

SUBMISSION TO THE SPECIAL RAPPORTEUR ON TORTURE

REPORT ON ACCOUNTABILITY FOR
TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT

BORDER VIOLENCE MONITORING NETWORK



Challenges to accountability

WHAT ARE THE MOST IMPORTANT LEGAL, PRACTICAL AND OTHER CHALLENGES THAT ARE CONDUCTIVE TO THE CURRENT WORLDWIDE ACCOUNTABILITY GAP FOR TORTURE AND ILL-TREATMENT?

The Greek State has responded to credible reports of pushbacks with denial and obfuscation, a clear attempt to evade accountability for systemic practices of torture and ill-treatment. Crucially, Greece has not effectively investigated pushbacks, demonstrating an accountability gap for torture.¹ The only state actors who have allegedly investigated pushbacks have been the police who, having investigated themselves for involvement in pushbacks, found no evidence of wrongdoing.² This is in clear variance with recognised principles of effective investigation.³ The Greek Ombudsperson recently recommended that the police continue to investigate themselves, demonstrating poor accountability mechanisms from a key National Human Rights Institution in Greece.⁴

Moreover, there is an overly high burden of proof on pushback victims when bringing claims to Greek administrative courts. They must show that their pushback was a State sanctioned action and not individuals acting in their personal capacity.⁵ Due to the perpetrators often acting with covered insignias and/or wearing balaclavas,⁶ and the Greek authorities not officially documenting their involvement in pushbacks, it is nearly impossible to instigate proceedings in administrative courts.⁷

Similarly, victims do not have reliable access to criminal proceedings. After victims bring the crime of torture to the attention of the public prosecutor, proceedings are at the prosecutor's discretion. So far no perpetrators have been charged with crimes in relation to pushbacks. Greek prosecutors have found the claims of Greek authorities practising pushbacks 'manifestly ill-founded in substance', despite the existence of reliable evidence proving otherwise. The lack of investigations and criminal prosecutions widens the accountability gap for torture.

Accountability is further hampered by pushback victims often not being in the Greek territory. Instigating legal proceedings from abroad is challenging, hindered by lack of legal aid and the difficulties of obtaining admissible letters of attorney and testimonies. When victims return to Greece, they often cannot present themselves to the authorities for testimonies due to the risk of being arrested for illegal entry.

Forms of accountability

PLEASE IDENTIFY THE DIFFERENT FUNCTIONS, FORMS AND LEVELS OF ACCOUNTABILITY FOR TORTURE AND ILL-TREATMENT.

Greece's lack of accountability for torture and ill-treatment must be repudiated through an effective investigation and adequate reparation 'proportional to the gravity of the violations and the harm suffered'.¹² Arguable torture claims require rigorous examination 'in line with recognised standards for effective investigation... as provided in the "Istanbul Protocol"'.¹³ Principle 2 of the Protocol stipulates that investigators should 'be independent of the suspected perpetrators and the agency they serve'.¹⁴ Therefore, the police investigating itself is ipso facto an ineffective investigation.

Public international law requires States to provide adequate, effective and prompt reparation to promote justice and redress violations,¹⁵ which includes: restitution, compensation, rehabilitation, satisfaction and, crucially, guarantees of non-repetition.¹⁶ Restitution should, when possible, restore the victim to the position they were in before the violation of their rights.¹⁷ In this way, survivors of pushbacks should be allowed to re-enter Greece. Such an approach was taken by a court in Rome who ordered the applicants who had been pushed back be returned to Italy.¹⁸ Compensation should be provided for pecuniary, including confiscated objects,¹⁹ and non-pecuniary damages such as mental harm, loss of opportunities and moral damage.²⁰

Rehabilitation includes providing medical, psychological, legal and social services.²¹ The next section of this report will establish that pushbacks constitute grave violations of the prohibition of refoulement and torture, as such,

survivors of pushbacks should be granted access to medical and psychological services, as well as access to the asylum service and legal representation. Satisfaction, with a more subjective perspective, asks whether the claimant feels justice has been served.²² This may include: full and public disclosure of pushbacks; public apology and the acceptance of responsibility of Greece for pushbacks; and judicial sanctions against those responsible for violations, including individual police officers and their superiors,²³ with the impunity of those who commit rights violations generated suffering for victims and others harmed by violations.²⁴ Finally, guarantees of non-repetition require Greece to demonstrate it will ensure non-repetition of the harm.²⁵

