

NATIONAL PREVENTIVE MECHANISMS: Monitoring the forced deportation flights of migrants

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Introduction

In the last years, there have been several cases of detainees dying prior to their forced **deportation**¹ (such as a Nigerian detainee in March 2010 at Zurich airport²) or during the deportation itself (such as Jimmy Mubenga who died on a deportation flight from the UK in December 2010³). Forced deportation is a moment where detainees are particularly vulnerable and exposed to the risk of ill-treatment and torture. There is serious ongoing human rights concern worldwide where refoulement, excessive use of force and even loss of life are increasingly common.

The European Council of Refugees and Exiles (ECRE)⁴ use the following definitions of return:

Voluntary return/repatriation: the return of persons with a legal basis for remaining in the host state who have made an informed choice and have freely consented to repatriate.

Mandatory return: refers to persons who no longer have a legal basis for remaining in the territory of the host state and who are therefore required by law to leave the country. It also applies to individuals who have consented to leave, or have been induced to leave by means of incentives or threats of sanctions.

Forced return: the return of those who have not given their consent and therefore may be subject to sanctions or the use of force in order to effect their removal.

¹ In this paper, the terms deportation, repatriation, expulsion, return and removal are used interchangeably to qualify the process of being sent back/returned to the country of origin or habitual residence.

² http://www.swissinfo.ch/eng/culture/Deportation_film_asks_disquieting_questions.html?cid=30861502

³ The Guardian, 2011: <http://www.guardian.co.uk/uk/jimmy-mubenga>

⁴ The European Council on Refugees and Exiles: <http://www.ecre.org/topics/areas-of-work/returns.html>

APT believes that forced deportation should only be used as a measure of **last resort and not systematically**. First and foremost, the central concern must be the **safety and dignity of the person**, and ultimately APT encourages States to avoid the use of forced returns whenever possible.

States have the overarching obligation to respect the fundamental principle of **non-refoulement**, to exclude the possibility of any deportation to a country where there is a risk that an individual would be tortured if returned⁵. When forced deportation is used, people should only be deported following a fair and efficient process which guarantees that all the legal safeguards have been applied.

The worrying trend of **forced deportation** mentioned above, calls for the increasing need for independent monitoring bodies to oversee the entire process, from the host State to the destination State of the deported so as to facilitate a greater level of transparency and accountability with regard to conditions for, and treatment of, detainees. However the use of monitoring in no way legitimises the practice of forced deportation, which should be avoided whenever possible as an inherently degrading situation involving serious risks to the detainee which might amount to torture.

Good practices have shown that monitoring not only sheds lights on conditions and treatment in detention but the mere fact that an external mechanism is present has a strong deterrent effect and reduces the risks of torture and ill-treatment. Effective monitoring provides a further safeguard for all individuals, including those with particular protection needs, and can be instrumental in pressing and assisting the authorities to address and improve them.

Deportation procedures vary greatly between States and are usually classified according to a number of factors such as **the extent to which force is used, the type of means of restraint employed, and the number of persons escorting the deportee**⁶.

For example, in Sweden⁷ there are three options: 1) voluntary repatriation, 2) escort by caseworkers or 3) being handed over to the police where restraint measures may be used.

In Switzerland, there are four levels⁸:

- 1) the person has agreed to a departure and is escorted by the police to the plane and then takes the flight alone;
- 2) the person has not given his/her consent and is escorted by two policemen dressed in civilians clothes, if needed the person is handcuffed;
- 3) it is believed that coercive measures may need to be employed but the person can still take a charter flight (mixed with other passengers) and is escorted by two police officers in civilian clothes. Handcuffs are used and possibly other means of restraint employed. The recourse to physical force is possible;

⁵ Convention against Torture, article 3: "No State Party shall expel, return ('refouler') 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".

⁶ CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.66

⁷ Grant Mitchell, *Asylum seekers in Sweden, An integrated approach to reception, detention, determination, integration and return*, 2001.

⁸ Translation of article 28 of the Swiss Order/Ruling on the use of constraint (*Ordonnance sur l'usage de la contrainte, Suisse*).

