



UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
GENERAL

A/33/196/Add.3
21 December 1978
ENGLISH
ORIGINAL: FRENCH

Thirty-third session
Agenda item 83

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT

Questionnaire on the Declaration on the Protection of all Persons
from Being Subjected to Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment

Report of the Secretary-General

Addendum

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REPLIES RECEIVED FROM GOVERNMENTS

GREECE

/Original: French/

/24 November 1978/

1. In Greece, the protection of the individual against torture and any other inhuman or degrading treatment is governed by article 2, paragraph 1, article 7, paragraph 2.4, and article 25, paragraph 1.3, of the Constitution.
2. In addition to this constitutional protection, a series of positive provisions of penal law and of the law governing prisons provide protection for victims of torture or of inhuman methods of detention or punishment. These include the provisions of articles 239, 308, 309, 310, 311 and 326 of the Penal Code and those of articles 4, paragraph 1, and 133 (b) of the Prison Code, which prohibit mistreatment of prisoners in both general and specific terms.
3. The authorities competent to conduct proceedings in respect of offences defined by the above-mentioned provisions are the examining magistrates and the police authorities, who, in conducting an inquiry to determine whether or not the offences in question have been committed, apply the provisions of the Code of Criminal Procedure governing such inquiries and the preliminary investigation, which are applicable to all offences. The same provisions require that a sufficient body of evidence be assembled before an accused person can be handed over to the competent court.
4. Once the existence of such evidence has been established, the accused is handed over to the competent court, i.e. the correctional court or the assize court, depending on the gravity of the offence and the severity of the penalty prescribed by law.
5. At the end of the trial, a decision is handed down; decisions are subject to appeal, the nature of which varies according to the particular court concerned, and may also be reviewed. If a person convicted of employing torture is a public official, he is, in addition to the criminal proceedings brought against him, liable to disciplinary action which may go as far as dismissal.
6. The provisions of the Code of Civil Procedure governing interruption of the execution of a sentence are also applicable to persons convicted of the above-mentioned offences, provided that the conditions prescribed by law are fulfilled or if the prisoner's health is seriously threatened. The person concerned can also apply for a pardon, which is granted by the President of the Republic in accordance with established procedure, i.e. following consultation with the Pardon Board on the proposal of the Minister of Justice (art. 47 of the Constitution).
7. With regard to redress, it should be noted that there is no special law providing for redress to victims of torture. However, such persons can apply to

the courts under the general provisions of the applicable legislation (art. 105 of the Initiation of Proceedings Act in conjunction with art. 914 of the Civil Code).

8. It should also be noted that the training schools for prison guards and officials, which are under the jurisdiction of the Ministry of Justice, offer special courses dealing with the proper behaviour of guards and other prison personnel towards prisoners; special importance is attached to these courses, so that prisoners are protected against all arbitrary acts by prison officials.

PORTUGAL

/Original: French/

/28 November 1978/

Question 1 of the questionnaire

1. Question 1 of the questionnaire calls for information on legislative and administrative measures taken to prevent and punish torture and other cruel, inhuman or degrading treatment or punishment, particularly in exceptional circumstances such as a state of war, internal political instability or any other public emergency.

2. Article 26, paragraph 2, of the Constitution of the Portuguese Republic provides as follows: "No person may be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This rule, since it is embodied in the country's basic law, admits of no exceptions.

3. Accordingly, article 21 of the Constitution further extends this constitutional norm by providing as follows:

"1. The State and other public corporations are civilly liable, jointly with the occupants of public offices, for actions or omissions committed in the exercise or by reason of the exercise of their functions which give rise to a violation of the rights, freedoms and guarantees of others or cause injury to others."

4. In so far as relates to criminal matters, the subject is briefly dealt with in the following provisions:

(a) Article 293 of the Penal Code:

"Any public official responsible for the supervision of a prisoner who employs unjustifiably harsh methods shall be subject to a penalty of up to six months' imprisonment; where the acts in question are deemed to be legally subject to a criminal penalty, such penalty shall be imposed."

