



# International Convention for the Protection of All Persons from Enforced Disappearance

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## Committee on Enforced Disappearances

### Concluding observations on the report submitted by Portugal under article 29 (1) of the Convention\*

1. The Committee on Enforced Disappearances considered the report submitted by Portugal under article 29 (1) of the Convention (CED/C/PRT/1) at its 259th and 260th meetings (see CED/C/SR.259 and 260), held on 6 and 7 November 2018. At its 272nd meeting, held on 15 November 2018, it adopted the present concluding observations.

#### A. Introduction

2. The Committee welcomes the timely submission of the report by Portugal under article 29 (1) of the Convention and the information therein. The Committee appreciates the constructive dialogue held with the delegation from the State party on the measures taken to implement the provisions of the Convention, which has dispelled several of its concerns. The Committee particularly welcomes the competence, rigour and openness with which the delegation responded to the questions raised. In addition, the Committee thanks the State party for its written replies (CED/C/PRT/Q/1/Add.1) to the list of issues (CED/C/PRT/Q/1), which were supplemented by the oral responses provided by the delegation during the dialogue.

#### B. Positive aspects

3. The Committee welcomes the fact that the State party has recognized the competence of the Committee, under articles 31 and 32 of the Convention, to receive and consider individual and inter-State communications.

4. The Committee also welcomes the measures taken by the State party in areas related to the Convention, including:

(a) 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;

(b) 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;

(c) The adoption and implementation of the third and fourth National Plans to Prevent and Combat Trafficking in Human Beings (2014–2017 and 2018–2021 respectively).

\* Adopted by the Committee at its fifteenth session (5–16 November 2018).



5. The Committee commends the State party for having ratified almost all the United Nations core human rights instruments and the Rome Statute of the International Criminal Court.

6. The Committee notes with appreciation that the State party has extended an open invitation to all special procedure mandate holders of the Human Rights Council to visit the country.

### **C. Principal subjects of concern and recommendation**

7. The Committee considers that, at the time of drafting of the present concluding observations, the legislative framework in force in the State party for preventing and punishing enforced disappearances was not in full compliance with the obligations incumbent on States that have ratified the Convention. The Committee recommends that the State party take account of its recommendations, which have been made in a constructive spirit of cooperation, with the aim of ensuring that the existing legal framework and the way in which it is implemented by the State authorities are fully consistent with the rights and obligations set out in the Convention.

#### **1. General information**

##### **Direct applicability of the Convention**

8. The Committee welcomes the confirmation by the delegation that the Convention is applied throughout the national territory of the State party, including the autonomous regions. It takes note of the statement by the delegation that the provisions of the Convention are directly applicable, except for those requiring legislative action to criminalize an offence. However, the Committee is concerned that the lack of action taken in relation to the criminalization of an autonomous crime of enforced disappearance may hinder the fulfilment of all the obligations stemming from the Convention and the enjoyment of the rights emanating from it.

**9. The Committee calls upon the State party to take all necessary measures to ensure the direct applicability and uniform application of all the provisions of the Convention.**

##### **National human rights institution**

10. The Committee notes with satisfaction that the Portuguese Ombudsman carries out the double mandate of ombudsman and national preventive mechanism under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. While taking note of the explanations provided by the delegation that the Office of the Ombudsman was still able to perform its functions without a sufficient budget, the Committee remains concerned at the information provided by the State party (CED/C/PRT/Q/1/Add.1, para. 115) that the Ombudsman is not allocated sufficient financial, human and technical resources to enable it to carry out its functions as national preventive mechanism effectively.