4) the person is believed to oppose physical force and can only be deported in a “special flight” and is escorted by at least two policemen. Handcuffs are used and other means of restraint employed (same as level 3). The recourse to physical force is possible.

The APT is therefore putting emphasis on this particular issue and encourages National Preventive Mechanisms (NPMs) under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) system to monitor the deportation process and contribute to protect migrants.

This paper therefore aims at:

- 1) demonstrating that under the OPCAT both the Subcommittee on Prevention of Torture (SPT) and NPMs have the mandate to monitor the entire deportation process;
- 2) providing some advice to NPMs on key considerations when defining its programme of visit and modalities;
- 3) highlighting some of the key safeguards appropriate to the deportation process.

1. The SPT and NPMs have the mandate to monitor deportations

1.1 Places and situations of risk

It is critical to determine whether the OPCAT provides a mandate to NPMs and the SPT to monitor forced deportations, a process which is distinct from typical places of detention, and which involves some element of extraterritoriality. This short analysis demonstrates that the process of forced deportation falls within the scope of OPCAT Article 4, which provides the authority for monitoring visits, and that NPMs and the SPT have the mandate to monitor forced deportations by land, sea and air.

Article 4 OPCAT provides:

1. Each State Party shall allow visits [...] to *any place under its jurisdiction and control* where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting...

The OPCAT’s definition of ‘places’ where people are deprived of their liberty was intended to be very broad in order to provide the widest possible protection for persons deprived of their liberty. The final text of the treaty does not contain a list of places; as such a list would have necessarily rendered the provision too narrow to cover all possible situations where persons may be detained.

Though a list of places is not set out, certain places of detention necessarily fall within this definition, and include such places as police stations, prisons, remand facilities, detention centres, immigration detention, and mental health centres.⁹ These examples are clearly places where persons are detained by state authorities. Yet the ‘places’ of detention described in OPCAT must also include the means of transport for the transfer of detainees, both between places of detention, and during any subsequent escorted deportation process. After all, during any such deportation process, the detainee remains deprived of his/her liberty and is under the control of the state authority, either directly or indirectly.

Any other interpretation of OPCAT, which asserts that actions between or outside the traditional places of detention do not fall within the scope of Art.4, would be to defeat the very object and purpose of OPCAT,¹⁰ which is to establish a system of visits by monitoring bodies to places where people are deprived of their liberty, in order to prevent torture and other ill-treatment.¹¹ Consequently, forced deportation processes by vehicle, boat or airplane are ‘places’ where monitoring may take place.

1.2 Jurisdiction and Control

Art.4 further provides that States Parties must allow visits to all places of detention *under its jurisdiction and control*.¹² Such language is similar to that applied by other international treaties, including the International Covenant on Civil and Political Rights and the Convention against Torture (UNCAT).¹³ Due to the clear link between the provisions of the UNCAT and the OPCAT, and the need for consistency in the interpretation of international law, the observations of the Committee Against Torture may be used to help interpret the significance of this provision.

The Committee Against Torture has observed that the obligation to prevent torture extends beyond a state border to “all areas where the State Party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control.”¹⁴ This interpretation has been supported in communications by other treaty bodies, UN Special Procedures, and the jurisprudence of the International Court of Justice.¹⁵

As a result, the State Party must allow monitoring of all non-voluntary deportation processes where they retain effective control of detainees, even when a forced

⁹ See APT, *OPCAT Implementation Manual*, p.50.

¹⁰ International practice requires that all treaty provisions are given their ordinary meaning in consideration of their context and in light of the treaty’s object and purpose. See the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, 1969, Art.31.

¹¹ OPCAT, Art.1.

¹² However, note that the French text, which is equally authentic, requires access to places under Parties’ jurisdiction or control. The provision should therefore be read as requiring access, not only to places of detention within a State Party’s territorial boundary or jurisdiction, but also in contexts where it exercises effective control.

¹³ In relation to the ICCPR, see General Comment 31, para.10, which extends the scope of the ICCPR to “anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party”.

¹⁴ CAT, General Comment N°2, CAT/C/GC/2, §16. For analysis, see APT, *OPCAT Implementation Manual*, p.51.

