

English summary of Fafo-rapport 2021:18

Torture victims in the Norwegian asylum process

Torture victims in the Norwegian asylum process A review of Norway's obligations, with recommendations for practice

Despite the total ban on torture, it remains widespread in many countries. Torture involves physical and mental violence, performed in ways in which the cruelty seems to know no bounds. By deliberately inflicting pain, the objective of torture is to break a person down mentally and physically, and it is considered one of the most brutal crimes against humanity. In general, the experience of torture will tend to stay with the victim for life (Elsass, 1997; Genefke, 1986). Torture may result in physical injuries and pain that are disabling and of lifelong duration. Torture will always leave a severe mental imprint, and the psychological after-effects will tend to be the most extensive, painful and frequently long-lasting consequences for many victims. These psychological after-effects also tend to make it difficult to elicit narratives about the experiences of torture.

Article 3 of the European Convention on Human Rights, Article 1 of the UN Convention Against Torture and Article 7 of the UN International Covenant on Civil and Political Rights prohibit torture and other cruel, inhuman or degrading treatment or punishment (CIDT). The right to freedom from torture and CIDT is an absolute and fundamental right, and the risk of violation of these human rights is at the core of what constitutes persecution according to Article 14 of the UN Declaration of Human Rights concerning the right to seek asylum and Article 1 A(2) of the Refugee Convention. Article 33(1) of the Refugee Convention and Article 3 of the Convention Against Torture specifically prohibit the return of refugees to persecution, torture and inhuman treatment, the so-called nonrefoulement principle, which is the cornerstone of the right to asylum. This implies protection against return to places and situations where the person concerned could be exposed to 'irreparable harm', and establishes special protection against return to torture and other cruel and degrading treatment. In addition to the UN Convention on Civil and Political Rights and the Convention Against Torture, this also follows from Articles 2, 3 and 13 of the European Convention on Human Rights.

Pursuant to these international regulations, governments have an active responsibility to prevent actions that violate the ban on torture and ensure that occurrences of such actions are investigated. Furthermore, governments have an active responsibility to ensure that victims of torture are identified, examined and diagnosed, and that their right to compensation and necessary rehabilitation

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is fulfilled. Governments are therefore recommended to strengthen mechanisms and procedures that can help identify persons who have been exposed to torture.

This report describes Norway's obligations, as well as recommended practices with regard to torture victims in the asylum process according to international and national law. The data material has been collected with the aid of various qualitative methods with a view to elucidating and discussing the general goals of this project. A review of international and national conventions, statutes, regulations and legal practice provides an account of the obligations and rights that apply to torture victims in general, to asylum seekers in particular and to persons with experience of torture and other forms of cruel and inhuman treatment who apply for protection. Part of what is described based on the analysis of legal obligations will be concerned with clear and indisputable rights, while other parts will have the nature of strong guidelines based on recommendations from treaty bodies, directives and court rulings. Yet others will refer to practices and procedures that have proven useful in work involving torture victims, including in the context of the asylum process. In this regard, it should be underscored that in the international efforts related to torture and asylum, attention has mainly been focused on ensuring that torture does not happen and that nobody is returned to situations where they risk exposure to torture. There has been less focus on what it means to have been tortured and the implications of this for the asylum process, although this also seems to be changing (OHCHR, 2017).

As part of the data collection for the project we also conducted qualitative interviews with leaders and staff in the immigration authorities, health personnel and the support services. We reviewed public documents, studies and the research literature in this area. To draw on international experience we also interviewed national and international experts whose work involves the examination and rehabilitation of torture victims. The user perspective is important, especially in a project that studies vulnerable groups, to ensure that the necessary precautions are taken. We have therefore also collected torture victims' experiences with the immigration authorities. We conducted qualitative interviews with a total of 93 persons. It has been a main objective to discuss the role and importance that should be placed on torture experiences in the asylum process, including how such experiences are identified, addressed and interpreted. Our perspective has included the situation of torture victims in the process itself, as well as the importance placed on such experiences in the context of the assessment and decision about their protection. The entire spectrum of the asylum process is therefore included in the review, in which various sectors of Norwegian public administration are involved with specific responsibilities and remits. Accordingly, the recommendations that emerge from the report refer to the various responsibilities of the different sectors and the importance of cooperation and communication between them.

