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## *The compliance with the Istanbul Protocol in the asylum procedure*

*A qualitative comparative study between Greece and the Netherlands*

Evangelia Rossolatou

6450571

Supervisor: Jing Hiah

Internship Supervisor: Joost Jan den Otter

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## Abstract

**Background.** In 1999, the Istanbul Protocol (IP) a manual of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment was created. Its importance and usefulness on recognizing alleged victims of torture (VoT) is undoubtable and its use is recommended by the Committee Against Torture (CAT) to every member state. However, its non-legally binding character in combination with the lack of awareness about its existence, result in confusion and conflict among the relevant actors, which have negative consequences on the alleged VoT, especially in the asylum procedure. This study explores how different actors comply with the IP in the asylum procedure in Greece and the Netherlands and how their compliance affects the alleged victims of torture. **Methods.** This was a qualitative comparative study between Greece and the Netherlands, in which fourteen experts of the IP participated through semi-structure interviews. Thematic-content analysis was applied and the results were presented in the context of the compliance theory and the street level bureaucrat's theory. **Results.** The Dutch state complies with the IP, while the Greek state does not. In both countries, however, the asylum officers disbelieve the stories of the alleged VoT most of the times, and often reject the IP reports made by NGOs. **Conclusion.** The variation on compliance by different actors with the IP in the asylum procedure is caused by a combination of personal, organizational and regulatory characteristics. This study has highlighted the importance of formulating an accurate national legislation, which incorporate the IP based on international law, and the importance of making the IP principles legally binding in order to create a common methodology on how to assess the alleged VoT during the asylum procedure.

**Key words:** Istanbul Protocol ▪ Victims of Torture ▪ Asylum ▪ Greece ▪ Netherlands ▪ Compliance

## Introduction

Torture has always been part of human history and it is still present in over 80 countries of the planet encroaching humans rights (Furtmayr & Frewer, 2010). The identification and the assessment of victims of torture (VoT) is vital for the protection of their psychological and mental health (Medical foundation for the care of victims of torture, 2010). Adopting the definition given by UNCAT<sup>1</sup> in 1984 (article 1) torture means:

*‘Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’ (United Nations, 2015,p.1)*

A population that is often exposed to torture practices is migrants, particularly the refugees and asylum-seekers. Based on the International Rehabilitation Council for Torture Victims (IRCTV), 35% of refugees and asylum seekers have experienced torture in their country of origin, during the migration journey or even in the host country (Committee & Union, 2017). According to UN Refugee Convention 1951 a refugee is *‘someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion’* (in UNHCR, 2010, p.3). On the other hand, an asylum seeker is a person who says he or she is a refugee and has requested international protection<sup>2</sup>, but his or her application for asylum has not yet been definitively accepted (Javed & Fountoulakis, 2019).

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<sup>1</sup> (UNCAT) United Nations Convention against Torture refers to the promise that all Member States have made of the Universal Declaration of Human Rights and provides with detailed provisions which establish the essential aspects of effective torture prohibition and prevention, to fulfil this shared promise (“UNCAT Ratification Tool,” 2016).

<sup>2</sup> See article 2 on DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 and Article 2(f) of Directive 2011/95/EU (European Union, 2013)

In the context of the Common European Asylum System (CEAS), individuals who have been tortured constitute a special category of vulnerable people who are in need for special asylum procedure guarantees, such as prioritization (AIDA, 2017c). The health assessment of such individuals is crucial as it can provide valid evidence of their need for international protection and asylum (Helmut & Slawomir, 2018). In reality, however, the alleged VoT is difficult to be identified and they are often neglected in the asylum procedure (Kastru, Jaranson, & Riba, 2008; Haagensen, 2007). This is happening due to multiple reasons, such as the nature of some torture methods (i.e. waterboarding) that do not leave physical traces of torture (Park & Oomen, 2010), or the after effects of torture (i.e. amnesia, confusion) that make the victims unable to give a coherent story about their experience. In both cases torture is difficult to be proved and the alleged VoT are rejected by the asylum authorities due to perceived lack of credibility (Bruin, Reneman & Bloemen, 2006). Additionally, authorities' duty to prevent irregular immigration makes them focusing on the legal status of the asylum applicants and not on their needs and vulnerability, which sometimes result to rejection of asylum seekers without requesting any further health examination (Sethi, 2013; IRFC, 2007).

In 1999, the Istanbul Protocol (IP) was created by a group of legal and medical professionals together with NGOs, as a manual of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (UNHCHR., 1999). This protocol is an important manual consists out of guidelines (see Appendix 1) for the assessment of individuals who have been alleged victims of torture and ill-treatment, for investigating their cases and for reporting the findings to the judiciary or other investigative body (UNHCHR., 1999). The importance of the IP in the asylum procedure is related to its purpose of proving torture to such an extent that it can stand up in courts, and should be used by trained professionals who can recognize the signs of torture (Haagensen, 2007). During the last years, there have been attempts to provide training to relevant professionals by different actors both national and international. An example was the *"ARTIP: Awareness Raising and Training Measures for the Istanbul Protocol in Europe"* project, which provided easily accessible training to support the interdisciplinary use of the IP by mental and legal professionals. It was an attempt of interdisciplinary collaboration between NGOs, professionals, Universities and others (<http://www.istanbulprotocol.info/index.php/en/short-summary>). Nevertheless, the application of the IP in the asylum procedure is still limited or absent in many countries.

