



*Missão Permanente de Portugal
junto do
Conselho da Europa*

Nº21

Strasbourg, le 21 février 2006

Monsieur le Secrétaire Général,

J'ai l'honneur de vous faire parvenir ci-joint les informations des autorités portugaises suite à votre demande selon la procédure prévue à l'article 52 de la Convention Européenne des Droits de l'Homme.

Je vous prie d'agréer, Monsieur le Secrétaire Général, l'assurance de ma haute considération.

Pedro Pessoa e Costa
Représentant Permanent Adjoint

Monsieur Terry DAVIS
Secrétaire Général du
CONSEIL DE L'EUROPE

21.02.2006

**Portuguese explanations to the Secretary General of the Council of Europe in
accordance with Article 52 of the European Convention
on Human Rights**

The Portuguese Government hereby provides information and clarifications requested by the Secretary General in accordance with article 52 of the European Convention on Human Rights regarding the effective enforcement of all the provisions of the European Convention on Human Rights with a view to fully clarifying the issue of the alleged existence of detention centres or illegal CIA flights in Europe.

This answer is based on information gathered through the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Ministry of Finance, the Ministry of National Defence, the Ministry of Justice and the Ministry of Public Works, Transport and Communications.

The request from the Secretary General was particularly pertinent since the international media has referred insistently some time ago to the alleged existence of secret facilities, somewhere in Europe, which would be used for the detention of individuals at the request of the United States in conditions that would violate international law. The international media also referred to the alleged use of aircraft by the Central Intelligence Agency of the United States (CIA) for the transportation of these individuals, in breach of international law.

Regarding the specific explanations requested on the 21st of November, concerning the guarantees enshrined in the national legislation regarding the effective enforcement of all the provisions of the European Convention on Human Rights (ECHR) and the involvement of any official or person exercising official functions in the deprivation of freedom or the transportation of individuals by a foreign agency or in the service thereof, the Portuguese Government informs that the ECHR, as an international treaty duly ratified by the Portuguese State, binds all Portuguese public authorities (article 8 n° 2 of the Constitution of the Portuguese Republic – CPR).

National courts, as the authorities entrusted with the administration of justice on behalf of the people, as well as with the competence to ensure the defence of the rights and legally protected interests of the citizens, the competence to repress breaches of the democratic rule of law and to settle conflicts between public and private interests, have, in a last analysis, the competence to assure that the ECHR is applied. Considering that the rules of the ECHR grant individual rights or recognize legitimate interests, those rules can be directly invoked by the national courts.

Regarding the question of knowing how the internal law ensures that acts by officials of foreign agencies within their jurisdiction are subject to adequate controls, it is important to notice that the Portuguese law on international co-operation in criminal matters (Law 144/99, of 31st August) foresees mechanisms that allow foreign officials to act in Portuguese territory.

In fact, article 145 of this law foresees different forms of mutual judicial assistance in criminal matters, determining that the assistance comprises, namely, the notification of deeds and the service of documents; the procuring of evidence; searches, seizure of property, experts examination and analysis; the service of writs to and hearing of suspects, accused persons, witnesses or experts; the transit of persons; and the communication of information. The number 5 of this article specifies that the Minister of Justice shall be empowered to authorise the participation of foreign judicial authorities and foreign criminal police authorities in criminal proceedings that take place on Portuguese territory, in particular within the framework of joint criminal investigation teams made up of both national and foreign members.

However, the law imposes that investigations in national territory are carried out under the authority and in the presence of Portuguese authorities. The nº 7 of article 145 clarifies that the participation of a foreign official is admitted when its purpose is to assist a Portuguese or foreign judicial authority or a Portuguese or foreign criminal police authority under the authority and in the presence of Portuguese authorities with respect for the provisions of the Portuguese criminal procedure law.