**11. The Committee recommends that the State party take the necessary steps to ensure that the Portuguese Ombudsman is provided with the necessary financial, material and human resources to effectively and independently carry out its mandate, including that as national preventive mechanism.**

#### **2. Definition and criminalization of enforced disappearance (arts. 1–7)**

##### **Definition of enforced disappearance as a crime against humanity**

12. While noting that article 9 (i) of Act 31/2004 of 22 July 2004 criminalizes enforced disappearance as a crime against humanity, the Committee is concerned that the definition contained in that law is not in full compliance with article 2 of the Convention. In particular, the current definition does not include the concealment of the fate or whereabouts of the

disappeared person as a possible element; it refers to crimes committed not by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, but by or with the authorization, support or acquiescence of a “State or political organization”. The Committee welcomes the State party’s indication (CED/C/PRT/Q/1/Add.1, para. 21) that removal from the protection of the law is regarded as a consequence of the crime of enforced disappearance and not as a constitutive element of that crime (art. 2).

**13. The Committee recommends that the State party review the definition of enforced disappearance as a crime against humanity in article 9 (i) of Act 31/2004 in order to ensure its full compliance with articles 2 and 5 of the Convention.**

#### **Enforced disappearance as an autonomous crime**

14. The Committee takes note of the State party’s position that the existing norms, such as article 158 of the Criminal Code (illegal restraint), are sufficient to prosecute and sanction cases of enforced disappearance and that, in its view, there is no need to incorporate enforced disappearance into domestic law as an autonomous offence. However, the Committee is concerned that article 158 of the Criminal Code and other offences against liberty referred to by the State party, including those under articles 159 and 161 of the code, are not sufficient to adequately encompass all the constituent elements and modalities of an enforced disappearance, as defined in article 2 of the Convention, and to comply with the obligation under article 4, which is closely related to other treaty obligations concerning legislation, such as those in articles 6 and 7. In this respect, while noting that, with regard to the commission of an offence by a public official, the abuse of his or her authority is considered an aggravating circumstance under the Criminal Code, the Committee considers that the existing provisions of the Criminal Code do not provide for appropriate penalties that take into account the extreme seriousness of enforced disappearance (arts. 2 and 4–7).

**15. The Committee recommends that the State party adopt the legislative measures necessary to ensure that enforced disappearance is criminalized as an autonomous offence, in accordance with the definition contained in article 2 of the Convention, and that the offence carries appropriate penalties that take into account its extreme seriousness. The State party should also take the necessary measures to hold criminally responsible and duly punish any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance, in accordance with article 6 (1) (a) of the Convention.**

#### **Criminal responsibility of superior officials and due obedience**

16. The Committee takes note of the information provided by the State party that, under article 271 (3) of the Constitution, the invocation of superior orders to justify the commission of a criminal act is prohibited. However, the Committee is concerned that, under article 177 (1) and (2) of Act No. 35/2014 of 20 July 2014, an official who fulfils illicit orders is exempt from liability if he or she has first demanded or required that they be transmitted to him or her in writing, expressly mentioning that he or she considers them illegal. The Committee is of the view that these provisions do not appear to adequately offer the guarantees required under article 6 (2) of the Convention.

**17. The Committee recommends that the State party take the measures necessary to ensure that domestic legislation specifically provides for the prohibition of invoking superior orders or instructions to justify an offence of enforced disappearance, in full compliance with article 6 (2) of the Convention.**

### **3. Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8–15)**

#### **Statute of limitations**

18. The Committee notes with satisfaction that, pursuant to article 7 of Act No. 31/2004, crimes against humanity are not subject to the statute of limitations. It also welcomes the

information that, in accordance with article 119 (2) (a) of the Criminal Code, the term of limitation for permanent crimes runs from the date on which the consummation of the act ceases, in other words, in cases of enforced disappearance when the disappeared person is found. The Committee is concerned, however, that the statute of limitations for an individual case of enforced disappearance remains unclear, as relevant offences under the Criminal Code have varying statutes of limitations (art. 8).