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Review of the legal framework

Part 1 of the report consists of a review and analysis of the legal framework that pertains to the ban on torture and other cruel, inhuman and degrading treatment (CIDT), the non-refoulement principle and the legal position of torture victims in the asylum process. The objective is to study Norway's obligations under international law in this area and how these correspond to Norwegian law. As part of this review we will take a closer look at the rights of torture victims, in particular those of asylum seekers when it comes to health care and rehabilitation, and how these rights are complied with in the relevant legislation.

The relationship between international law and Norwegian law is in principle dualistic, meaning that international law needs to be incorporated into Norwegian law in order to apply. In the area of asylum, sector monism is the rule, meaning that human rights and other rules whose purpose is 'to strengthen the position of the individual' shall apply as Norwegian law. These rules take precedence in the Immigration Act whenever they are in the migrant's favour. If doubts arise regarding the application of a provision, Section 3 of the Immigration Act specifies that it should be interpreted so as to avoid breaches of international law. The legislator must respect the rules in the Refugee Convention, the ECHR and international case law on rights in the asylum process (Proposition no. 75 (2006–2007) to the Odelsting, p. 401). Realisation of the rights that follow from these conventions presupposes a procedure to clarify the need for protection, and it is especially relevant to examine the procedural rights of torture victims in the asylum process. To understand Norway's obligations under international law and conventions, court rulings are also a key source of law, especially rulings by supranational courts such as the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU). Although the European Convention on Human Rights contains no specific rules on refugees and asylum, the rulings by the ECHR have significantly helped circumscribe the latitude of member states when it comes to refugees. The EU Charter of Fundamental Rights has acquired an indirect bearing on Norwegian sources of law with the aid of other international legal agreements by which Norway is bound, as well as serving as a model based on international law in the interpretation of Chapter E of the Constitution. The CJEU and the ECHR look to each other's decisions when interpreting the rules, and the EU Charter is included and applied by the ECHR in the interpretation of European human rights law, by which Norway is bound.

Asylum and refugee law regulates important rights for everybody, including torture victims who are in need of protection. To be granted asylum, a person must be recognised as a refugee, and the asylum process must include an assessment of whether the applicant can be considered a refugee according to the Refugee Convention, and pursuant to Norwegian law, an assessment must be made in accordance with Section 28 first paragraph litera b of the Immigration Act. Insuf-

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ficient access to a fair and legally sound asylum process could have serious consequences for those concerned, not least for asylum applicants with experience of torture, and this can in itself be regarded as a violation of international obligations. It follows from the conventions and their respective authoritative interpretations as well as from international case law, that asylum seekers shall be met with a legally fair, effective and non-discriminatory asylum process. Not least, asylum seekers shall be protected against deportation if there is a significant risk that they will face torture or other forms of cruel and degrading treatment upon their return. A satisfactory asylum process is therefore essential to ensure that protection is granted to those who are in genuine need of it, that concrete assessments and decisions are made regarding alternative grounds for residence where this is deemed necessary and in line with the rights of individuals, and that those who are not entitled to residence can be promptly repatriated.

The ban on torture and refoulement is of an absolute nature and legally binding for Norway following from international case law, the ECHR, the Convention Against Torture and practice by the European Court of Human Rights. This indicates a special obligation for enforcement of international legal obligations through effective administrative and legislative measures in Norwegian law.

1 – Norway has an obligation to adopt laws and other administrative measures that ensure compliance with the ban on torture and other cruel and degrading treatment and ensure protection against deportation according to the principle of non-refoulement.

2 – Norway has an obligation to ensure an asylum process that includes a thorough and appropriate assessment of all relevant risk factors for future torture or other cruel and degrading treatment in the assessment of the need for asylum and the question of protection against deportation.

3 – Norway has an obligation to ensure that the processing of the application for asylum does not relativise the risk assessment to the torture victim, and that it adheres to the principle of equal treatment, the principle of non-discrimination, the absolute ban on torture and the protection against deportation to torture or other cruel and degrading treatment.