The UNHCR has argued that the respect for the principle of non-refoulement is 'most effectively ensured if claims to refugee status and asylum are determined substantively and expeditiously'.²⁶ Greece must demonstrate how claims for international protection are determined in such a way in practice. While Greek law requires that those who claim international protection must have their claims assessed, this is not a practical reality for the thousands of pushback victims. A preventative approach to accountability could therefore require a constructive method to the problem through the establishment of an independent border monitoring mechanism, to identify shortcomings and protect individuals from future human rights abuses at borders.²⁷

Rights of victims

WHO SHOULD BE RECOGNISED AS A VICTIM OF TORTURE AND ILL-TREATMENT, AND WHAT ARE VICTIMS' PROCEDURAL AND SUBSTANTIVE RIGHTS WITHIN ACCOUNTABILITY PROCESSES? WHO ELSE SHOULD BE ENTITLED TO HAVE ACCESS TO AND/OR PARTICIPATE IN ACCOUNTABILITY PROCESSES AND MECHANISMS?

Victims of pushbacks

“Pushback” is a common term to denote the action of a State forcibly returning an individual or a group across borders to another country without due process and subsequently preventing or restricting them access to protection mechanisms. Pushbacks violate the prohibition of torture in at least three ways.

Firstly, pushbacks always procedurally violate Article 3(2) CAT which requires “the competent authorities shall take into account all relevant considerations”. The Committee has clarified that “Each case should be individually examined by the State party through competent administrative and/or judicial authorities. Any form of collective deportation without an objective examination of the particular cases should be considered as a violation of the principle of “non-refoulement” as it prevents States parties from adequately verifying, through an assessment of each individual case, whether there are well founded reasons not to deport a person”.²⁸ Pushbacks, which deny people access to individual examination processes, and illegally return people without due process thus violate the procedural requirements of Article 3(2) CAT.

Second, Greek pushbacks often substantively violate Article 3(1) CAT. The continued and credible allegations published by BVMN partners and a range of NGOs and international monitoring bodies would meet any threshold to sustain the claim that Turkey is not a safe country for return.²⁹ Therefore, pushbacks carried out by Greece to Turkey may well substantively violate the

principle of *non-refoulement*. In addition to the risk of torture in Turkey, many face the threat of being chain *refouled*, with current reports indicating this disproportionately affects Syrian nationals who are being illegally returned en-masse to Syria.

Finally, due to the levels of violence, humiliation and intimidation used during pushbacks, the cumulative approach to torture requires that all whom experience pushbacks should be considered a victim of torture and ill-treatment. In 2020, BVMN found that 90% of all pushback testimonies in Greece contained at least one act of physical torture or ill-treatment, including: forced undressing, beatings, use of electric discharge weapons, use of firearms, mock executions and the use of inhuman and extralegal detention,³⁰ with up to 52% of all pushback groups containing minors.³¹ While many of the violent techniques highlighted above alone are inhuman treatment, the cumulative acts of humiliation, intimidation, physical and psychological violence intentionally carried out on people amount to treatment contrary to Article 1 CAT due to the psychological impact these acts have. For those seeking asylum, an additional dimension of trauma is evident where people are denied the right to seek safety. This cumulative approach to defining torture is in line with the Istanbul Protocol which defines torture through a holistic process that can involve both physical and psychological methods and effects.³² It is imperative to consider the entire process of a pushback and the impact of these acts one after another, with every pushback constituting treatment contrary to Article 1 CAT.

Pushbacks also have a severe mental impact on the relatives of those who have been

pushed back, who endure mental suffering due to the lack of information they can obtain on the whereabouts of their family during and after a pushback.³³ As the destruction or confiscation of phones is a commonplace pushback practice, all lines of communication are cut-off, leaving relatives fearful for their loved ones with the knowledge they are at risk of serious harm. This mental anguish may well meet the threshold for inhuman treatment as found in *Varanva and Others v. Turkey* (2009).

