

# The role of the Istanbul-Protocol<sup>a</sup> in the uphill battle for torture survivors being granted asylum in Europe and ensuring the perpetrators pay

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Three Dutch organisations, Pharos, Amnesty International, and the Council for Refugees, have published *Care Full – Medico-Legal Reports and the Istanbul Protocol in Asylum Procedures*<sup>1</sup> which gives a comprehensive and very detailed background on the pertinent need in asylum procedures for medical-legal reports based on the Istanbul protocol. The book is an important contribution to the European debate on asylum policies and the fate of the most vulnerable refugee groups coming to Europe. This article will explore why it is now required to use medical-legal reports in asylum procedures.

## Changes in asylum and asylum seeking procedures

During the Cold War era, people from the East could hardly travel to the West. Furthermore, people's geographic mobility was severely limited by the high costs of airfares. Therefore, the asylum policies in Europe were much more lenient, in general, the number of asylum seekers was fewer and the political discourses were narrowly linked

to the East-West conflict. After the political changes in 1989, the situation shifted and the inflow of refugees applying for asylum status gradually increased. This trend was exacerbated by the lowered travel costs, which brought asylum seekers to the doorsteps of the territories of the European Union (EU) more easily<sup>b</sup>.

Today, the asylum policies in most EU countries do not appear to be about protecting people in need but about reducing the influx of refugees to the EU. This tendency has been accentuated after the event of September 11, 2001<sup>c</sup>. Today it is extremely difficult for an asylum seeker to come to the EU countries, which keep people from their shores with archaic policies and pro-

a) Office of the United Nations' High Commissioner for Human Rights, Geneva (2004): *The Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*. Professional Training Series No. 8 Rev. 1. United Nations, New York and Geneva.

b) Not to mention the growth of the business of human trafficking.

c) Paradoxically, while it is mainly the rich affluent countries that put up these restrictions, the vast majority of refugees stay in poor neighbouring countries. Considering their large numbers, we hear very little about these refugees.

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cedures covered by a continuously thinning humanitarian layer. The strict policies have spread from one European country to another<sup>d</sup>, and the forthcoming adoption of common policies on asylum procedures of the EU is continuing along these lines. To get to the EU and to acquire asylum today has become a rat race – a modern version of the survival of the fittest – where the asylum seeker has to be economically, physically and mentally resourceful to come to the shores of its member countries. Needless to say, the weaker groups loose out in this process, among them torture survivors.

### **Torture survivors at a loss**

Torture survivors constitute a significant group among the asylum seekers<sup>e</sup>. Myrthe Wijnkoop's<sup>3</sup> thorough country assessments on asylum procedures towards vulnerable groups show great differences from one European state to another. Some states have formal procedures that may provide special treatment for torture survivors and other vulnerable groups. Nevertheless, Wenzel and Kjaer<sup>4</sup> found that torture experiences often are neglected in the asylum process. Torture survivors do not have easier access to asylum than other groups. Several studies seem to show that, on the contrary, they have more difficulties in getting asylum.<sup>5</sup> Bloemen, Vloeberghs & Smits<sup>1</sup> give ample evidence that interviewed torture survivors applying for asylum due to their experience of being tortured

often conceal or forget to forward important information (see also the Istanbul Protocol paragraphs 167 and 141 and 142) that could have a positive influence on their asylum application. The recently introduced so-called accelerated asylum procedures adopted by more and more European countries, do not even include special considerations towards vulnerable groups like torture survivors.

Furthermore, a Common European Asylum System is expected to be in place by 2010<sup>f</sup>. This will be based on a harmonisation of the individual states' policies and it is therefore not expected to constitute an improvement for asylum seeking torture survivors.