4 – Norway has an obligation to ensure that the asylum seeker's previous experience of abuse, torture or other cruel and degrading treatment is included in the assessment of the future risk of torture or other cruel and degrading treatment when assessing the need for asylum and the question of protection against deportation to torture or other cruel and degrading treatment.

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5 – If health issues constitute a relevant risk factor for the torture victim, the assessment of the need for asylum and protection against deportation shall include a specific assessment of the risk of a serious, rapid or irreversible exacerbation of their health condition that might give rise to intense pain or reduced life expectancy.

6 –In its legislation, regulations or other administrative measures, Norway should codify clear and specific procedures and guidelines for identification of vulnerable asylum seekers who have been exposed to torture.

7 – Norway should implement the Istanbul Protocol as part of the rules for identification and documentation of torture and other cruel and degrading treatment in the processing of asylum applications.

8 – Norway has an obligation to undertake health examinations of asylum seekers and special healthcare follow-up of torture victims during the asylum process and in the care of asylum seekers in reception centres.

9 – Norway has a particular obligation to identify children who have been exposed to abuse, torture or other cruel and degrading treatment and ensure appropriate healthcare.

10 – Norway has an obligation to follow up and ensure the rights of torture victims to medical assistance and rehabilitation. The immigration authorities are obligated to inform the correct healthcare agency about the injuries sustained by the torture victim as a result of abuse, torture or other cruel and degrading treatment as soon as these have been identified during the asylum process.

11 – Norway has an obligation to ensure torture victims their right to rehabilitation, irrespective of their residence status. If a health examination indicates serious torture injuries that require rehabilitation, such measures should be implemented.

12 – Norway has an obligation to provide training and competence enhancement with regard to the ban on torture, identification of torture victims and documentation, including the Istanbul Protocol, as well as in applying the law and interpreting the legal assessment of torture and other cruel and degrading treatment in the processing of the asylum application.

13 – The necessary competence shall be ensured in agencies and sectors that are responsible for provision of health care and similar ser-

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vices to asylum seekers who have been exposed to torture or other cruel and degrading treatment, including in the identification and documentation of torture.

14 – Norway has an obligation to ensure effective measures to prevent torture and other cruel and degrading treatment, and to ensure that the situation of vulnerable persons, especially vulnerable persons involved in asylum proceedings, is not exacerbated or does not develop in ways that can constitute a serious burden on the person concerned or society as a whole.

Initiatives for identification and documentation of torture and CIDT

Investigation, identification and documentation of torture is currently regarded as key to the efforts to combat torture, including in the context of refugees and their protection. The importance of such investigations and documentation has been linked to the ability to produce information and documentation for use in legal contexts, in order to define the responsibility for torture and as an element of the victims' right to compensation. Moreover, such investigations, documentation and identification are essential for the treatment and rehabilitation of torture victims. All such measures to identify and investigate torture and various other forms of inhuman treatment involve comprehensive challenges, often because persons with such experiences can have problems reporting them, for reasons of shame, fear or injury.

Part 2 of the report describes the international work undertaken over the last 25 years to develop standards, procedures and guidelines for the investigation and documentation of torture. We describe regional initiatives, primarily from the EU, to ensure that torture victims are identified as part of the asylum process. In this context, the Istanbul Protocol (Manual for effective investigation and documentation of torture and CIDT) is the best-known and most central document.

Despite a number of positive initiatives and measures taken both nationally and internationally, the identification of asylum seekers who have been exposed to torture remains unsystematic and coincidental. On the other hand, there are many examples of how this work is being enhanced in a number of countries, and in Norway we have a lot to learn from these ongoing projects, not least when it comes to measures to ensure that torture victims are identified, and that such findings are taken into consideration in the asylum procedure. It is deemed absolutely crucial that thorough health examinations are undertaken early in the asylum process, and that persons who are identified as torture victims or report to have been exposed to torture or other forms of cruel treatment are given access

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to independent health professionals with competence to undertake assessments of torture in accordance with international standards, primarily the Istanbul Protocol. Such examinations can be provided on the initiative of national immigration authorities, lawyers or health personnel involved in health checks. Furthermore, it is essential that investigations of torture be undertaken at no cost to the individual asylum seeker. Moreover, investigation of torture must be recognised as a specialised and demanding task that cannot be undertaken free of charge by health personnel outside the public healthcare system.