Yet, most of the existing studies about the IP use quantitative methods, which fail to give an in-depth explanation about why the IP is limited or absent among countries. Some of the studies claim that factors such as lack of awareness, difficulties with official state adoption of the IP and incorporation of IP standards in their national policies, or lack of training, cause problems with the application of the IP in the asylum procedure in many countries (Haar, Lin, Modvig, Nee, & Iacopino, 2019). What is more, as Pettitt (2016) pointed out in her study, professionals who have no clinical qualifications and who replace the medical expert opinion with their own speculation about clinical matters often conduct the interviews of the asylum applicants. The same study showed that asylum professionals misunderstand the IP methodology and/or the clinical interpretation of findings and this results to rejections of asylum applications due to lack of proof on evidence (Pettitt, 2016). Furthermore, according to Kelly, Jensen and Andersen (2016), although the IP outlines minimum standards for states, the use of the IP for investigation of alleged victims of torture and ill-treatment is too often left to civil society organizations. This is related to the non-legally binding character of the IP, whose application is left on the discretion of the states (Reneman, 2018; Battjes in Bruin, Reneman, & Bloemen, 2006; Furtmayr & Frewer, 2010). Similarly, the request for an IP assessment and the interpretation of the findings of the IP reports in the asylum procedure are left on the discretion of bureaucrats, such as asylum officers and judges. Using qualitative methods, this study contributes to the literature by exploring how the compliance of the state and the street level bureaucrats may be factors behind the absence of the IP in the asylum procedure among countries.

Considering the importance of the IP in the asylum procedure, this study aims to fill in the gap in the literature by giving an in-depth explanation about why the IP is limited or absent in the asylum procedure in two European countries: Greece and the Netherlands. Theoretically, this study uses a combination of the compliance theory (Guzman, 2002) and the street level bureaucrats (Lipsky, 1980) aiming to explain how the compliance of the state and street level bureaucrats affects the way the IP is applied, and what the consequences are on victims' lives. More specifically, the research question of this study is: *How do different actors comply with the Istanbul Protocol in Greece and the Netherlands and how does their compliance affect the alleged victims of torture in the asylum procedure?*

The remainder of the article is divided in four sections; in the first section, the theoretical framework used for this research is introduced and relevant empirical studies are mentioned. The second section includes details about the methodology of the research as well as the participants' characteristics and recruitment. In the third section, the results of the research are presented

thematically in the context of the theoretical framework. The article ends with a discussion section where the main findings of the research are highlighted and their implications in current policy and law are discussed.

## **Theoretical Framework**

### **States' compliance with international law**

Many scholars have tried to explain why states comply with international law giving a range of possible reasons. Most of them agree that international law can affect the behavior of states because states are concerned about the reputational and direct sanctions of its violation (Hathaway, 2007; Guzman, 2002). The assumption of the traditional compliance theories is that states are rational, acting in their own self-interest and being aware of the impact of international law on their behavior. However, empirical studies have shown that other factors may also influence states' behavior against international law. According to Hathaway (2007), '*whether states will commit to a treaty depends in significant part on whether they expect to comply with it once they join*' (p.590). In his quantitative research found that two central dynamics influence a state's decisions to commit to and comply with human right treaties. The first dynamic is the *domestic legal enforcement* that refers to whether and how the terms of the treaty will be enforced against the government within the state itself. The second dynamic is the *collateral consequences* of the decision, which refers to the expected reactions of individuals, states, and organizations to the state's decision to commit to the treaty and then to abide or not abide by its terms (Hathaway, 2007).

Similar empirical evidence are given by Hillebrecht (2012) and Lupu (2013) who examined how domestic mechanisms affect whether states will comply with human right treaties or law. Hillebrecht (2012) compared Argentina, Brazil and Columbia and found out that in each country the relationship between domestic actors resulted to different mechanisms, which in turn resulted in different state's behaviors against human rights law. In her study, Hillebrecht claimed that international human rights courts often ask states to engage in costly compliance measures; however, the courts have little enforcement capacity. Hence, the responsibility for compliance falls to domestic actors such as executives, legislators and judiciaries (Hillebrecht, 2012). On the other hand, Lupu (2013) conducted a quantitative analysis and found out that domestic courts play a great role on whether and how international human rights law will be incorporated in the national domain. This, however, is more likely to happen when evidence-production costs and standards of proof are low which enable the courts to constrain government practices (Lupu, 2013). Besides

courts, the role of the NGOs on affecting states' compliance with international law is also important, as argued by McCann (2006). According to him, *legal mobilization* can be seen as political pressure since the social movements, including NGOs, have legal dynamic to affect state's compliance with law. The legal advocacy can be a source of institutional and symbolic power of movement activists against opponents (McCann, 2006).