¹⁵ APT Legal Briefing Series, *Application of OPCAT to a State Party’s Places of Military Detention Located Overseas* (October 2009), at:

http://www.apr.ch/index.php?option=com_docman&task=doc_download&gid=387&Itemid=260&lang=en. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p.136, at §109.

deportation moves beyond the territory of the State Party, either into international areas or into the territory of another state.¹⁶

Effective control should be determined on the facts. As noted above, even partial effective control (for instance, when a deportation process is subject to the orders of an airline captain, who is also able to assert some authority over the transfer) engages a State Party's obligations under the OPCAT. Though some commentators have argued effective control might be difficult to demonstrate in circumstances of conflict or bilateral cooperation,¹⁷ it is clear that such effective control will be shown where the State Party retains custody of the detainee.

1.3 Private Guards

Finally, it should be noted where situations of detention are contracted to a private authority, the provisions of the OPCAT still apply. Art.4 (1) provides that State Parties shall permit visits to places where persons are held with the consent or acquiescence of the state, and Art.4 (2) further explicitly confirms that visits shall be permitted in private custodial settings.

2. Monitoring deportations – key considerations

The above section demonstrates that the OPCAT grants both NPMs and the SPT the mandate to monitor deportations. These bodies, and in particular the NPMs who are based in country, can play a crucial role in monitoring the deportation process in order to reduce the risks of torture and ill-treatment.

To maximise the preventive impact of detention monitoring, the specificities of deportation have to be taken into account at an early stage, especially when the NPM is defining its programme of visit and modalities.¹⁸ The following elements could be considered:

- 1) **Where?** Initial mapping: NPMs should take into consideration all situations where persons are deprived of their liberty including non-traditional places¹⁹ and circumstances such as international ports, means of transport and the entire deportation process including overseas escorts. Ideally the initial mapping or inventory of all places of detention will therefore reflect **detention as a status** rather than a place.
- 2) **What?** Type of monitoring: In light of the fact that forced deportations occur outside of typical places of detention, and involve some element of extraterritoriality, the type of visit will be significantly different to the traditional categories of *periodic in-depth; short ad hoc and thematic* visits²⁰. In this case

¹⁶ For further analysis of 'jurisdiction and control' over detention, see APT, *Establishment and Designation of National Preventive Mechanisms* (2006), pp.19-22, and APT Legal Briefing Series, *Application of OPCAT to a State Party's Places of Military Detention Located Overseas* (October 2009), at:

http://www.apr.ch/index.php?option=com_docman&task=doc_download&gid=387&Itemid=260&lang=en.

¹⁷ See, for example, Antenor Hallo de Wolf, 'Visits to Less Traditional Places of Detention: Challenges under the OPCAT', EHRR Vol.6, Number 1 (Special Issue 2009), pp.82-83.

¹⁸ The programme of visit should be flexible enough to respond to evolving situations or needs.

¹⁹ See APT, OPCAT Implementation Manual, p.239

²⁰ See APT, OPCAT Implementation Manual, p.241.

the monitor will examine the treatment of detainees throughout **the entire deportation process** and until detainees reach their country of origin. This will include monitoring the successive stages of the process such as the places in which people are held pending deportation; the transfer process including pick-up and transfer for removal, custody at the airport and boarding the aircraft. When relevant, monitors will conduct interviews with detainees and others (staff including medical and escort teams) in private.

Ideally unannounced visits with a small team including a medical expert are intrinsically more fitting. However in practice surprise visits on the flights (charter or special flights) are difficult. For example, one of the UK NPM bodies (Her Majesty's Inspectorate of Prisons) has monitored two deportations flights so far to Nigeria and Afghanistan, both of which were planned and announced. Likewise, the Spanish NPM (*Defensor del Pueblo*) monitored a flight to Morocco and the Swiss NPM (National Commission for the Prevention of Torture) monitored six forced repatriations of 'level four'²¹ all of which were announced.