With special reference to the Istanbul Protocol, we believe that the authorities have a responsibility for referrals, and for ordering and funding such examinations, as well as for ensuring that such services are available at the required level of competence. Mechanisms and procedures need to be established to identify persons who have been exposed to torture and inhuman treatment, and to further identify and if possible document the resulting injuries. Service chains need to be established under the administration of, or in formalised collaboration with, public authorities in the fields of immigration and health. Last, but not least, there must be a clear understanding of the contributions to be made by such investigations and their role in the asylum process.

Over the years, Norway has taken many different initiatives and implemented various projects to strengthen and systematise health examinations of asylum seekers and the efforts to identify vulnerable groups and asylum seekers with special needs, including identification and documentation of torture injuries. The latter will be relevant for the asylum process as well as the assessment of necessary health interventions and rehabilitation. Both our report and others (e.g. Red Cross 2020) point out that inadequate identification procedures can reduce the access to follow-up and further treatment, including rehabilitation of torture victims.

As seen in this report, there is no shortage of good and well-founded proposals from Norwegian authorities in the form of public documents, studies and reports produced on behalf of public agencies, or of guidelines and manuals prepared with a view to safeguarding the welfare and health of refugees. Moreover, the situation appeared especially promising in 2011, when the Ministry of Justice and Public Security and the Ministry of Health jointly decided to implement a programme consisting of a total of 56 measures, many of which have a direct bearing on the topics discussed in this report. Many of the measures that were initiated jointly by the ministries led to the establishment of expert groups to study and propose measures for investigation, identification and follow-up. In a review of these measures, exactly ten years after the first publication of the ISF report, which *de facto* laid the foundation for many of the measures referred to above, possible obstacles and other issues that can explain inadequate implementation of the measures can now be discussed and solutions identified.

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Norwegian authorities have long acknowledged their responsibility in this area, recognised the key principles and developed necessary guidelines and manuals to ensure satisfactory care for the health and welfare of refugees. However, in the report we have argued that the measures that resulted from this comprehensive work have been inadequately implemented or not completed to the extent foreseen. Funding on a fee-for-services basis, a clear distribution of responsibilities for documentation of torture and procedures for monitoring of health services for torture victims are examples of measures that have yet to be implemented. A great deal of work remains to be done to put in place a complete system for follow-up of torture victims and vulnerable asylum seekers (including identification) which is practicable given the preconditions that this would require in terms of inter-agency cooperation, guidelines and regulations, evaluation of measures, relevant competence in various sectors, funding and management.

Review of practices and experiences

This part describes practices and experiences with torture victims in the immigration administration, reception centres and the health services. The review is based on approximately 80 qualitative interviews and 12 selected reports from asylum interviews. In our interviews with staff and leaders of the Directorate of Immigration (UDI), the Immigration Appeals Board (UNE) and the National Police Immigration Service (PU), we explored how staff in the various departments encounter torture victims, to what extent they actively seek for information on experience of torture, whether and how torture is identified and documented, and whether torture victims are followed up in the course of their asylum process. In our interviews with staff in the reception centres we also asked about identification and follow-up of vulnerable persons in the centres, as well as the staff members' experiences with regard to collaboration with the healthcare sector. The interviews with health personnel focused on their experiences with asylum seekers who had been exposed to torture and their familiarity with, and application of, the Istanbul Protocol. Questions pertaining to procedures, guidelines and action cards were in focus in the interviews with all these professional groups.

A main finding that emerged from the review of practices in the immigration administration, the reception centres and the health sector is a general absence of guidelines, routines, procedures and competence, as well as of a clear distribution of responsibilities between the agencies and sectors when it comes to asylum seekers who have been exposed to torture. While there appears to be good knowledge of vulnerability in general, and good guidelines and procedures are in place for certain vulnerable groups, such as victims of human trafficking, there is a total absence of equivalent procedures when it comes to victims of torture.

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This includes action cards and procedures intended for case officers and reception centre staff.

There is a dearth of knowledge about the nature of torture and other inhuman treatment, the rights that are activated by such experiences and the impact this may have on the processing of the case. Among the staff of the immigration authorities we found some uncertainty regarding the definition of torture and other cruel and inhuman treatment. Very few of our respondents were familiar with the content of the Convention Against Torture and its *de facto* implications, not only in the context of asylum, but also in terms of obligations in general. The Istanbul Protocol is also largely unknown to most of the staff in the immigration administration.