**19. The Committee recommends that the State party ensure that, in line with article 8 of the Convention, the term of limitation for an offence of enforced disappearance is of long duration and is proportionate to the extreme seriousness of the offence.**

**4. Measures to prevent enforced disappearances (arts. 16–23)**

**Non-refoulement**

20. The Committee takes note of the information provided by the State party (CED/C/PRT/Q/1/Add.1, para. 89) that enforced disappearance, as a crime against humanity, constitutes a serious violation of human rights, and that extradition is thus mandatorily refused if there are sufficient reasons to believe that the person could be subjected to an enforced disappearance. It also notes that, according to articles 6 to 8 and 32 of Act No. 144/99 of 31 August 1999, the authorities could refuse a request for international cooperation or extradition on mandatory grounds. However, the Committee expresses its concern about the uncertainty relating to cases in which a person who is requested to be extradited may be subjected to an autonomous crime of enforced disappearance that does not amount to a crime against humanity (art. 16).

**21. The Committee recommends that the State party take all the measures necessary to fully comply with the principle of non-refoulement enshrined in article 16 (1) of the Convention.**

**Training**

22. The Committee notes with appreciation the information provided by the State party that extensive training on international human rights law, including on the Convention, is provided to judges and to military and law enforcement officials, including prison guards. However, the Committee notes the lack of information on the provision of such training to all public officials and other persons, such as medical personnel, who may be involved in the custody or treatment of persons deprived of their liberty (art. 23).

**23. The Committee recommends that the State party ensure that all law enforcement and security personnel, whether civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of persons deprived of their liberty, including judges, prosecutors and other officials responsible for the administration of justice, receive specific and regular training on the provisions of the Convention, in accordance with article 23 (1).**

**5. Measures to provide reparation and to protect children from enforced disappearance (arts. 24–25)**

**Right to receive reparation and prompt, fair and adequate compensation**

24. While welcoming the adoption of the Victims' Statute, which aims to reinforce the rights of victims of crime, including by extending those rights to victims' family members, the Committee is concerned that the absence of an autonomous crime of enforced disappearance under the Criminal Code may have implications for the enjoyment of such rights by a victim of an individual case of enforced disappearance. The Committee is also concerned at the information provided by the State party (CED/C/PRT/Q/1/Add.1, para. 136) that Portuguese law does not provide for a guarantee of non-repetition in accordance with article 24 (5) (d) of the Convention.

25. **The Committee recommends that the State party take the measures necessary to ensure that all victims of enforced disappearance obtain full reparation, including restitution, rehabilitation, satisfaction and guarantees of non-repetition.**

#### **Legislation concerning the wrongful removal of children**

26. The Committee takes note of the information provided by the State party (CED/C/PRT/Q/1/Add.1, para. 145) that the current provisions of the Criminal Code, including article 256 (forgery or counterfeiting of documents), article 255 (a) (definition of documents for criminal purposes) and article 259 (intent to cause damage or making omissions in documents), cover the types of conduct referred to in article 25 (1) (b) of the Convention. However, the Committee remains concerned that there are no provisions that specifically reflect the measures set out in article 25 (1) of the Convention and recalls the obligation incumbent on States parties to prevent and punish the acts covered by this article.

27. **The Committee recommends that the State party review its criminal legislation with a view to incorporating the acts described in article 25 (1) of the Convention as specific offences and that it provide appropriate penalties that take into account the extreme seriousness of the offences.**

#### **D. Dissemination and follow-up**

28. **The Committee wishes to recall the obligations undertaken by States when becoming parties to the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when becoming party to the Convention and other relevant international instruments.**

29. **The Committee also wishes to emphasize the particularly cruel effect of enforced disappearances on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisal as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.**

30. **The State party is encouraged to disseminate widely the Convention, its report submitted under article 29 (1) of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society in the actions taken in line with the present concluding observations.**

31. **In accordance with the Committee's rules of procedure, the State party should provide, by 16 November 2019 at the latest, information on the implementation of the recommendations contained in paragraphs 15 (enforced disappearance as an autonomous crime), 17 (criminal responsibility of superior officials and due obedience) and 21 (non-refoulement).**

32. **Under article 29 (4) of the Convention, the Committee requests the State party to submit, by no later than 16 November 2024, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with the guidelines on the form and content of reports to be submitted by**

**States parties under article 29 of the Convention (CED/C/2, para. 39). The Committee encourages the State party to promote and facilitate the participation of civil society in the preparation of this information.**

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