To counter the fact that torture survivors loose out in the asylum processes, European organisations dealing with treatment of torture survivors or offering legal assistance to these have come up with some principles and recommendations for the role and use of medico-legal reports in European asylum procedures.<sup>g</sup> These are on the verge of being adopted by organisations in Europe dealing with the treatment of torture survivors. The organisations are trying to rectify today's fundamentally unfair system by smoothening the new EU asylum policies so that the vulnerable asylum seekers, such as torture survivors, are not on the losing side. It is about giving torture survivors a decent chance. However, it can also be seen as making minor technical corrections (by ensuring more valid information) to a system that

d) This has often taken place along with all too familiar populist xenophobic political discourses.

e) I.e. in Denmark studies have shown one third of refugees to be torture survivors (2), although this number obviously changes with the societal context of the refugees.

f) The European Commission (2006): The European Union Policy towards a Common European Asylum System, See [http://ec.europa.eu/justice\\_home/fsj/asylum/fsj\\_asylum\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm) Accessed 9th July 2007.

g) This was the outcome of a meeting 14-15 October and it is part of the Care Full Initiative. A draft was discussed by the European Network of Treatment and Rehabilitation Centres for Victims of Torture and Human Right Violations.

is a reflection of global injustices. To focus on a refinement of the asylum system is an acceptance of the overall policy framework intended to keep as many refugees out of Europe as possible.

### **The Istanbul Protocol – a standard in need of adaptations and updating**

The main purpose of the Istanbul Protocol was to develop an instrument in the documentation of torture to counter impunity, which is still flourishing and a central impediment for freedom from torture. The Protocol is about how to prove torture to such an extent that it can stand up in courts. The rather comprehensive Istanbul Protocol was made with the involvement of a substantial number of professionals with medical and legal expertise in the field of rehabilitation and prevention. The protocol has become an UN document, but it is not an internationally legally binding document, as Hemme Batje<sup>6</sup> is at a pain to show in her article.<sup>h</sup> It has nevertheless become a standard covering the state of the art in medical-legal documentation of torture. Although the document is important and should be taken as a standard it must also be seen as a dynamic product that needs to be adapted to local circumstances<sup>7</sup> as well as updated according to the continuing scientific advancements in the field.

### **The focus on the continued struggle against impunity and ensuring the perpetrators pay**

Using the Istanbul Protocol in medico-legal documentation to help torture survivors provide more valid information in the asylum process will cost salaries, and *ceteris paribus*, be more time consuming. Nowadays, torture survivors often do not get asylum due to their torture experiences; there must be hard evidence that he/she will be personally at risk of being tortured again if sent back.

Nevertheless, a more systematic introduction of medico-legal reports to the asylum process offers a great opportunity for strengthening the struggle against impunity of torture. If the data collected using the Protocol during the asylum process is systematically and properly stored it can be used to have the perpetrators, and the countries that condone torture, persecuted. They will then pay for the asylum procedures as well as for any treatment needed by the torture survivor.

In other words, the perpetrators and the countries that produce the problem should one way or another pay for the costs – thereby further discouraging the practices. Such a move could help to substantially reduce impunity in the future. Along the same lines, RCT will now, after pilot testing,<sup>8</sup> be introducing a system where client data will be collected parallel to, and stored separately from, its treatment records, for legal and research purposes. Needless to say, it will only take place upon consent from the individual torture survivors, but the pilot test showed that clients were more than willing, as it was seen to be a chance for getting justice.

<sup>i</sup>This is further supported by the experience of many organisations in the South that testimonials and justice can be seen as an important part of the healing process as well.<sup>j</sup>

h) Torture is a multidisciplinary problem involving many different professions and disciplines. This sometimes creates some misunderstandings and confusions as the same words may have different meanings in different disciplines. The word protocol may be such one.

i) It is some time called psycho-legal counselling (see for instance Agger et al., forthcoming): both in therapeutic jurisprudence as well as the testimony methods, justice is seen as having a healing effect (see also Agger & Buus, 1990, 1995) and Weine, 2006).

j) Based on several years of interactions with RCT partners in the South.

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