

8 June 2006

Case document No. 1

World Organisation Against Torture (OMCT)
v. Portugal
Collective complaint n° 34/2006

COMPLAINT

registered at the Secretariat on 31 May 2006

Mr. Regis Brillat
Executive Secretary
Secretariat of the European Social Charter
Directorate General of Human Rights – DG II
Council of Europe
F-67705 Strasbourg Cedex
FRANCE

Geneva, 31 May 2006

Dear Regis Brillat,

Please find enclosed a further collective complaint against Portugal presented by the World Organisation Against Torture (OMCT) under the Additional Protocol to the European Social Charter of 1995 concerning its compliance with Article 17 of the Revised Social Charter. You will also find enclosed the required annexes.

All future communications regarding this matter should be addressed to the OMCT at:

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Yours sincerely,

Eric Sottas
OMCT Director

Collective Complaint against Portugal
submitted by the
World Organisation against Torture (OMCT)
under the 1995 Additional Protocol

Compliance of OMCT (World Organisation against Torture) with the requirements of the Additional Protocol

Compliance with article 1(b) of the 1995 Additional Protocol:

OMCT is an international non-governmental organisation; it enjoys consultative status with the Council of Europe. It was put on the list established by the Governmental Committee of international non-governmental organisations which have the right to submit a collective complaint.

Compliance with article 3 of the 1995 Additional Protocol:

OMCT's competence to submit collective complaints under the Social Charters was accepted in relation to Collective Complaints numbers 17/2003 – 21/2003 including number 20/2003 against Portugal. We repeat here our explanation of OMCT's competence.

According to Article 2 of its Statutes, the OMCT's aim is to *"contribute to the struggle against torture, summary executions, disappearances, arbitrary detention, psychiatric internment for political reasons, and other cruel, inhuman and degrading treatment"* (OMCT Statutes, Geneva, December 2001, art. 2, page 2).

Ten years after the decision taken by its 1991 General Assembly to set up a specific programme on children, the OMCT, in conjunction with the Mannerheim League for Child Welfare (Finland), and under the auspices of the Office of the United Nations High Commissioner on Human Rights, held an international conference on children, torture and other forms of violence in Tampere (Finland) from 27 to 30 November 2001 that brought together 183 participants from 73 countries. At the close of three days of discussions, the Conference unanimously adopted the Tampere Declaration which calls for the establishment of new international mechanisms in the fight to eradicate violence against children. The declaration states that *"violence against children, both girls and boys, encompasses all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and includes, inter alia, sexual abuse, harmful traditional practices, trafficking, exploitation, bullying in schools and corporal punishment"*.

It further recommends to states that they *"review, enact and amend as necessary all laws to prevent and prohibit torture and all forms of violence against children"*. (*Children, torture and other forms of violence – Facing the Facts, Forging the Future*, conference report, Tampere Declaration rec.11, OMCT, 2002, Geneva, page 13).

For preventive and rehabilitative purposes, OMCT regularly documents practices of corporal punishment against children in the context of its urgent appeals and of its reports submitted to the UN Committee on the Rights of the Child (in order to brief the Committee before it examines reports from states under the Convention on the Rights of the Child). These reports always contain an analysis of the legal framework and practice of torture and other cruel, inhuman or degrading treatments or punishments, including corporal punishment. In 2001-2002, in partnership with local NGOs and members of its network, OMCT has produced 18 alternative country reports presented to the UN Committee on the Rights of the Child, on the rights of the child in Ethiopia, Egypt, Democratic Republic of the Congo, Turkey, Guatemala, Paraguay, Cameroon, Kenya, Bahrain, Spain, Switzerland, Tunisia, Argentina, Sudan, the Ukraine, Italy, the Czech Republic, and Haiti.

In addition, OMCT has regularly made specific statements on the issue of corporal punishment. On 28 September 2001, at the Committee on the Rights of the Child Day of General Discussion on Violence Against Children within the Family and in Schools, OMCT presented a report including analysis and recommendations on physical violence in the home, including corporal punishment.

Compliance with rule 20 of the Rules of Procedure for the system of collective complaints:

The complaint is signed by Eric Sottas, Director of OMCT. Article 20/3 of OMCT's Statutes states that "The director is entitled to take any measures deemed necessary for the implementation of the programmes defined by the General Assembly, the Council and its Bureau, within the limits of the approved budget" (OMCT Statutes, art.20 page 8).