Accountability processes

Pushback survivors have the right to be heard in accountability processes. A main obstacle for accountability is the lack of access to judicial processes, including lack of access to Greek territory. Therefore, an elemental procedural right for the victims of pushbacks should be the access to Greece during the accountability process, as well as the right to claim asylum. Furthermore and in order to avoid backlash on their asylum claims, as well as intimidation from the authorities, victims should be able to remain anonymous throughout the accountability process. As a result of the accountability process, and as highlighted in Section 2, accountability for torture also requires a full and effective reparative response to victims, that goes beyond mere compensatory damages.

As well as victims and their families, NGOs working with survivors should also be able to participate in accountability proceedings, without the threat of criminalisation of solidarity. An impartial, independent monitoring mechanism, as it is recommended below, should also be part of the process.

Recommendations

- **Pushbacks should be formally recognised by the Special Rapporteur as direct violations of the prohibition of torture.** Pushbacks amount to procedural and often substantive violations of the prohibition of refoulement as well a direct violation of the prohibition of torture due to the level of physical and psychological violence inflicted on victims.
- **Greece must conduct, in line with recognised principles of international law, an effective investigation into the perpetrators of pushbacks.**
- **Survivors of pushbacks, in line with international public law standards, must be granted adequate reparation.** This not only includes compensation but also restitution by being safely returned to Greece, rehabilitation for harms suffered, satisfaction and guarantees of non-repetition.
- **An independent and impartial border monitoring mechanism should be established at Greece's borders.** This mechanism should, as recommended by other NGOs, have broad scope to investigate violations at the border; be given strong powers to carry out its mandate; be accessible and transparent and its work submitted to public scrutiny; and strengthen human rights accountability with a mandatory follow-up process. Consequences, including political and financial costs must follow governments' non-compliance.
- **CAT should use Article 20(1) to investigate Greece.** As CAT has received reliable information that a Member State is systematically torturing those within its jurisdictions, it should invite Greece to participate in an examination of pushbacks and, if necessary, using Article 20(2), make a confidential inquiry into the matter.

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2. Police directorates of Alexandroupoli, Orestiada, the Reception and Identification Service, the Aliens' and Border Protection Division, and the Regional Director for Eastern Macedonia and Thrace, all investigated themselves and their own departments and found no evidence of wrongdoing, and in fact denied the occurrence of such incidents. Instead, the police attributed all allegations for pushbacks to "traffickers and unidentified individuals" aiming to destabilise the operational capacities of the Greek authorities.
3. In particular the "Istanbul Protocol" requires that "investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial" (2000 para 2).
4. Greek Ombudsperson. 2021. *Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection* [Online]. [Accessed 14 May 2021]. Available from: <https://www.synigoros.gr/?i=human-rights.en.recentinterventions.791674>
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23. While the criminal law punitively punishes individuals who commit torture, no individual in Greece has faced trial for their involvement in pushbacks. As stated in CAT General Comment No2 at paragraph 26, it is crucial that those exercising authority must not be permitted to "avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates" where they knew or should have known that such conduct was likely to occur. Likewise, this also stands in relation to police who simply 'followed orders'. ECtHR jurisprudence supports this approach. In *Streletz, Kessler And Krenz v. Germany* (2001) the ECtHR unanimously upheld the criminal prosecution of the leaders of the German Democratic Republic (GDR) who ordered the murder of individuals attempting to flee the GDR who they defined as 'border transgressors' (at paras 102-103 of the judgement). Subsequently, in *K.-H.W. v. Germany* (2001) the Court affirmed *Streletz*, applying criminal responsibility for a low-ranking soldier (see Oxman and Rudolf. 2001. *Streletz, Kessler and Krenz v. Germany and K.-H W. v. Germany American Journal of International Law* 95(4): 904-910. [Online]. [Accessed 1 July 2020] Available from: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/streletz-kesslerand-krenz-v-germany-and-kh-w-v-germany/DFA7410F1E17021ADFD43652392256E3>). This approach is aligned with the Minnesota Protocol (1991). While its focus is extralegal killings, it clarifies that responses to serious rights abuses require that investigations seek to determine both individual criminal responsibility and the larger truth about 'policies and systematic failures that may have contributed to a death, and identify patterns where they exist' (2001 para 26). Thus, investigations require two tracks – the establishment of individual responsibility and another inquiry focused on systematic failures and related political accountability (Hessbruegge. 2017. *Minnesota Protocol on the Investigation of Unlawful Death Gets a New Life EJIL:Talk!* [Online]. [Accessed 10 May 2021]. Available from: <https://www.ejiltalk.org/minnesota-protocol-on-the-investigation-of-unlawful-death-gets-a-new-life/>).