In this research, the aim is to examine how and why the Greek and the Dutch States comply with the IP when it comes to the assessment of alleged VoT in the asylum procedure. According to recent literature about compliance theory, international law also includes what is called '*soft law*', which refers to non-legally binding laws and treaties (Guzman, 2000). Since the IP is soft law, the theoretical concepts of *compliance* and *legal enforcement* were considered applicable for this study and were used with the aim to understand the role and behaviour of the states towards the use of the IP in the asylum procedure in the two under research countries. As Hathaway (2007) claimed, states' willingness to comply with international law is influenced by how likely the domestic institutions are to require from the government to change state's practices in order to conform to the treaty requirements. Adopting these ideas, the different levels of the domestic enforcement against the states is expected to cause differences between Greece and the Netherlands on how their states comply with the IP.

### **The compliance of *street level bureaucrats* with international law**

Besides the states' compliance with the IP, the compliance of the asylum officers with it is also important when talking about asylum procedure and should not be neglected. In order to explain the behavior of the asylum officers in Greece and the Netherlands, the theory of *street-level bureaucrats* is applied (Lipsky, 1980). According to Lipsky, street-level bureaucrats '*are public service workers who interact directly with citizens in the course of their jobs and who have substantial discretion in the execution of their work*' (in Loyens & Maesschalck, 2010, pp- 70). Hence, it is important to examine the discretion of those bureaucrats, since whether and how the IP will be used, not only depends on state's compliance but also on the discretion of the street-level bureaucrats, such as asylum officers or judges, whose work is relevant with it in the national level. In Pettitt's study (2016), many court cases are presented showing how likely is for an asylum applicant to be rejected based on officers' wrong interpretation of the presented evidence. Similarly, asylum cases of alleged VoT are often rejected because of wrong interpretations on the IP findings by asylum authorities or judges who have no knowledge on recognizing alleged VoT

(Reneman, 2018). As Lipsky (1980) claimed, street level bureaucrats are '*agents of social control*' due to their unique position in the implementation process on either provide access to public programs or enforce laws and regulations. In this research, the role of the asylum officers is remarkable since they decide upon asylum cases on the first place. The way that asylum officers deal with the alleged VoT and the IP reports, underline their great power on asylum seekers' lives.

In the literature, there are many empirical studies, which either criticize or expand Lipsky's theory. Some authors, like Winter (2002) have tried to explain the variation of copying behaviors among street level bureaucrats, criticizing Lipsky's arguments that there is no variation of copying behaviors among them. Winter (2002) claimed that the variation in coping behavior is caused due to high degree of variation in street-level bureaucrats' discretion. One of his findings was that an important factor behind copying variations is the own attitudes of street level bureaucrats, such as the *perceived capability/workload*. For example, he claimed that, the negative perception of the target groups' motives increases coping behavior. Other authors have stated that the behavior of the street level bureaucrats on implementing policy or developing copying behavior depends on their individual characteristics, organizational characteristics and other extraorganizational factors such the broader community or regulations (Loyens & Maesschalck, 2010). The question that remains is what factors influence the street level bureaucrat's compliance with international law.

To this respect, few empirical studies have managed to give an answer. Two empirical studies that deals with this question are those of Hunter, Bretherton, Halliday and Johnsen (2016) and Dörrenbächer (2017). According to Hunter et al. (2016), factors behind street level bureaucrat's compliance with law are the *simplicity* of the law, their *legal knowledge* and their *cultural norms*. They found that when the legal provision is simple is more likely to facilitate the legal knowledge of street level bureaucrats and demands nothing for them in terms of competence. Furthermore, bureaucrats' ability to understand and work with legal material and their attitudes about the lawfulness, influence their likelihood of legal compliance. On the other hand, Dörrenbächer (2017) studied the motivations of street level bureaucrats to comply with EU law. What she observed was that when *national regulatory frameworks* are unclear, substantive moral norms and instrumental motivations activate some implementers to rely on EU law, instead of the national one. In this research, the compliance of street level bureaucrats is explored when it comes to the IP in the asylum procedure. Any potential differences between Greece and the Netherlands on how the asylum officers and judges comply with the IP are expected to occur due to differences on their legal knowledge, personal attitudes and the national regulation.