Applicability to Portugal of the European Social Charter of 1961 and the Additional Protocol to the European Social Charter of 1995, providing for a system of collective complaints

Portugal signed the European Social Charter of 1961 on 1/6/82 and deposited the instrument of ratification on 30/9/91; the Charter entered into force in Portugal on 30/10/91. Portugal signed the Revised Social Charter on 3/5/96, ratified it on 30/5/02 and it came into force on 1/7/02. Portugal signed the Additional Protocol to the European Social Charter allowing for a system of collective complaints on 9/11/95 and ratified it on 20/3/98. The Protocol entered into force on 1/7/98.

Applicability of Articles 7 and 17 of the Revised Social Charter of 1996 to Portugal

According to the declarations contained in the instrument of ratification of the Revised Social Charter, Portugal considers itself bound by articles 7 and 17.

These provide (Revised Charter):

Article 7: The right of children and young persons to protection

"With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

...

"(10) to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work."

Article 17: The right of children and young persons to social, legal and economic protection

"With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

...

1b to protect children and young persons against negligence, violence or exploitation;

...

European Social Rights Committee observations and conclusions

We detailed in our Collective Complaint number 20/2003 the relevant observations and conclusions of the ECSR, including its General Observations in the Introduction to Conclusions XV – 2, Volume 1 (2001), in which the Committee concludes that "... *the Committee considers that Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.*"

More recently in its decisions on collective complaints numbers 17/2003, 18/2003 and 21/2003, the Committee has emphasised: "*The Committee's case-law is to the effect that the prohibition of all the forms of violence must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or of the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate.*" (para. 32, 17/2003 against Greece, para. 64, 18/2003 against Ireland, para. 39, 21/2003 against Belgium).

Portugal's obligations under other international human rights instruments

Portugal has also ratified the United Nations Convention on the Rights of the Child, in 1990.

We note that when Portugal's Initial Report under the Convention on the Rights of the Child was considered by the Committee on the Rights of the Child in 1995, the Committee's concluding observations stated:

"The Committee is worried about the insufficient measures adopted to prevent and fight abuse and corporal punishment, in particular within the family."

"The Committee recommends that the authorities take the necessary measures, including the implementation of a national policy, to prevent abuse and corporal punishment of children, including within the family".

(27 November 1995, CRC/C/15/Add.45, paras. 15 and 23)

When Portugal's second report under the Convention on the Rights of the Child was examined in 2001, the Committee concluded:

"Noting its 1995 concluding observations, the Committee is concerned that corporal punishment continues to be practiced within the family, there is a lack of legislation prohibiting such punishment, and that insufficient measures have been adopted to prevent corporal punishment in this context."

"The Committee recommends that the State party:

- a) adopt legislation prohibiting corporal punishment in the family and in any other contexts not covered by existing legislation*
- b) develop mechanisms to end the practice of corporal punishment including, inter-alia, the use of information campaigns targeting parents, teachers and children*
- c) promote positive, participatory, non-violent forms of discipline as an alternative to corporal punishment at all levels of society*
- d) develop mandatory reporting systems for professionals working with children toward the detection of the practice of corporal punishment in the family..."*

(12 October 2001, CRC/C/15/Add.162, paras. 26 and 27)

Portugal has also ratified the International Covenant on Civil and Political Rights, in 1978. The Covenant states (article 26): *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law..."*

The Covenant also requires that (article 24) every child shall have *"the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State"*.

The law relating to corporal punishment of children in Portugal

On April 5 2006, Portugal's highest Court, the Supreme Court, issued its judgment (annexed, together with unofficial translation into English) in a case concerning cruelty and ill-treatment of children in an institution. The summary of the judgment indicates, without any qualification, that (unofficial translation): *"Moderate punishments administered to the minor by the person entitled to do it and whose purpose is exclusively educational and adequate to the situation, are not unlawful."*

In another passage, the judgment suggests that corporal punishment is not only lawful but necessary: *"Who being a good parent does not, once or twice, slap the bottom of the child refusing to go to school? Does not slap the child who throws a knife at him? Or punishes a child by sending it to his room when it does not want to eat?"*

"As for the first two, we can even say that if the person having the lawful control or charge of the child would refrain from acting, then yes, that would amount to educational neglect. Many children refuse at times to go to the school. Because of its utmost importance, going to school has to be strongly imposed. It is obvious that in case of repeated school phobia, it would be advisable to find out the reasons and even get professional counselling. But should it happen once or twice, slapping (always moderate) the bottom is part of the method of upbringing."