(b) Article 299 of the Penal Code:

"Any public employee who, in the exercise or during the exercise of his functions, employs or causes to be employed against any person, without valid reason, violence which is deemed to be unnecessary for the performance of the legal act required of him shall be punishable by imprisonment for a term of from one to six months, it being understood that the penalty may be made more severe where the acts of violence are deemed to be criminal in nature."

5. It should be emphasized that, in accordance with the most widely held view, this norm applies to both physical and psychological violence. Indeed, under

section XXXV, paragraph 3, of Act No. 2118 of 3 April 1963, an official of a mental health establishment or service who forcibly applies psychiatric treatment other than that authorized by law is guilty of the offence referred to in article 299 above.

6. Article 306 of the Code of Criminal Procedure provides as follows:

"An authority or official thereof responsible for making an arrest shall be forbidden to mistreat, insult or commit acts of violence against prisoners, and only in cases of resistance, flight or attempted flight shall such authority or official thereof be permitted to employ force or take necessary measures in order to overcome such resistance or to effect or ensure an arrest."

7. The organization of the Portuguese prison system is based on the principle set out in article 229 of the Prison Reform (Decree-Law No. 26643 of 28 May 1936), which requires that prisoners be treated "in a just and humane manner".

8. Military legislation also prescribes norms which must be observed. Article 88 of the Code of Military Justice, approved by Decree-Law No. 141/77 of 9 April 1977, provides as follows:

"A member of the military service who, in the exercise of his functions, employs or causes to be employed against any person, without valid reason, violence which is unnecessary for the performance of the act required of him shall be sentenced to military confinement for a term of from six months to two years."

Article 94 of the Code of Military Justice provides as follows:

"A person of higher rank shall be liable to military confinement if:

"...

"(e) He employs unjustifiably harsh methods in dealing with a person of lower rank who is under arrest; ..."

The next article provides as follows:

"Military confinement for a term of from six months to two years shall be imposed upon any member of the military service who, in the exercise of his functions with the armed services or while claiming to be exercising such functions although in fact he is not, commits against any person, in the circumstances specified in article 94 (a) - (f), any of the acts specified in those subparagraphs."

Question 2 of the questionnaire

9. The second question seeks to establish how and to what extent information and educational material regarding the prohibition of torture and other cruel, inhuman

or degrading treatment or punishment are included in programmes and activities for the training of law enforcement personnel and other public officials responsible for persons deprived of their liberty.

10. Clearly, since Portuguese legislation manifests an age-old destitution of torture, and inhuman, cruel and degrading punishment and treatment, Portugal is proud to have commemorated some years ago the centenary of the abolition of the death penalty. It can therefore be assumed that personnel responsible for people deprived of their liberty perform their functions somewhat leniently.

11. We believe, however, that since the duties associated with the post of member of the prison service are a compulsory subject in the entrance examinations for such personnel, and they include the obligation to treat prisoners with justice and humanity, the latter subject always comes up in the examination.

Question 3 of the questionnaire

12. Question 3 has been answered in the foregoing paragraph. It asked how and to what extent the prohibition of torture and other cruel, inhuman or degrading treatment or punishment was incorporated in rules or instructions setting forth the duties and functions of anyone who might be involved in the custody of prisoners.

13. The reply could, however, be amplified by the Directorate of Prison Services, which certainly has standard regulations for prison establishments.

Question 4 of the questionnaire

14. To our knowledge, Portugal has no method of ensuring the systematic review of interrogation practices and of arrangements for the custody and treatment of prisoners with a view to preventing torture and other cruel, inhuman or degrading treatment and punishment. This is in reply to paragraph 4 of the questionnaire.

Question 5 of the questionnaire

15. The question here is whether acts of torture, as well as participation in, complicity in, incitement to or the attempt to commit torture, are punishable under criminal law.

16. The Portuguese criminal system has no provision defining torture as a crime. It is obvious, from what has been stated earlier, that the act is unlawful. Nevertheless, if, for example, A tortures B, and thereby causes bodily harm, it is for the offence of causing bodily harm and not for torture that A will be prosecuted.

