

**International Convention for the Protection of All Persons from
Enforced Disappearance
Follow up to the Concluding observations
on the report submitted by Portugal**

- (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 measures to hold criminally responsible any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance is duly punished, in accordance with article 6 (1) (a) of the Convention.*

Portugal takes this recommendation into good consideration. At this time, there is no additional information.

Notwithstanding, Portugal takes this opportunity to underline that any isolated case of enforced disappearance will always be investigated, prosecuted and harshly sanctioned under the Criminal Code. As already pointed out, the conducts making up the crime of enforced disappearance are covered by the description of the objective elements of the type of several other crimes – torture and other cruel, degrading or inhuman treatment (Articles 243 and 244 CC); illegal restraint (Article 158 CC); slavery (Article 159 of the CC); trafficking in persons (Article 160 of the CC); kidnapping (Article 161 of the CC); taking of hostages (Article 162 of the CC).

The abovementioned crimes are classified as public crimes and, as such, even when no individual complaint has been presented, the Public Prosecution Service or the Criminal Police shall initiate an investigation *ex officio* once they become aware of the commission of such crimes.

Moreover, all forms of participation in a criminal action are punished under the Criminal Code as required by Article 6(1)(a) of the Convention. Any person who commits (material author), participates in (co-author), orders, solicits or induces (moral author) to the commission of an enforced disappearance is punished as author of the crime (article 26 of the CC); any person who is an accomplice to it is punished under the complicity regime (article 27 of the CC). In crimes to which a more severe penalty is applicable, such as the ones listed above, attempt is also punishable.

- (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.*

Invoking superior orders or instructions to justify the commission of a crime of enforced disappearance is prohibited in the Constitution of the Portuguese Republic (article 271(3)) and in ordinary law (Article 36 (2) of the Criminal Code and Article 177 (5) of Law no. 35/2014, of 20 July). All these provisions **expressly state that the duty of obedience ceases to apply whenever compliance with orders or instructions implies the commission of a crime.**

Therefore, the subordinate who receives an order or instruction that entails the commission of a crime of enforced disappearance is not bound by it and incurs in criminal liability in case he/she executes it. Since duty of obedience is excluded in such cases, the subordinate cannot invoke the superior order as a justification to circumvent responsibility.

The procedure foreseen in Article 177 (1) and (2) of Law no. 35/2014, which causes concern to the Committee, applies **only** in case of disciplinary liability and **never** to situations where the acts at stake constitute a crime, as explained above.

This means that *no order or instruction from any public authority, civilian, military or other, may be invoked to justify a crime of enforced disappearance*, in full compliance with article 6(2) of the Convention.

- (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.*

The Committee has expressed concern regarding the “uncertainty relating to the 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” (par. 20 of the Concluding Observations).

In that regard, Portugal would like to stress that extradition procedures follow a strict set of rules foreseen in Law no. 144/99, of 31 August, regulating the international judicial cooperation in criminal matters

Article 6 of said law sets out the mandatory general grounds for refusal of a request for international cooperation.

The first ground reads: “when it does not meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November, 1950, or **other relevant international instruments in this matter, ratified by Portugal**”, which is the case of the Convention for the Protection of All Persons from Enforced Disappearance.

The second ground for refusal reads: “if there are reasonable grounds to believe that cooperation is requested for the purpose of prosecuting or punishing a person on account of his/her race, religion, sex, nationality, language, of his/her political or ideological beliefs or his/her membership of a particular social group”.

The request is examined taking into account not only the reasons that justify the request and the situation of the person concerned, but also the whole context of the requesting State, including the knowledge that there is a consistent pattern of gross, flagrant or mass violation of human rights or serious violations of international humanitarian law.

Therefore, there should be no uncertainty as to the fact that extradition is mandatorily refused if there are sufficient reasons to believe that the person could be subject to an enforced disappearance.