at hand, the State party extended the jurisdiction in respect of its own criminal law to those acts committed outside the national territory.

44. The definition under Portuguese law of abduction, a complex crime encompassing a range of acts, covered the behaviours listed under the definition of enforced disappearance in the Convention. The offence might be perpetrated by anyone, but if the perpetrator was in a position of authority, then they were considered to be aggravating circumstances. It appeared, then, that Portuguese criminal law was in line with the concepts set out in the Convention.

45. **Mr. Lopes Da Mota** (Portugal) said that the establishment of enforced disappearance as a stand-alone crime, as per the Convention, helped to raise the profile of the crime in criminal codes. However, there were necessarily discrepancies between concepts set out in international conventions and the national legislation of a given country, because of the influence of history and domestic systems of that country. In the case of abduction, for instance, article 2 of the Convention referred to arrest, detention and abduction; however, under Portuguese law, abduction itself encompassed arrest and detention. Thus, the Convention and Portuguese law were aligned in terms of the crime of enforced disappearance but not in terms of the crime of abduction. While the merits of ensuring that domestic legislation reflected the provisions of the Convention were clear, changing the law to establish enforced disappearance as an autonomous crime, rather than an aggravating circumstance of abduction, were not immediately so. Nevertheless, the benefits of giving better visibility to international treaties such as the Convention would be further considered. Portugal was convinced of the usefulness of the Convention, even though, fortunately, it had not experienced any cases of enforced disappearance since its return to democracy some 50 years ago. Portugal was a young democracy with a robust legal system that was nevertheless committed to receiving the guidance of international institutions. While it did not have any cases of enforced disappearance, it was willing to cooperate with other countries on cases of enforced disappearance, provided those countries could provide assurances of the necessary legal safeguards.

The meeting rose at 5.55 p.m.