## Methods

### Study design, data collection and data analysis

This study is comparative qualitative research aiming to explore broadly the differences in the compliance with the IP in the asylum procedure, in Greece and the Netherlands. The two countries were chosen for many reasons. Firstly, both countries are EU Members and are obliged to uphold with the UN Convention (1951) and the EU Directives within the CEAS when it comes to identifying and addressing vulnerable migrants or migrants in need. Secondly, the Committee Against Torture (CAT) has submitted concerns against both countries regarding on the way they assess VoT, and has highlighted the need to use the IP for investigating cases their cases in the asylum procedure (CAT, 2018; CAT, 2012). Finally, in both countries the role of non- state organizations have been fundamental in identifying victims of torture compared to the state actors (Tsapopoulou, Tzeferakou & Stroux, 2012 ;Haagensen, 2007). Nevertheless, there are also some differences between the two countries that should be taken into consideration throughout the comparison. Greece is a southern European country that has been a transition country to migrants for many years, while the Netherlands, a northern European country, has been mostly a destination country (Feischmidt, Pries, & Cantat, 2018). Moreover, even though in both countries the refugee flows has been increased during the last years, the number of refugees and asylum seekers coming in Greece is notably higher than that of the Netherlands. Based on AIDA data, in 2017 the refugee rate in Greece was 41,4% while in the Netherland was only 19%. (AIDA, 2017a; AIDA, 2017b). Finally, the economy of these two countries differ since Greece has been in recession since 2008, while the Netherlands has not.

In order to understand the reasons why differences occur on the compliance of different actors with the IP , qualitative methods were selected as a better way to fulfil the explanatory as well as the exploratory character of this research (Ritchie & Lewis, 2003). For the data collection, semi-structure interviews were selected among other qualitative methods to approach this sensitive topic by giving room to the interviewees to share their thoughts while allowing to the interviewer to keep the control of the conversation and staying close to the topic ( Miles, Huberman, & Saldana, 2014). Moreover, individual in-depth interviews is the only way to collect data where the perspectives within the context of personal experience can be heard (Ritchie & Lewis, 2003).

Due to little previous research about the compliance with the Istanbul Protocol, inductive grounded theory was used as the most appropriate research method in order to gather rich data and to be able to creatively analyse it and finding patterns during the data collection and analysis (Bowen, 2006; Charmaz, 1996). More specifically, abstract themes were used to formulate the topic list including questions about how the IP is applied in the two countries, who are involved in this application, what problems occur in its application, what the impact of the IP is on the VoT and what the opinion of the participants is about these, to name few (see Appendix 2). For the data analysis, Nvivo was used to organize and code the data (see Appendix 3). Inductive open coding was used for the data in order to create themes and categories. Four rounds of coding were made, starting with the initial coding, continuing with line-by-line coding and categorizing the data, ending up with the determination of the themes (Flick, Kardorff & Steinke, 2004; Charmaz, 1996).

### **Participants and recruitment**

For the purpose of this research, individual semi-structured interviews were conducted with fifteen professionals who were found to have some relevance with the topic in terms of knowledge or/and working experience with victims of torture and the IP. Non-random sampling techniques were used to select the participants, combining purposive and snow-ball sampling (Ritchie & Lewis, 2003). The criteria for selecting the participants were based on their relevance with the application of the IP in the asylum procedure and the provision of training, assumed by their previous participation in relevant projects and research on the field. Moreover, the study's supervisor who is an expert on the topic himself suggested potential participants from his network. These individuals were contacted first, and they were asked to suggest other professionals from their network that would be willing to participate on the research. The participants were recruited via email or phone and they were informed about the purpose of the study, the consent form and the reason of their selection beforehand.

The interviews took place at participants' offices or houses in different cities in Greece and the Netherlands. The interviews lasted minimum 30 minutes and maximum 1,5 hour and they were conducted either in Greek or in English. Although the intended duration for the interviews was estimated at 60 minutes, in some cases this was adjusted on the availability and the time offered by the participants. The participants ranged from medical, legal professionals and social workers to other professionals within or out of organizations, who were found to have some relevance with the health assessment of VoT and the use of the IP in the asylum procedure. To make the sample

more comparable, participants with similar professions were chosen from each country (see Appendix 4).