“Similarly, to throw a knife and what’s more at the person raising him, justifies, within the framework of a stable upbringing, emphasizing to the child that it did wrong and let it see the possible consequences. A slap in the heat of the moment cannot be considered extreme.”

It is quite clear from this judgment that the law as interpreted by Portugal’s highest Court tolerates, if not encourages, corporal punishment. This directly contradicts the interpretation of the law made on behalf of the Portuguese Government in response to our complaint 20/2003.

The Supreme Court in its 2006 judgment does not even refer to a previous – 1994 - decision of the Court (Supremo Tribunal de Justiça, 9 February 1994), which asserted that under Portuguese law parents had no right to use physical aggression as a form of discipline. That case concerned a father who had been sentenced by a first instance court to one month’s imprisonment for having inflicted “light corporal assaults” on his daughter. In 1991 (when the victim was 15 years old) the father slapped her twice in the face. But the 2006 judgment does refer to a 10 October 1995 judgment which considered that “parents have the power/duty to moderately punish the children”. This underlines the unsatisfactory state of the penal and civil law which plainly allows for contradictory interpretations.

We noted in our previous complaint, concerning the Supreme Court’s 1994 judgment: *“This positive decision has not been widely disseminated and is not reflected in legislation. While welcome, it does not send a clear message to parents and others that no corporal punishment is permitted. The decision could be reversed by a subsequent ruling.”* It has plainly been reversed by subsequent judgments, emphatically so by the 2006 judgment.

It seems unnecessary to detail again here the relevant aspects of Portugal’s criminal and civil codes, but if necessary we will do so in additional observations.

The complaint

Our previous complaint (20/2003) concluded: *“The overall purpose of the Additional Protocol is ‘to improve the effective enforcement of the social rights guaranteed by the Charter’. The purpose of this complaint is to improve the effective enforcement of children’s right to protection from violence, including all corporal punishment.*

“Portugal is failing to conform with its obligations under article 17 of the Revised Social Charter because it has not explicitly and effectively prohibited all corporal punishment of children, including by parents and others and accompanied such law reform with comprehensive awareness-raising on the law and children’s rights to protection. The current state of the Civil and Criminal Codes does not send a clear message to parents and others that all corporal punishment is prohibited, within the family and in all other settings.”

The decision of the European Committee of Social Rights on Complaint 20/2003, by 9 votes to 4, was that there was no violation of Article 17 of the Revised Charter. It argued:

“42. Given Section 143 of the Criminal Code as interpreted by the Supreme Court, the Committee holds that in Portugal the prohibition of all forms of violence has a legislative basis; it has the potential to reach all forms of violence regardless of where it occurs or to the identity of the alleged perpetrator; and it is backed by adequate, dissuasive and proportionate sanctions.”

In the light of the text of the April 2006 Supreme Court judgment, we reiterate that Portugal is failing to conform with its obligations under article 17 of the Revised Social Charter because it has not explicitly and effectively prohibited all corporal punishment of children, including by parents and other carers, and accompanied such law reform with comprehensive awareness-raising on the law and children’s rights to protection. The current state of the Civil and Criminal Codes does not send a clear message to the courts, let alone to parents and others, that all corporal punishment is prohibited, within the family and in all other settings. It is possible, plainly, for the law to be interpreted in a way which condones corporal punishment of children.

Portugal has not prohibited in legislation any other form of degrading punishment or treatment of children, nor provided adequate sanctions in penal or civil law.

In the absence of explicit prohibition in legislation and comprehensive awareness-raising and public education on children's rights to protection and promotion of positive, non-violent forms of discipline, we believe that hundreds of thousands of Portugal's smallest and most vulnerable citizens are still being subjected to preventable breaches of their rights to respect for human dignity and physical integrity.

We hope that the Committee will confirm in its decision that article 17 of the Charter cannot be satisfied simply by court decisions, which can always be reversed or amended. Explicit prohibition in legislation of all corporal punishment and of all other forms of degrading punishment or treatment of children is required.

Given that this Complaint concerns the protection of the rights of vulnerable children and given the Committee's clear existing interpretation of article 17 in decisions on other complaints, we ask the Committee to give precedence to this complaint, expedite consideration of it and come to a speedy decision.

Eric Sottas, Director OMCT