References

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27. This understanding of accountability goes much further than the ECtHR who in *Hirsi*, a landmark case for its substantive defence of *non-refoulement* stumbles at the Court's reparative determinations making its strategic impact 'high insofar as the symbolic value of the judgement is concerned but lower in practical terms' (Baumgärtel. 2019. *Demanding rights : Europe's supranational courts and the dilemma of migrant vulnerability*. Cambridge: Cambridge University Press). Having found a violation of the prohibition of refoulement, the Court's approach to remedies had two steps. First, it required the Italian Government to 'obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3' (at para 221 of the judgement), which undermines the Court's ruling in the same judgement that, due to the well-known situation in Libya, when returning the applicants the Italian authorities knew or ought to have known that they would be exposed to treatment contrary to Article 3 (para 131) and putting the ruling in contravention with established case law that stipulates that assurances against torture are no panacea of protection. Second, the Court awarded each of the applicants 'EUR 15,000 in respect of non-pecuniary damage' (at para 222) thus only fulfilling the compensatory element of reparative remedy as required by international law. As Dembour argues, "if we are really talking of *reparation*, surely the best way to put things back ... would have been to have the applicants invited to come to Italy, so as to enable them to have any claim they would choose to make against expulsion duly examined. This is what Judge Pinto de Albuquerque, who appended a concurring opinion, thought. In his words, "The Italian Government has a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy'. His was a lone opinion" (Dembour. 2012. '*Hirsi* (part II): Another side to the judgement. *Strasbourg Observers*. [Online]. [Accessed 1 January 2021]. Available from: <https://strasbourgobservers.com/2012/03/02/hirsi-part-ii-another-side-to-the-judgment/>.
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31. BVMN. 2021. *Annual Torture Report 2020* [Online]. [Accessed 13 May 2021]. Available from: <https://www.borderviolence.eu/wp-content/uploads/Annual-Torture-Report-2020-BVMN.pdf> p.26
32. The ECtHR has found 'physical and mental suffering' to constitute torture (*Aksoy v. Turkey*, 100/1995/606/694, Council of Europe: European Court of Human Rights, 18 December 1996 § 95; *Ireland v. The United Kingdom*, 5310/71, 13 December 1977, § 167). For example finding that physical force and degrading treatment constitutes torture as it arose 'feelings of fear, anguish and inferiority capable of humiliating and debasing ... and possibly breaking their physical or moral resistance' (*Ireland v. The United Kingdom*, 5310/71, 13 December 1977, § 167).
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Reporting Organisation

BORDER VIOLENCE MONITORING NETWORK (BVMN) IS A COALITION OF ORGANISATIONS WORKING TO DOCUMENT PUSHBACKS, INTERNAL VIOLENCE AND OTHER HUMAN RIGHTS VIOLATIONS ALONG THE EU'S EXTERNAL BORDERS IN THE WESTERN BALKANS SINCE THE FORMAL CLOSURE OF THE ROUTE IN 2016. THE COLLECTION OF DATA ON PUSHBACKS AND INTERNAL VIOLENCE IS DONE BY A CONSORTIUM OF INDEPENDENT FIELD VOLUNTEERS WHO ARE PART OF OR COOPERATE WITH HUMANITARIAN SUPPORT GROUPS UNITED THROUGH THE BORDER VIOLENCE MONITORING NETWORK.

