**“The duty to investigate crimes of torture in national law and practice”**

**Thematic report of the Special Rapporteur on Torture**

**52nd Session of the Human Rights Council**

**Questionnaire**

**SUBMISSION BY PORTUGAL**

Regulatory framework

In the Portuguese criminal law framework, torture is punished as a crime under the Penal Code ([Decree Law n. º 48/95](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis)) and under the Law on Violations of International Humanitarian Law ([Law no. 31/2004, of July 22](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=123&tabela=leis)).

Article 243 of the Penal Code defines torture or cruel, degrading or inhumane treatment as an act that consists of inflicting acute physical or psychological suffering, severe physical or psychological fatigue or the use of chemical products, drugs or other means, natural or artificial, with the intention to disturb the victim’s capacity for determination or free expression of will.

The article determines that any person whose role is related to i) either the prevention, prosecution or investigation of crimes, misdemeanors or disciplinary offenses; ii) the execution of sanctions; iii) or the protection, custody or surveillance of a detained or imprisoned person; is punished with the crime of torture by imprisonment from 1 to 5 years (if a more serious penalty is not applicable by virtue of another legal provision) if they torture a detained or imprisoned person with a view to: i) obtaining a confession, testimony, statement or information; ii) punishing the detained person for an act committed or allegedly committed by them or another person; or iii) to intimidate them or to intimidate another person.

The crime of torture is aggravated under the circumstances described in article 244 of the Penal Code, namely when i) the offense against physical integrity is serious; ii) particularly serious means or methods of torture are employed, namely beatings, electroshock, simulated execution, or hallucinatory substances; or iii) the perpetrator habitually carries out acts of torture. Under such circumstances, the crime of torture is punished with imprisonment from 3 to 12 years. If torture results in the victim’s death or suicide, the crime is punished with imprisonment from 8 to 16 years.

The perpetrator is the person who either commits the act themselves or through another person, or who directly participates in its execution, as well as the person who knowingly causes another person to commit the act (article 26 of the Penal Code).

According to article 245, the Penal Code also punishes a hierarchical superior who, having knowledge of a subordinate’s practice of an act of torture, fails to report it within three days of becoming aware of it.

As per article 118 of the Penal Code, the statute of limitations for prosecution of the crime of torture is ten years.

It should also be noted that offenses against physical integrity are considered ‘qualified’ when, under the terms of article 145, committed under circumstances that reveal the agent’s special ‘perversity’, circumstances that include the use of torture or other cruelty to increase the victim’s suffering and/or are determined by racial, religious or political hatred as well as hatred for the victim’s ethnic or national origin, gender, sexual orientation or gender identity (article 132).

If considered ‘qualified’, offenses against physical integrity can be punished with imprisonment up to 4 years (in the case of a simple offense against physical integrity) and with prison sentences of up 12 years in the case of an aggravated offense against physical integrity.

Similarly, the crime of kidnapping, punishable by up to 3 years in prison or a fine, is punished with a sentence from 2 to 10 years if the kidnapping is preceded or accompanied by an offense against physical integrity, torture or other cruel, degrading, or inhuman treatment.

On the other hand, the Portuguese legal system punishes with a prison sentence of 12 to 25 years whoever, as part of a generalized or systematic attack against any civilian population, commits torture (under article 9 of the Law on Violations of International Humanitarian Law).

In Portugal, the granting of general amnesties and pardons falls under the legislative and political authority of Parliament (under article 161 of the Constitution). Amnesties and general pardons are understood as acts of sovereignty and appear as general and objective measures, aimed not at a specific person but at a category of infractions committed under certain circumstances or within a specific timeframe. The last amnesty granted by the Portuguese Parliament was in 1999 ([Law no. 29/99](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=326&tabela=leis&so_miolo=)), granting the general pardon and amnesty of minor infractions, not covering the crime of torture, similar to the previous amnesties granted by the parliament.

Elements of human rights-compliant investigations and prosecutions

Under article 32 of the Constitution, criminal proceedings must ensure all guarantees of defense, including appeal. Everyone investigated or prosecuted for a crime shall be presumed innocent until the conviction has become final and shall be tried as soon as possible, in a manner compatible with the guarantees of the defense.

The defendant shall have the right to choose a lawyer and to be assisted by them in all acts of the process, and the law shall specify the cases and phases in which the assistance of a lawyer shall be mandatory.