## **Results**

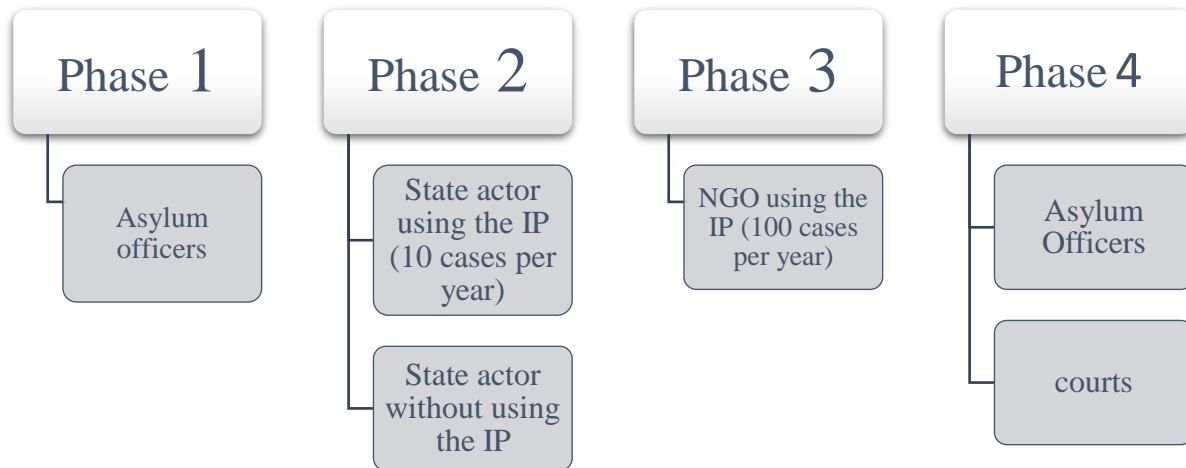
In this section, the results of the research are presented and discussed. The results are presented thematically based on patterns that were found on the data and are analyzed within the context of the compliance theory (Guzman, 2002) and the street level bureaucrats theory (Lipsky, 1980). The aim is to answer the research question: *How do different actors comply with the Istanbul Protocol in Greece and the Netherlands and how does their compliance affect the alleged victims of torture in the asylum procedure?* Firstly, background information will be given about the way that the IP is applied, focusing on the *discretionary space* (Lipsky, 1980) of the actors who are involved with the application of the IP in Greece and the Netherlands.

### **The Health assessment of victims of torture and the use of the Istanbul Protocol in the asylum procedure**

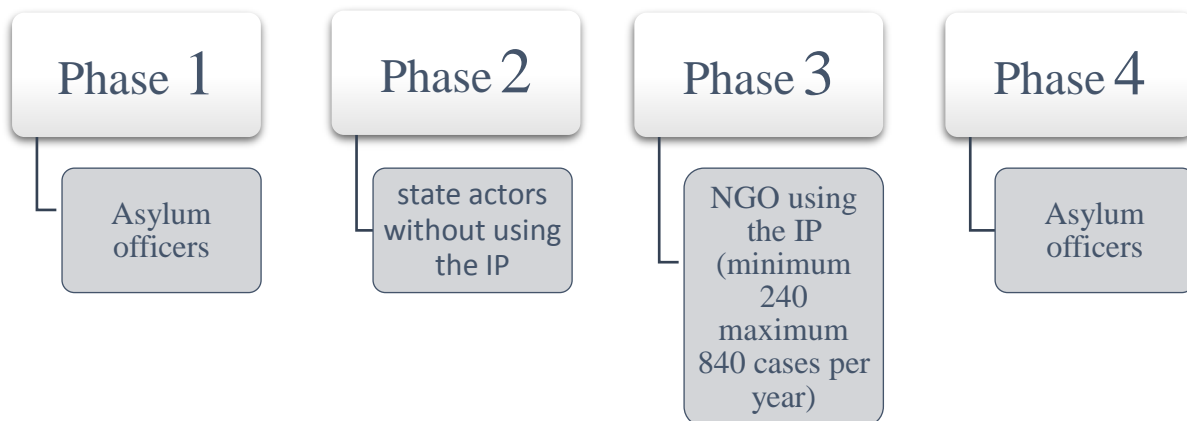
Participants were asked to discuss about their personal experiences with the application of the Istanbul Protocol in their country. The results showed that, overall, in both countries the extent to which the IP is applied for the health assessment of alleged VoT in the asylum procedure is limited. Furthermore, similarly with the findings of Kelly et al (2016) the IP is mostly used by non-state actors. In the following graphs (graph 1,2), it is described how the alleged VoT are assessed in the asylum procedure in Greece and the Netherlands, either with or without using the IP, based on participants narratives. The assessment procedure is divided in phases with the aim to help the reader understanding the differences and similarities between Greece and the Netherlands. In the analysis, it is highlighted the discretionary space of the involved actors on how to interpret the IP throughout the process. Although the procedure is simplified in these graphs, in reality, the health assessment of VoT is more complex and the phases are not always taken place consecutively. As it is shown in the graphs, the main difference between Greece and the Netherlands is the extent to which the state complies with the IP. While in the Netherlands, there is a state actor using the IP for assessing alleged VoT in the asylum procedure, in Greece this is left solely to an NGO without any involvement of the state. Regarding the level of discretionary space among asylum officers and judges, this is higher on phase 1 and phase 4 in both countries. Nevertheless, there is variation on

bureaucrats' discretion, which causes differences between the way that the IP is applied and interpreted in Greece and the Netherlands, as discussed in the next sections.