- 3) **When? Frequency of monitoring:** in light of the specificities of the deportation process, **the frequency of monitoring will very much depend on the overall objectives**. Practice has shown two options: 1) randomly monitoring flights throughout the year; or/and 2) conducting a certain percentage of monitoring over a specific period of time. For instance the Swiss NPM monitored six forced repatriations of level four between October 2010 and July 2011.
- 4) **Who? Monitoring team:** Again in line with the specificities of monitoring deportations, the size of the monitoring team will usually be **small²² and highly specialised**. It is an asset to have a gender balance. **Mental preparation²³** prior to monitoring is vital in this process. Special attention should be paid to including in the monitoring team:
- **Qualified health professionals** as their participation is necessary to assess the particularly sensitive health issues such as for: monitoring medical screening before departure, for interviewing people deprived of liberty and identifying trauma, analysing the medical files, examining the medical aspects of a whole range of issues related to ill-treatment, including conditions of custody (including food, water, heat, light, ventilation, sanitation and exercise), suicide and self-harm risks, administrative segregation, disciplinary isolation, use of force and restraint, and mental health issues.
 - **Interpreters** when relevant to conduct if possible private interviews with the persons being deported (the use of telephone interpreters is obviously impossible on a flight). Again, in practice some debate exists as to whether this is possible. Ultimately monitoring bodies should explore ways to conduct interviews in private before and possibly during deportation flights.

²¹ See footnote 8.

²² For example, the Swiss NPM team was comprised of two members each time. See visit report at http://www.nkvf.admin.ch/content/dam/data/nkvf/111130-ber-rueckfuehrung_luftweg-f.pdf

²³ Mental preparation refers to: knowing your powers; being confident and asserting your authority; always keeping in mind that there is no such thing as "routine" monitoring; being alert at all times.

3. Safeguards to prevent ill-treatment during the deportation processes

A number of legal and procedural safeguards have been developed by various international and regional bodies which may help prevent torture and other ill-treatment. It is important that this non-exhaustive list of safeguards particularly appropriate to the deportation process is reflected in domestic law and policy, and respected in practice as one effective way to prevent ill-treatment and torture.²⁴ NPMs should monitor their use and make recommendations to encourage their implementation.

Conduct individual medical screening prior to deportation

It is an accepted norm of international law that all persons deprived of liberty should have access to a doctor *as necessary*.

The UN *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment* states: “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission [...] and thereafter medical care and treatment shall be provided whenever necessary.”²⁵

Due to clear risks to a person’s health and safety caused by escorted and forced deportations, it is necessary that a medical screening should be carried out prior to the deportation by a qualified professional. NPMs should therefore ensure that all persons being deported have had a medical screening to determine their state of health, detect pre-existing injuries, and consider associated risks prior to the deportation.

Access to detention records including medical information

Principle 12 (2) of the *UN Body of Principles* recommends that detainees or their legal representatives should have access to their detention record. This enables persons to make timely and accurate complaints about their treatment based on evidence contained within the record. Access to the detention record therefore acts as an important deterrent to prevent acts of ill-treatment during detention.

The UN Body of Principles also recommends that all medical examinations are recorded in the detention record (Principle 26). If a detainee is provided with any medical examination during the deportation process, it is important that the examination is reflected in the record and made available to the detainee or their legal representative.

Strict limits on the use of force

While recognizing that enforcing a deportation order is a difficult task for state authorities, the force used to effect a deportation should be necessary and

²⁴ Articles 11 and 16 of the Convention Against Torture require States Parties to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture or ill-treatment.

²⁵ Principle 24, *UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, Also see *Standard Minimum Rules for the Treatment of Prisoners* (1955), Rule 24; CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.28.

proportionate in the circumstances.²⁶ As with all situations in which force might be used, it should only be used as a last resort, depending on the individual circumstances of the person being deported.²⁷ The UN Standard Minimum Rules for the Treatment of Prisoners also recommend that any use of force must be reported and recorded (Rule 54).

NPMs should ensure that rules and regulations are in place which describe in what circumstances and what level of force may be used during deportation processes,²⁸ and that practices exist for the effective recording and review of all uses of force during such processes. Where State agents use excessive force, the Convention Against Torture, as well as various other international legal instruments state that the detainee is entitled to legal remedy and that the agent must be appropriately sanctioned.