All investigations are under the responsibility of a judge, who may delegate to other bodies the performance of acts of fact-finding that are not directly related to human rights.

Criminal proceedings shall be based on an accusatorial structure and the hearing of the case, and any investigative acts determined by law shall be subject to the adversarial principle.

The law shall define the cases in which, provided that the rights of the defense are assured, the presence of the defendant or accused person in procedural acts, including the trial hearing, may be dispensed.

The victim shall have the right to participate in the proceedings, under the terms of the law.

All evidence obtained through torture, coercion, offence against the physical or moral integrity of the person, abusive intrusion into private life, the home, correspondence, or telecommunications, shall be null and void.

No case may be removed from the court whose jurisdiction is established by previous law. In administrative infraction proceedings, as well as in any sanction’s proceedings, the accused shall be assured the right to a hearing and the right of defense.

All the principles enshrined in Article 32 are set forth in the Code of Criminal Procedure ([Decree Law No. 78/87](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=199&tabela=leis)).

Mechanisms/institutions/entities involved in complaints, investigations and prosecution

To implement the international obligations assumed by the State arising from the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the Ombudsperson was designated as the National Preventive Mechanism.

Therefore, the Ombudsperson is responsible for regularly examining the treatment of persons deprived of their liberty in places of detention, making recommendations to the competent authorities in order to improve the treatment and situation of persons deprived of liberty and prevent torture and other cruel, inhuman or degrading treatment or punishment, and presenting proposals and observations concerning current legislation or draft legislation on the matter enjoying total independence in the exercise of their functions. Accordingly, in order to exercise their functions, the Ombudsperson is empowered to carry out, with or without notice, inspection visits to all and any sector of activity of the central, regional and local administration, specifically public services and civil and military prisons, companies and services of general interest, whatever their legal nature, or to any entities subject to their control, hearing the respective bodies and agents and requesting information, as well as the exhibition of documents that he deems appropriate.

Victim participation and protection

Under the Code of Criminal Procedure, a ‘victim’ is considered to be a person who has suffered harm, namely physical or psychological integrity or emotional or moral damage, directly caused by action or omission, in the commission of a crime, as well as, in the case of death resulting from a crime, the relatives of the deceased.

Under the Victim Statute ([Law no. 130/2015](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?tabela=leis&nid=2394&pagina=1&ficha=1)), victims enjoy the right to information, which includes access to elements such as the type of services or organizations they can turn to for support; the type of support they can receive; where and how to make a complaint; procedures following a complaint and their role in them; how and requirements of obtaining protection; information on access to legal consultation, legal aid, other forms of counselling, compensation, reimbursement of expenses, interpretation and translation. They shall also have the right to consult the case file and to obtain copies of procedural documents and, whenever they so request, to be informed of the progress of the proceedings and decisions taken in the course of the proceedings, including on the coercive measures applied to the accused, as well as to be informed of the court verdict.

Victims are also entitled to have the necessary measures taken to ensure that they understand what is happening and are understood in the criminal proceedings, as well as to have access to legal consultation and, if necessary, to subsequent legal aid. They should also be reimbursed for expenses incurred as a result of their participation in criminal proceedings, and their safety and privacy should be protected, and secondary victimization prevented. The victim shall be entitled, in the framework of criminal proceedings, to obtain a decision on compensation within a reasonable time.

Given the gravity of the consequences, victims of torture, cruel, inhuman or degrading treatment as well as of sexual and gender-based violence can be granted the status of ‘particularly vulnerable victims’, which entitles them to benefit from special protection measures, such as the right to be questioned by the same person at all times, action to avoid visual contact between victims and accused persons, including during the giving of evidence, through the use of appropriate technological means, the provision of statements for future use and the exclusion of publicity during hearings. If necessary, access to State-supported shelters and medical assistance and medication can also be provided. These victims are exempted from the payment of user charges within the National Health Service.

[Law No. 93/2021](https://dre.pt/dre/detalhe/lei/93-2021-176147929) established the general regime for the protection of whistleblowers, transposing the [European Union Directive 2019/1937](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1937&from=PT) of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report violations of European Union law.

[Law 93/99](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=234&tabela=leis) regulates the application of measures to protect witnesses in criminal proceedings when their life, physical or psychological integrity, freedom, or property of considerable value are endangered as a result of their contribution to the evidence of the facts that are the subject matter of the proceedings.