*Graph 1: Health assessment of VoT in the asylum procedure in the Netherlands*



*Graph 2: Health assessment of VoT in the asylum procedure in Greece*



*Source: Author*

The first phase (Phase1) is a general phase that every asylum applicant follows no matter whether they are alleged VoT, and it is common in both countries. In this phase, the discretionary space of the asylum officers is high since they decide whether someone is an alleged VoT and whether an IP assessment is relevant. Based on the research data and in line with Reneman (2018), an IP assessment is rarely requested because the asylum officers have usually no doubts about the situation of the applicant, especially in the Netherlands. However, when the asylum officer suspects that the applicant might be a VoT, but more evidence is needed to be fully convinced, they request for a health assessment. In the Netherlands, the immigration service never requests health assessment by NGOs. It will only requests of a health assessment to state actors who do forensic evaluations, by which only the one is using the IP. On the contrary, in Greece the asylum service might request a health assessment either from state actors who do not use the IP (Phase 2) or directly from the NGO that uses the IP (phase 3). In the case of the Netherlands, if the assessment report by the states, claims that the person is not a VoT, which is often the case, the lawyer of the asylum seeker may request another health assessment from the NGO that uses the IP (phase 3), as mentioned also in Aarts, Wanrooij, Bloemen, & Smid (2019). In Greece, this may happen only if the asylum service reject an applicant in advance without requesting a health assessment.

Finally, the alleged VoT use the IP reports written by the NGOs in the asylum procedure to support their claims (phase 4). In these phase, the level of the discretionary level of the asylum officers or the judges is high, since they have to decide upon those reports. Their role is crucial as their interpretation upon the IP findings will determines whether an alleged VoT will be offered asylum or sent back to their country. In the Netherlands, the immigration service has usually objections against the IP findings of the NGO's report, and the two actors may meet in courts, where judges decide upon their arguments (phase 4). While in Greece, the asylum service usually has no objections on the content of the IP reports but only on the fact that the assessment is not made by state actor, as obliged by the national law.

## **The compliance of the Greek and the Dutch states with the IP in the asylum procedure**

### ***The non-legally binding character of the IP***

In the research, it was found that actors who are relevant with the assessment of alleged victims of torture in the asylum procedure differ on the extent to which they comply with the Istanbul Protocol. As discussed previously, although in both countries the actors who comply with the IP in the asylum procedure are mostly non-governmental organizations, in the Netherlands there is also

a state actor who does assessments based on this Protocol. Yet, this state actor is using the IP only few times per year (see graph 1). As highlighted by almost all participants in the two countries, the non-legally binding character of the IP can explain the absence of state actors through its application. In the following quote it is explained how the non-legally binding character of the IP demotivates state actors to use this protocol, who insist in using their own methods instead.

*‘The interesting thing is that in the EU law it is only recommended to use the IP and it is not obligatory. So there is a difference and that is why one of the state organizations for doctors for forensic doctors they say that ‘we use our own methods and we won’t use the IP’. So there we differ in our working method’ (P4- Director, NL).*

In line with Battje’s arguments (2006), many participants especially in the Netherlands claimed that the IP should be obligatory by law in order to avoid many problems, such as the mismatch of the methods used by state and non-state actors, which results in different health assessment findings and confusion on which one is the most likely to be true. Theoretically, compliance theory argues that states comply with international law – including ‘soft’ law- due to concerns about the reputational and direct sanctions triggered by violations of the law (Guzman, 2002). In the case of the IP, there is no strict sanctions in case of violation and whether and how the IP will be used is left on the discretion of the states. This is observed on participants’ responses in both countries. As a participant in the Netherlands clearly said ‘ (...) *the state will only make movements in this field when on the legal side there are decisions against them. Otherwise they won’t move. That’s my experience*’ (P1- Medical Doctor, NL).

### ***Domestic legal enforcement and collateral consequences***

Besides the legal character of the IP, the *domestic legal enforcement* also influence state’s compliance with international law. According to Hathaway (2007), whether a state will comply with an international treaty depends on whether and how the terms of the treaty will be enforced against the government within the state itself, what is called *domestic legal enforcement*. As it was observed on the narratives, in the Netherlands there have been many attempts to enforce the state to comply with the IP by many non-governmental organizations during the last years. On the other hand, in Greece there have been no such attempts because experts do not want the state to be involved with the IP. Particularly, as almost all participants in Greece argued, they are quite happy that the state is not using the IP and they do not want this to happen. Their position against the

state's involvement with the IP is related to what Hathaway(2007) call *collateral consequences* of the decision. According to him, the fact that the state does not expect any reactions on its decision to not comply with a treaty, makes it to not comply with it. For example, when talking about the involvement of the state with the application of the IP for the assessment of alleged VoT in the asylum procedure in Greece, a participant states:

*'Fortunately not (there are no state actors involved with the IP). There are not. I don't want to be prejudiced. I don't think this has to do with prejudice, but with the core of torture definition; That it is an inhuman behaviour that comes from state actors, therefore it is good when those people are coming here, not to be addressed by state actors for the identification of their torture. This I think creates a conflict and an ambivalence inside them'* (P10- Psychologist, GR)