Regarding the question of *how the internal law ensures that adequate safeguard exist to prevent unacknowledged deprivation of liberty of any person (...), whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Party or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty*, it is important to mention article 27 of the CPR, clearly inspired on article 5 of the ECHR, that gathers the rights to freedom and security. The freedom here mentioned is physical freedom, freedom of movements – the right to not be detained, imprisoned or in anyway physically restrained within a determined space or impeded from moving. This same article determines the cases in which the freedom may be limited and how it can be done. The cases of deprivation of freedom are exceptions to a constitutional principle and therefore must obey to strict requirements. In this framework, article 28 CPR determines that within at most forty-eight hours, all detentions shall be submitted to judicial scrutiny with a view to either the detainee's release or the imposition of an appropriate coercive measure. This same article reinforces the exceptional nature of preventive detention shall have exceptional nature and shall not be ordered or maintained whenever it is possible to grant bail or apply another, more favourable measure foreseen by law.

Following the above-mentioned constitutional principles, the Criminal Procedure Code (CPC) contains rules that ensure the exceptional character of detention and preventive imprisonment. If the Constitution or the CPC' rules considering detention and imprisonment are not respected, it is possible to require "habeas corpus" against the abuse of power by the authorities (article 31° PRC and CPC). The article 220° of the CPC ("*habeas corpus*" in cases of illegal detention) determines that all detained persons by order of any authority may present a request to the investigating judge of that geographical area to order the immediate presentation of the detained before a judge, based on one of the following elements:

- a) When the legal time in which the detained should be delivered to judicial authorities has been exceeded;
- b) When the detention is kept out of the places legally admitted;



MINISTÉRIO DOS NEGÓCIOS ESTRANGEIROS

- c) When the detention was performed or ordered by an incompetent authority;
- d) If the detention is based on a fact for which the law does not allow detention.

This requirement may be signed by the detained person or by any other citizen enjoying the exercise of his political rights. The same rule determines that the conduct of raising an illegitimate obstacle to the presentation of the above-mentioned requirement or to its delivery to the judge is punishable with imprisonment until 3 years or fine.

The Supreme Court of Justice grants, under request, the “*habeas corpus*”, in cases of illegal imprisonment, to any person who is illegally arrested (article 222 CPC). The request may be based on the fact that the imprisonment was performed or ordered by an incompetent authority; on the fact that the imprisonment had an illegal ground; or when the imprisonment is maintained over the term imposed by law or by judicial decision.

Regarding the question of how internal law provides an adequate response to any alleged infringements of the Convention rights of individuals within their jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies, in particular how internal law ensures the existence of effective investigations that are prompt, independent and capable of leading to the identification and sanctioning of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims, it is important to notice that the investigation and pursuit, in national territory, of the alleged offenders are competence, accordingly to the Constitution and the law, of the Public Prosecutor’s Office.

The Public Prosecutors’ Office possesses its own statute and autonomy, as laid down by law (article 219 nr 2 of the Constitution). The autonomy of the Public Prosecutor’s Office is characterized by the obedience to strict legal and objectivity criteria and by the exclusive subjection to its own statute.



The officials of the Public Prosecutors' Office are accountable judicial officers, form part of and are subject to a hierarchy and shall not be transferred, suspended, retired or removed from office except in cases provided for by law (article 219 nr4 of the Constitution).

The Public Prosecutors' Office is responsible for promoting penal action (article 219 nr 1 of the Constitution and article 3 b) of the Public Prosecutor's Office Statute), for participating in the implementation of the criminal policy defined by the bodies that exercise sovereign power (article 3 a) of its Statute), conducting criminal investigation even when performed by other entities (article 3 h) of its Statute) and for supervising the activity of the criminal police acting regarding procedural exigencies (article 3 n) of its Statute).

The State and all other public bodies have civil liability for such actions or omissions in the performance of their functions as result in a breach of rights, freedoms or guarantees or in any loss to others, accordingly to article 22 of the Constitution. Therefore, any person who is injured by an illegal act of the State (in the exercise of legislative, executive or judicial power) or of any other public entity, for acts or omissions in the exercise of their functions, has the right to be compensated for the amount of the suffered damages. Article 22 grants a fundamental right to compensation for damages, being directly applicable not only *contra legem* but also in the absence of law.

The Constitution foresees, in particular, the obligation for compensation in cases of illegal deprivation of freedom (article 27 nr 5 of the Constitution). The CPC concretizes this obligation of the State, granting the right to request compensation to those who have suffered manifestly illegal detention or imprisonment for the damage caused.