The lack of guidelines and procedures, insufficient competence about torture and its effects, and unclarity about Norway's legal obligations vis-à-vis torture victims complicate the work on identification, documentation and follow-up of torture victims. We find, for example, that frontline staff in the immigration administration on the one hand and staff in reception centres and the health sector on the other differ in their assessments of the possibility of eliciting narratives and experiences of torture and other forms of abuse. Case officers report that in their experience, the applicants themselves often mention exposure to torture, also when not prompted. For this reason, they do not directly ask about such experiences. Health personnel, on the other hand, frequently pointed out that narratives of torture are 'buried deep' and that talking about them is fraught with difficulty. In their experience it may take a long time, even after contact has been established, before persons are ready to talk about their exposure to torture or other forms abuse.

Since the asylum process (both in UDI and UNE) shall be future-oriented, whereby the risk of future persecution shall be assessed (the Refugee Convention/ Convention Against Torture), and since no guidelines and procedures pertaining to torture and torture victims are available for this process, there is also widespread uncertainty about the weight to be given to torture in appraisals of the applicants' credibility and their asylum status. While the asylum seekers' previous experience of torture might give an indication of their risk of persecution after return home, exposure to torture or other forms of cruel and inhuman treatment does not in itself constitute grounds for protection, as described above. It is up to the asylum seeker to show the likelihood that this torture and persecution will be repeated after their return home. The limited importance which is attached to torture in the assessment of the case also means that few follow-up questions are asked, and only in exceptional cases is the applicant encouraged to document any injuries sustained during torture. Information about health care therefore focuses more on treatment of acute physical or mental health issues than on collecting assessments of injuries caused by torture or identifying needs

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for rehabilitation. As a result, the opportunity to assess the right to rehabilitation, alternatively the opportunities for rehabilitation after return to the home country, will be severely limited.

In the interviews with reception centre staff, we were especially concerned with guidelines and action cards developed by the Directorate of Immigration (UDI) to identify especially vulnerable asylum seekers in the reception centres, primarily persons who had been exposed to forced marriage, child marriage, violence in intimate relationships and female genital mutilation. Key guidelines include those on vulnerable groups in general (UDI 2015-029), which describe various types of vulnerabilities, but not torture. The knowledge of and experience with the use of action cards that specify certain categories of vulnerability, as well as procedures associated with each one, is considered to be satisfactory among UDI staff. There is agreement that such issues must be followed up, and it is essential that information be transferred to the UDI system with a view to the different stages of the asylum procedure. Broadly speaking, the reception centre staff whom we interviewed were aware of torture victims, and they attempted to make the best possible provisions for those whom they deem to be or can be regarded as being traumatised.

In the review of experience and measures in the health sector we also find a general dearth of familiarity with or knowledge about the Istanbul Protocol, torture and injuries from torture. This problem is associated both with insufficient knowledge about possible interventions when torture is discovered and with the absence of available interventions. Health personnel lack routines for where and how to communicate information on exposure to torture and its consequences for the asylum process. Similarly, there is a lack of information and procedures for examination, treatment and rehabilitation of torture injuries, and many respondents refer to the limited access to and knowledge about treatment of torture injuries. The Istanbul Protocol is largely unknown among health personnel in the municipalities. Moreover, work with examination and follow-up of torture injuries is not considered a priority. Furthermore, because tasks related to investigation of torture are not defined and categorised as services on a par with similar examinations and certifications in the health services, they fall between two stools and are not undertaken. Many of our interviewees called for more specific regulations that could not only define examinations of torture victims and necessary follow-up as relevant and important tasks for the services, but could also establish the required framework in the form of time spent and reimbursement rates.