Contrary to this statement, when talking about the involvement of the state with the application of the IP in the asylum procedure in the Netherlands, participants not only expect from the state to comply with the IP but they also believe that the IP should be the only method of assessing alleged VoT in the asylum procedure. As a participant argued:

*'I: What is your opinion about the fact that, as you said, the state don't use the IP often?*

*P: I think it's a pity because now we have two different kind of systems and they do it with different thing and its about the different way of looking at refugees and how they can tell the stories and how they can relate the problems they have now to what they have told. And I think it would be much more easy if all use the same IP or the same method, so we can more easy compare the assessments with each other and now its quite difficult'* (P14- Legal officer, NL)

The difference between experts' opinion about whether the state should be involved with the IP in the two countries, is related to both mechanisms for which Hathaway (2007) talked in his study. For instance, in the Netherlands, the NGO that uses the IP has met multiple times in court with the immigration office, putting pressure on states to comply with the IP in a more responsible way. This relates to the first mechanism of Hathaway (2007), the *domestic legal enforcement*; but also to the second one, the *collateral consequences*, since the Dutch state expects reactions on its decision not to use the IP in a regular basis. The following quote is important because it shows the long time efforts of the NGO in the Netherlands to enforce the states to comply with the IP using domestic legal power.

*‘At the beginning I have been talking , I have been visiting the state doctors twice and they did not read the IP, they knew that it existed but they didn’t use it and they didn’t want to know it because there were not going to use it. (...) Then I said well I think that this is incredible because this is an international agreed method on how to investigate people who claimed that have been victims of extreme violence.(...) Then they said we have a perfect working method, our own method and this is what we are going to use. And because of the fact that for now this situation has been going now for two years, so we have met each other few times in court and now we know that they are changing a little bit’ (P4- Director, NL)*

## **The compliance of street level bureaucrats with the IP in the asylum procedure**

### ***Negative perceptions***

As discussed previously, the compliance of street level bureaucrats with the IP is crucial for the assessment of alleged VoT in the asylum procedure in Greece and the Netherlands. During the asylum procedure, the asylum officers or/and the judges have discretionary space on whether to request an IP assessment and how to interpret its findings (Phase 1 and 4). Therefore, it is important not only to explore how states comply with the IP, but also how the street level bureaucrats comply with it during their work. This section presents reasons why asylum officers may comply with the IP, and how their compliance affect the alleged VoT. On the same line with Pettitt (2016), a pattern found on the narratives of the participants from both countries is the negative behaviour of the asylum officers or/judges against the stories of the alleged VoT as well as the findings of IP reports supporting their claims. According to the majority of the participants, especially in the Netherlands, although the state is using the IP, asylum officers not only do not trust the stories of the alleged VoT but they also doubt upon the IP findings written by the NGO’s experts. For example, similarly with the findings of Pettitt (2016) and Reneman (2018) what is often the case in the Netherlands is that *‘they (the alleged VoT) are not believed’* as stated by participant 3. This copying behaviour of rejecting alleged VoT due to lack of credibility is caused by the *negative perceptions* of target groups’ motives (Winter, 2002). These negative perceptions and their effect on the alleged VoT is mentioned also by a participant in Greece when talking about the need of the alleged VoT to describe their story immediately after they are referred for assessment to the NGO:

*‘We know that in the asylum service they are not believed. That is why they have that desperate need to come here and immediately try to convince us. Many of them say that*



*'I don't lie to you like the others; I really want to prove that what I say is true'. Because, the truth is that most of the times they are faced as they are telling lies'* (P7- Program Assistant, GR)

The lack of trust of the asylum officers to the alleged VoT and the IP reports is also mentioned by experts in the Netherlands. The pattern found was that the asylum officers working for the immigration office might always find a reason to reject an applicant by interpreting the IP findings on their own favour. As a participant put it: *'On the base, it is that they have a way out all the time'* (P14- Legal officer, NL). This copying behaviour against the alleged VoT and the IP findings is not only caused by the negative perceptions of the alleged victims' motives but also of the NGO's motives. As many participants in both countries claimed, the asylum service believe that the NGOs are too much in favour of the alleged VoT and that is why they do not always trust their IP reports. This is said clearly by the following participant:

*'There is always discussion between the NGO who does IP assessments and the immigration service because the immigration service believes that the NGO is too much in favour of the asylum seekers, the decisions, the judgments about the caution relationship between scars and after effects and history of torture is too strong. We have this IP gradation and the immigration service thinks that the NGO are always too high in the strength of this gradation while the state organization is always a little bit lower because they are made by the state.'* (P2- Professor of Law, NL)