Whenever, in criminal international cooperation, the criminal investigation teams composed of agents with different nationalities, acting in Portuguese territory, cause damages to anyone, the Portuguese State ensures the compensation to the injured person, without prejudice of being reimbursed by the responsible State.

The extradition procedure, the European Arrest Warrant or the European Convention on the transfer of Sentenced Persons are the only ways of transfer of detained persons. However, no one shall be extradited or handed over under any circumstances for political reasons, or for crimes which are punishable under the applicant state's law by death or by any other sentence that results in irreversible damage to a person's physical integrity (article 33 nr. 6 of the Portuguese Constitution).

These constitutional rules have direct application and are concretized through law nr 65/03, of 23rd August (European Arrest Warrant) and law nr. 144/99, of 31st August.

The first one does not apply to this case and the second one is applicable to:

- a) Extradition;
- b) Transfer of proceedings in criminal matters;
- c) Enforcement of criminal judgements;
- d) Transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty;
- e) Supervision of conditionally sentenced or conditionally released persons;
- f) Mutual legal assistance in criminal matters.

The international cooperation in criminal matters request is denied:

- a) Where the proceedings do not comply with the requirements laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or other relevant international instruments ratified by Portugal;
- b) Where there are well-founded reasons for believing that co-operation is sought for the purpose of persecuting or punishing a person on account of that person's race, religion, sex, nationality, language, political or ideological beliefs, or his belonging to a given social group;



MINISTÉRIO DOS NEGÓCIOS ESTRANGEIROS

- c) Where the risk exists that the procedural situation of the person might be impaired on account of any of the factors indicated in the preceding sub-paragraph;
- d) Where the co-operation sought might lead to a trial by a court of exceptional jurisdiction or where it concerns the enforcement of a sentence passed by such a court;
- e) Where any of the facts in question is punishable with the death sentence or with a sentence resulting in any irreversible injury of the person's integrity;
- f) Where any of the offences in question carries a life-long or indefinite sentence or measure.

Finally, the Portuguese Government reiterates that, until now, no cases were reported to the Portuguese authorities of public officials or other person acting on an official capacity being involved in any manner – whether by action or omission - in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency.

Furthermore, with regard to Portugal, the hypothetical existence of secret detention centres has never been raised by the national or international media. The Portuguese authorities, nonetheless, have carried out an investigation and both the Ministry of Home Affairs and the Ministry of Justice guarantee that they are not aware of any such situation taking place within the Portuguese territory, either in the present or in the past. The Ministry of Justice, which exercises oversight over prison services, has certified that no such secret detention centres exist and guarantees that, since 11 September 2001, no person arrested in circumstances of the type described by the media has been admitted to any Portuguese prison.

The second allegation concerns – as referred to above – the landing in Portuguese airports of planes that, in breach of international law, were transporting prisoners to locations where they were, or could be, subjected to torture, cruel or degrading treatment, or even death.

In light of the foregoing, the following conclusions can be drawn:

- a) Apart from the usual overflight and landing authorisations issued to all the aircraft operators who request them, under the terms of the bilateral agreements or the international conventions in force, including those with the United States, in particular for the operations under the aegis of the United Nations presently taking place in Afghanistan and Iraq, the Portuguese authorities never issued, nor received any request for any overflight or landing authorisation for an aircraft of the type alleged in the press, which would violate national legislation and/or international law;
- b) After contacting the national technical services and having all the relevant documentation checked, the Portuguese Government can officially state that it has no evidence that any aircraft of the type described by the press, which would violate national legislation and/or international law, used Portuguese airspace;
- c) The United States has, with regard to this matter, assured the Portuguese Government that there was never in our national territory any offence whatsoever against the sovereignty of the Portuguese state or any violation of bilateral agreements or international law. The Portuguese authorities have no reason to doubt the veracity of the declarations of the US authorities;
- d) Portugal is a country firmly committed to the respect for Human Rights and to the values of the Council of Europe. In this sense, Portugal has ratified the European Convention on Human Rights on 9 November 1978 and has signed and ratified all the major Council of Europe and United Nations instruments in the field of Human Rights. However, in the light of the Portuguese authorities commitment to the protection of Human Rights, should at any time, any fact or facts be discovered which fully or partially contradict the contents of these account, the Portuguese Government will immediately inform the Council of Europe.