

There is, and as has historically been, a high prevalence of torture survivors amongst asylum seekers due primarily to experiences in their countries of origin. The resulting trauma may be exacerbated during transit and in receiving states. The tendency for receiving states to detain asylum seekers upon arrival, criminalise and punish 'irregular' arrivals, deny the right to family reunification, subject asylum seekers to lengthy status determination processes, provide inadequate living conditions, and the risk of deportation contributes to an 'escalating cycle of repression and deterrence'.¹

NON-REFOULEMENT

As a cornerstone of international protection, both customary and treaty law (Article 3 of UNCAT) **absolutely and without exception** prohibit states to *expel, return or extradite* individuals, from any territory under its control, to a territory where they would be at a 'foreseeable, personal, present and real' risk of torture or ill-treatment.² While it is the risk of torture that is explicitly addressed, any other form of ill-treatment 'constitutes an indication that the person is in danger of being subjected to torture (and) should be taken into account'.³

'Deportation' is explicitly and broadly defined to include 'expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations (including at sea)'.⁴ Relatedly, **dissuasive measures** and policies such as delays in process, poor conditions of indefinite detention are to be avoided.⁵ **Territory** is any territory subject to the de jure or de facto control of the state party, including where **non-state actors** perpetrate torture or ill-treat with impunity.⁶ **Collective deportation** is prohibited.⁷ **Procedural guarantees**, prior to an intended deportation, must be provided to individuals at risk of deportation, such as informing and enabling timely appeals of the decision before a competent, impartial and independent body.⁸ Interim measures are usually called by UN bodies to stop or delay deportation until legal proceedings are finalised.⁹ Such measures have proven to be an important tool to prevent torture in serious and urgent individual cases, stopping states from executing decisions which would have been irreparably harmful.

ASYLUM PROCESSES

Determining the risk of *refoulement*, on an individual basis, is integral to asylum processes. Linguistic, legal, medical, social and financial support and safeguards need to be provided to asylum seekers to ensure the effectiveness of asylum processes.¹⁰ Internal flight alternatives, an assessment of whether a part of a territory where an asylum seeker might be returned, are not reliable or effective and, as such, a territory needs to be assessed in its entirety.¹¹ Risk must be assessed on a number of factors including: whether the person concerned, or a family member, has previously had experience of torture, or been detained (or would be detained) in inhuman and degrading conditions; whether they have been denied fundamental guarantees in police custody (see factsheet on 'Safeguards in Police Custody').¹² Article 3 (2) of the UNCAT also requires assessment of whether the country of return has a 'consistent pattern of gross, flagrant or mass violations of human rights.'

States must put into place processes for systematic screening and medical examination of all asylum seekers to identify torture victims by qualified personnel throughout the asylum process.¹³ Where an asylum seeker claims to have been tortured, the state is obliged to rigorously investigate the claim in line with the *Istanbul Protocol*.¹⁴ Findings such as psychological trauma, which may hinder asylum seekers from satisfying credibility assessments, must be taken into account by the legal process.¹⁵

DETENTION OF ASYLUM SEEKERS

The law recognizes narrow grounds for states to legitimately detain asylum seekers for brief periods, i.e. documentation of entry and claim and determination of identity.¹⁶ Detention must be individually justified as 'lawful, necessary and proportionate in the circumstances and, in case of administrative or preventative detention, must be periodically re-assessed as it extends in time'.¹⁷ Alternatives to detention including reporting conditions or sureties need to be considered and pursued.¹⁸

People at risk, including children, women, older people, persons with disabilities, medical conditions, torture trauma, and ethnic or social minorities (e.g. LGBTI), warrant particularly stronger protections.¹⁹ Detention of children fails the best interest, necessity and proportionality tests, particularly in cases of short term detention and if solely on the basis of their or their parents' migration status.²⁰ Such unjustified instances of detention amount to arbitrary detention. As a general rule, the longer the arbitrary detention, the more likely it would amount to ill-treatment.²¹ Detainees are to enjoy the same legal safeguards regardless of legal status.²²

DIPLOMATIC ASSURANCES

Diplomatic assurances, whereby states bilaterally agree that an individual being deported would not be subjected to torture, have been questioned and criticized as not being effective and for circumventing the non-refoulement principle.²³ They should, therefore, be 'exercised with great caution'.²⁴ Extradition treaties are also subject to the principle of non-refoulement. In case of any conflicts, the principle as found in Article 3 of the UNCAT will prevail.²⁵

MOREOVER

- Restrictive state policies have heightened the risk for those in transit to be exploited, by smugglers, human traffickers and corrupt officials, in terms of 'forced labour, slavery or servitude, all forms of sexual exploitation, forced adoption, child soldiering, begging, criminal activities and, arguably, also exploitation for ransom'.²⁶
- To avoid *refoulement*, rehabilitation services in receiving state are to be taken into account, bearing in mind that victims of torture and ill-treatment may require sustained specialized rehabilitation services. Once their health fragility and need for treatment have been medically certified, no deportation should occur to states where such services are not available or guaranteed.²⁷

REFERENCES

¹ UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report. (2017). A/HRC/37/50. para. 8. ('UNSRT Report 2017')

² Article 3, UNCAT: 1. No State Party shall expel, return ("re-fouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights; UN Committee Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 11. ('CAT GC IV')

³ CAT GC IV, para. 28.

⁴ CAT GC IV, para. 4.

⁵ CAT GC IV, para. 14.

⁶ CAT GC IV, para. 30.

⁷ CAT GC IV, para. 13.

⁸ UNSRT Report 2017, para. 40.

⁹ CAT GC IV, paras. 36-37; see also Fanny de Weck, *Non-Refoulement under European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff, Leiden; 2017), p. 67.

¹⁰ CAT GC IV, para. 41.

¹¹ CAT GC IV, paras. 46 and 47.

¹² CAT GC IV, Pt VIII.

¹³ CAT, Concluding observations on the combined sixth and seventh periodic reports of Denmark, 4 February 2016, CAT/C/DNK/Q/6-7, para. 23.

¹⁴ UNSRT Report 2017, para 43; CAT GC IV, para. 41.

¹⁵ UNSRT Report 2017, para 42; CAT GC IV, paras. 42, 49.

¹⁶ UN Human Rights Committee, *Bakhtiyari v. Australia*, 1069/2002, paras. 9.2–9.3.

¹⁷ UNSRT Report 2017, para. 22; CAT GC IV, para. 12.

¹⁸ UN Human Rights Committee, General Comment No. 35 (2014): Article 9 (Liberty and security of the person), CCPR/C/GC/35, para. 18

¹⁹ UNSRT Report 2017, para. 28.

²⁰ UNSRT Report 2017, para. 28

²¹ UNSRT Report 2017, para. 28.

²² See 'Safeguards in Police Custody' factsheet.

²³ UNSRT Report 2017, paras. 47-50; see also Manfred Nowak and Elizabeth McArthur (eds.). *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 215.

²⁴ UN Committee Against Torture, Report on Georgia, CAT/C/GEO/ CO/3 (2016), para. 11.

²⁵ CAT GC IV, Pt VI.

²⁶ UNSRT Report 2017, para. 32.

²⁷ CAT GC IV, para. 22; CAT, *A.N. v. Switzerland*, CAT/C/64/D/742/2016, 3 September 2018.