17. However, if A employs unlawful force against a prisoner for whom he is responsible even if such force does not reach the level of torture, A is punished for that act. 1/

1/ This argument arises in connexion with the definition of torture given in art. 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with which torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

18. As the subject is not specifically dealt with, the general rules of the Penal Code on the forms of commission of a crime - positive act, negative act and attempt - and of persons committing it - perpetrator, accomplice and accessory after the fact - are applied.

Question 6 of the questionnaire

19. The sixth question asks which authorities are competent to receive and examine complaints from alleged victims that torture or other cruel, inhuman or degrading treatment or punishment has been inflicted upon them by public officials.

20. The legal forms of crime to which reference has already been made are essentially those committed by public officials.

21. They are covered by no specific regulation. The authorities competent for instituting proceedings and rendering judgements are the same authorities which, in general, are responsible for prosecutions and judgements in the case of any other act punishable under criminal law.

22. Obviously the question can arise in the context of the responsibility of the official under disciplinary regulations. In Portugal disciplinary procedure, based on the need to ensure the orderly operation of public services, is independent of criminal procedure, whose legitimacy is based on the defence of society itself.

23. In this sphere, the Minister and the official's superior officers empowered to impose penalties are competent to institute or have instituted disciplinary proceedings under article 31 of the Disciplinary Statute of Civil Servants, approved by Legislative Decree No. 32 659 of 9 February 1943.

Question 7 of the questionnaire

24. Question 7 asks whether, whenever there is reasonable ground to believe that an act of torture has been committed, the competent authorities proceed to an investigation ex officio even if there is no formal complaint.

25. We believe that the answer is "yes".

26. If the accused person is a public official or a member of the armed forces, his superior, on learning that he has committed an act contrary to the rights, liberties and guarantees of citizens, must start an investigation of the act, even if no formal complaint has been submitted.

27. On the other hand, there is ex officio an investigation in the case of crimes committed by public officials. In Portugal, as stated earlier, there is no legal definition of torture as a crime. Nevertheless, if, for example, A, who shows bodily injuries, has been tortured, and if there are grounds for believing this, that circumstance has to be verified because it aggravates the responsibility of the perpetrator, under the provisions of article 34, No. 23, of the Penal Code: "If the crime was committed with acts of cruelty ..."

28. Since there is no legal crime of torture there can be no investigation based solely on that act.

29. In short, cruelty, as far as the conduct of the offender is concerned, is an aggravating circumstance when it is added to any punishable act. Nevertheless, it is possible for a person convicted in these circumstances to benefit from pardon, commutation of sentence or amnesties or to have his penalty suspended. Suspension depends on consideration of the degree of culpability, the moral conduct of the offender and the circumstances of the offence, under article 88 of the Penal Code. Thus, if the accused person has tortured the complainant, a suspension of sentence is very improbable.

Question 8 of the questionnaire

30. The foregoing answers question 8, which asks whether, when an ex officio investigation or a formal complaint has led to establishing that an act of torture has been committed, criminal proceedings are instituted against the alleged offender, whether sentences may be suspended and whether the offender may benefit from pardon, commutation or amnesties.

Question 9 of the questionnaire

31. In question 9 of the questionnaire, the following questions are raised:

"What are the disciplinary and other sanctions, if any, which may be applied to persons guilty of torture? May such persons be barred or suspended from public service or from certain other professions involved in the treatment of prisoners, such as lawyer or physician? What action may be taken by occupational associations against their members convicted of torture as a grave breach of professional ethics?"

32. In the case of disciplinary sanctions, it should be noted, in order to avoid misunderstandings on the part of those unacquainted with the Portuguese system of procedure, that such sanctions are applied not as part of the judgement, but at the time of the trial itself by the senior official invested with the power to punish.

33. In addition, Portuguese law embodies the principle of legal flexibility of disciplinary action. In this field the view is taken that punishment, in order to be effective, must be flexible.

34. An offence has been committed where there has been a breach of one of the general or specific duties relating to the service or a lapse in the general duties of citizens imposed by law or by social ethics - article 2 of the Disciplinary Statute on the Civil Service.