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Recommendations

Recommendations to the Ministry of Justice and Public Security

- Introduce a statutory definition of vulnerability in the Immigration Regulations in the form of a non-exhaustive list, where torture victims are mentioned as one of several vulnerable groups.
- Introduce a statutory obligation for UDI to alert appropriate healthcare bodies to torture injuries sustained by asylum seekers.
- Instruct UDI to identify torture victims during the asylum interview and to undertake a specific and justified assessment of the need for submitted documentation of torture* in the assessment of risk and need for rehabilitation into Section 28 of the Immigration Act and in the assessment of whether there are strong humanitarian considerations pursuant to Section 38 of the Immigration Act.
- Instruct UDI to undertake a specific and documented assessment of risk factors for future torture and their weight and importance as a basis for assessment of the asylum application.

Recommendations to the Directorate of Immigration

- Include questions to the applicant about exposure to torture in the arrival registration form used by the National Police Immigration Service.
- Collect and investigate information on the asylum seeker's experience of exposure to torture, including health consequences, in the asylum interview.
- Inform and encourage applicants who report exposure to torture to submit an existing health certificate or other documentation. If such documentation is unavailable, UDI must order an examination of torture injuries.
- Collect and examine information about the asylum seeker's health status, including the need for rehabilitation, as part of the basis for assessing the application.
- Ensure that information about vulnerability, including torture, is taken into account throughout the asylum process.
- Create action cards for torture victims for use by both the asylum department and the reception centre staff.
- Update the guidelines on interviews for collection of information on torture.
- Improve competence about the rights of torture victims and Norway's obligations vis-à-vis torture victims, and training about the consequences of exposure to torture and its potential effects on the ability to provide a consistent account in the asylum interview and thereby also on the assessment of credibility, as well as the implications of exposure to torture for the risk assessment.

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- Prepare a declaration of consent to enable UDI to forward information about torture to appropriate healthcare bodies, and for reception centres to inform UDI.
- Establish a procedure for UDI and reception centre staff to receive follow-up after meetings with asylum seekers who have been exposed to torture.
- Incorporate into the requirement specifications for reception centres that the staff shall identify vulnerable persons, including torture victims, and that staff members who are made privy to information indicating that reception centre residents have been exposed to torture shall register this information in the MOT reporting system and obtain consent for forwarding this information to UDI.
- Provide training to reception centre staff about torture and its physical and mental consequences and about how the living situation can best be adapted, including help in contacting health services.
- Evaluate the implementation and effects of these recommendations after a period of five years in collaboration with the Directorate of Health.

Recommendations to the Ministry of Health and Care Services

- Prepare a national action plan for identification of torture victims, documentation of injuries resulting from torture and rehabilitation of torture victims.
- Establish a core professional community in forensic medicine for implementation of torture assessments in line with the Istanbul Protocol, to function as an advisory resource to doctors and psychologists who undertake such investigations.
- Earmark budget funds for local authorities to undertake initial health surveys and expanded health examinations.
- Establish procedures for identification, examination and follow-up of vulnerable asylum seekers as described in Annex 1, including by
 - introducing a statutory requirement for identification of torture victims in line with the Istanbul principles;
 - introducing a statutory requirement for asylum seekers to be offered a health examination at the National Arrival Centre;
 - introducing a statutory requirement for asylum seekers to be offered an expanded health examination if the initial health examination indicates a need for health follow-up, including need for rehabilitation as a result of injuries sustained during torture;
 - introducing a statutory provision to the effect that the health services are responsible for examination of torture victims in line with the Istanbul Protocol.

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Recommendations to the Directorate of Health and the Directorate of eHealth

- Introduce a procedure rate for torture examinations at the same level as for specialist certifications.
- Incorporate into the IS-1022 manual that a doctor at the National Arrival Centre shall judge whether a torture examination can be done at the centre or whether a referral to a specialist examination shall be made.
- Prepare a declaration of consent to enable health personnel to forward information on torture to UDI.
- Improve competence in identification and documentation of torture among doctors and the specialist health service by way of mandatory and recurrent training courses that earn credit.
- Evaluate the implementation and effects of these recommendations after a period of five years, in collaboration with the Directorate of Immigration.

Recommendation to the Board of Health Supervision

• Monitor provision of health services to torture victims.

Recommendation to the Ministry of Education and Research

• Include knowledge about torture in all relevant educational programmes, reinforce the syllabus, teaching and practical training in this topic as required in relevant training programmes.

* In all recommendations, the term 'torture' also includes other cruel, inhuman and degrading treatment.

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