Limited means of restraint

In the use of restraints during a deportation process, several techniques have been shown to cause injuries or death. Due to the inherent risks involved in their use, restraints should be used only as a last resort, to the least extent necessary, and be removed at the earliest opportunity.²⁹

Restraints which gag a person or otherwise obstruct their breathing are clearly highly dangerous and should be avoided. The European Committee for the Prevention of Torture (CPT) has observed circumstances where persons are drugged to ensure compliance for the deportation process. It recommends “any provision of medication to persons subject to an expulsion order must only be done on the basis of a medical decision and in accordance with medical ethics.”³⁰ Additionally, the CPT has reported that keeping persons restrained in their seat for long periods adds risk to the health of the detainee and that forcing persons to wear nappies for the flight is an inherently degrading situation. For these reasons, it is recommended that all instruments of restraint be removed prior to take off. In circumstances where it is necessary that restraints must be left in place, escort staff should cover the person’s limbs with a blanket so as to conceal the means of restraint from other passengers.³¹

Similarly, the Special Rapporteur on Torture has also previously reported that the use of restraints in order to control a detainee may amount to torture or another form of ill-treatment when they are applied in a degrading and painful manner.³²

Specific training designed for escort staff

Escorting persons through a deportation process is a specialized task and consequently, deportation staff should be given dedicated training. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials recommends that governments put in place effective selection criteria and that staff

²⁶ For some guidance, see *Keremedchiev v. Bulgaria*, CAT Communication N°257/2004, §9(3); and the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 7 September 1990.

²⁷ See also the *UN Code of Conduct for Law Enforcement Officials*, adopted by GA Res 34/169 of 17 December 1979.

²⁸ Principle 15 of the *UN Basic Principle on the Use of Force and Firearms by Law Enforcement Officials*.

²⁹ For general discussion on the use of restraints during deportation processes, see CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.67.

³⁰ CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.57.

³¹ CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.68.

³² Report of the Special Rapporteur on Torture, E/CN.4/2004/56, 23 December 2003, §45.

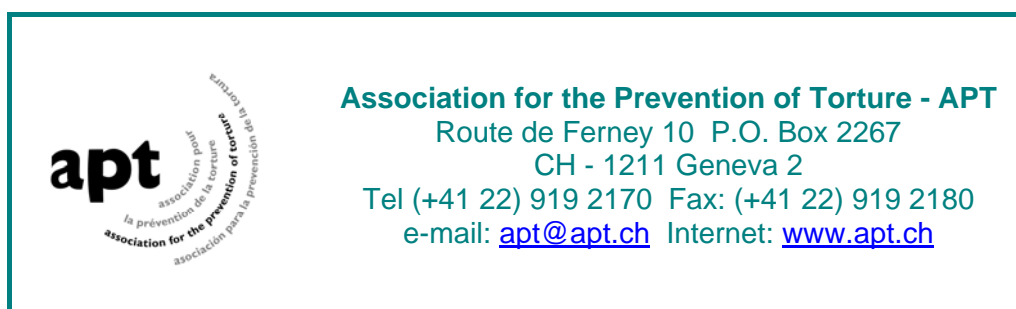
receive continuous and thorough training (Principle 18). Similarly the CPT states that “escort staff must be selected with the utmost care and receive appropriate, specific training designed to reduce the risk of ill-treatment to a minimum”.³³

NPMs should assess the adequacy of the policies and practices of the state to ensure effective selection and assessment of candidates and staff, and that training is designed to meet the particular challenges of deportations.

4. Conclusion

The OPCAT bodies have the mandate to monitor forced deportations of migrants and can thus contribute to protect this particularly vulnerable population, who are exposed to a high risk of torture and ill-treatment. The deportation process includes the need to remind and sensitise States of their responsibility to ensure a ‘smooth’ return by, for instance, informing all relevant Parties prior to removal and subsequently collecting information on the outcome of the return.³⁴

The practice of monitoring deportation processes is still fairly new. NPM bodies need to further exchange experiences, including with the UN and regional committees, and think creatively as to how effective monitoring can be applied in this complex and challenging area. One avenue to explore further is how NPMs can engage with the migrant sector in order to raise awareness, share information and possibly forge partnership so as to give themselves the means with which to respond to their mandate.



³³ CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.70.

³⁴ CPT, *CPT Standards*, doc. CPT/Inf/E (2002) 1 – Rev.2010, p.70, §41.