35. Pursuant to these principles, the law lays down the penalties but confers a certain discretionary power in respect of the punishment to be applied.

36. Naturally, for each serious offence - torture being prohibited under the Constitution - a rigorous sanction is applied. Suspension and even dismissal are forms of punishment under Portuguese disciplinary law.

37. With regard to occupational associations, the Bar and the medical association also resort to disciplinary machinery in the case of lawyers and physicians respectively. All the foregoing considerations, although more applicable to the public service, are also valid for these associations.

Question 10 of the questionnaire

38. The replies to questions 8 and 9 are equally applicable to question 10, since all that has been stated on the subject of torture applies also to other forms of cruel, inhuman or degrading treatment or punishment.

Question 11 of the questionnaire

39. The Parquet (State counsel in court) is not qualified to state whether, since the adoption of the Declaration, any investigations have been carried out or any proceedings instituted in connexion with allegations of torture or other forms of cruel, inhuman or degrading treatment or punishment. (Question 11 of the questionnaire)

Question 12 of the questionnaire

40. Question 12 asks whether the law ensures redress and compensation to the victim of acts of torture or other cruel, inhuman or degrading treatment or punishment.

41. The answer is "yes".

42. Portuguese law is based on the general principle according to which "Any person who, through fraud or simply through misconduct, unlawfully violates the right of another person or any legal provision which protects the interests of that person, shall pay compensation for any damage arising from the violation" - article 483 of the Civil Code.

43. Furthermore, "In determining the indemnity, account must be taken of the non-pecuniary damages which, in view of their size, should be decided by the court" - article 496 of the Civil Code.

44. Article 21 of the Constitution, under the terms of article 271, paragraph 1, thereof, also provides for the following:

"Any official or agent of the State or of any other public body is responsible under civil, criminal and disciplinary law for actions or omissions arising from a violation of the rights or interests of citizens protected by the law; action and procedure shall in no case be dependent upon authorization by a senior official."

45. The accused, after having been sentenced under criminal law, shall, whatever the punishment, indemnify the victim for the damage caused - article 75, paragraph 3, of the Criminal Code.

46. The Parquet does not have sufficient material to reply to the question raised at the end of No. 12 of the questionnaire, namely "whether, since the adoption of the Declaration, any such redress and compensation have been afforded".

Question 13 of the questionnaire

47. The reply to question 13 of the questionnaire is as follows:

"Any evidence extracted under torture, duress, violation of the physical or moral integrity of the person, abusive interference in private or domestic life or with correspondence or telecommunications, shall be null and void" - article 32, paragraph 6, of the Constitution.

48. Article 261 of the Code of Criminal Procedure states:

"1. Any organ or person taking part in the implementation of criminal procedure shall be forbidden:

(a) To influence the free will or decision of the accused through torture, corporal punishment, the use of any means of hypnosis or recourse to cruel or fraudulent means;

(b) To influence the accused person's power of memory or reasoning;

(c) To use force against the accused person other than in cases and within limits laid down by the law;

(d) To threaten the accused person with any action that is not permitted by law or to promise him a benefit not provided for by law.

"2. The agreement of the accused in no way alters the prohibitions established in the previous paragraph. Similarly, any statement which violates those prohibitions shall be deemed inadmissible before the court or the examining judge, even with the agreement of the accused."

49. The list of such means is unlimited. Other means have been omitted, such as advice on the consequences of untruthful replies, narco-analysis, or the use of microphones, unauthorized voice recordings or lie detectors.

50. Thus, all the means used with a view to eliciting replies which may physically or morally violate the accused or which place conditions on his freedom or his will are strictly forbidden and are deemed inadmissible. 2/

2/ In that connexion, compare the Code of Criminal Procedure, by Maia Gonçalves, 2nd edition, p. 359.

Question 14 of the questionnaire

51. As to question 14, it is not known what measures have been taken in governmental bodies and services as well as among the public at large to give publicity to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

52. The Parquet does not have sufficient material to enable it to indicate the progress accomplished and difficulties encountered as regards the prevention and punishment of torture and other cruel, inhuman or degrading treatment or punishment, since the adoption of the Declaration.