### ***Legal knowledge, National regulation and Personal attitudes***

Besides the negative perceptions of the alleged VoT's motives and NGOs' motives on behalf of the asylum officers and judges, other reasons influence the compliance of street level bureaucrats with the IP. As Haar et al. (2019) argued, the asylum officers and/or judges sometimes do not even take the IP results into consideration when deciding upon asylum cases. This, in some cases, is happening due to lack of knowledge about how to interpret the IP reports. For example, in Greece, contrary to the Netherlands, the problem is not only the lack of credibility but also the lack of awareness about what the IP is (Haar et al., 2019). In line with Hunter et al. (2016), the simplicity of the law is an important factor that influences whether the bureaucrats will comply with it. If the law is simple, it is easier for them to understand it and work with it. If the law is not simple, it is less likely for them to learn about it and comply with it (Hunter et al, 2006). A pattern found in both countries is that due to the lack of legal and medical knowledge, the IP is too complicated for

asylum officers and judges, and therefore, it is easier for them not to comply with it or to use their old methods of assessing alleged VoT in the asylum procedure. The following statement shows how the asylum officers and judges think about the IP reports and how they react on IP report during their work.

*'They only want the conclusion from the doctor; they don't want to do these big reports. Because asylum officers are also burned out, traumatized, became highly cynical and sceptical because of that (the lack of evidence). So the testimony of asylum seekers in a very biased or negative light, right, and so the involvement of other people is very important.'* (P3- lawyer& IP trainer, NL)

Another factor that influences the compliance of asylum officers and judges with the IP was found to be the national law. In Greece, based on the new law (art.23 v.4550/2018) the alleged VoT must be recognized by public or military hospitals. This new law has caused many problems on the acceptance of IP reports by the asylum officers and judges, when those are written by the NGO. This is related to the findings of Dorrenbacher's (2017) who claimed that when the *national regulation* is clear then the street level bureaucrats is less likely to comply with an international law . Since in Greece the new law is very clear, the asylum officers and especially the judges do not comply with the IP.

*'There is usually lack of awareness rather than disinclination. I remember a case of one asylum employee who has rejected our IP certification with the justification that it should be done by a state actor. The problem is on the committees where there are administration judges who have nothing to do with refugees or humanitarian actions and they only do what the law says. So no matter how many IP certificates you have, they will do what the law says'* (P7- Program assistant,GR)

Although participants in both countries highlighted the negative behaviour of the asylum officers against the alleged VoT and the IP reports made by NGOs, in Greece it was observed that the discretion of the asylum officers differ than the discretion of those in the Netherlands. This variation is a result of the sphere of autonomy for the asylum employees within which they take decisions based on their personal judgment and assessment (Loyens & Maesschalck, 2010), which is influenced by their legal knowledge and the accuracy of the national regulation (Dorrenbacher ,2017; Hanter et al, 2016). As a participant in Greece put it *'The asylum employees might call us, might be more interested in paying attention to it (the IP)'* (P7- Program assistant, GR). On the other

hand, in the Netherlands the negative behaviour of the asylum officers against the alleged VoT and the NGO's experts is more common as found also in Aarts et al (2019).

*'Sometimes the immigration service asks for an assessment at the state actor who does the assessments and then they use this to support their opinion that someone is not telling the truth. (...) But the chance that somebody is speaking the truth is as big as the other chance. But they will do it this way. (...) That should be seen as an independent objective, medical information and you should weigh it. But not like this, and just choosing out of it what you can pick out and then using it for your own gain.'*

(P14- Legal officer, NL)

Although in the Netherlands the pattern found was that the majority of the street level bureaucrats have developed copying behaviour against the alleged VoT and the IP reports, it is not uncommon that some asylum officers will not develop copying behaviour. The following quote shows that these exceptions on the copying behaviours between the bureaucrats in the Netherlands, is caused by bureaucrats' personal judgment (Loyens & Maesschalck, 2010).

*'Some officers are good some others are not good, but when someone says that the person is not credible cause you know they gave the wrong birthday or they gave the wrong date, others are a little bit more open minded let's say or understanding.'* (P3- Lawyer & IP trainer, NL)

Another difference between Greece and the Netherlands is associated with how the asylum officers decide whether an IP assessment is relevant (see graphs 1 & 2- phase 1). In Greece, it was observed that the asylum officers would send the applicant for assessment even when they have no doubts about their credibility. On the contrary, in the Netherlands, they only request for assessment when there are doubts, which is rarely the case. This difference can be explained based on the personal attitudes of the street level bureaucrats, especially on their *perceived capability* (Winter, 2002). Since in Greece the asylum officers have no legal or medical specialization, they usually request for an IP assessment by the NGO (phase 3), *'just to be sure'* as a participant (7) said.

*'In the beginning, due to lack of training of people in other NGOs or state actors, there was this tension of referring everyone to us for verification, and it turned out to have 50 referrals per month. And we were trying to explain to them that this is neither doable or realistic. We are here to assess people with less strong psychical evidence or other cases that are more debatable, lets say'* (P7- Program assistant, GR)

On the contrary, in the Netherlands, the asylum officers are mostly lawyers who have legal knowledge but not medical. Their *perceived capability* (Winter, 2002) make them believe that they can judge an IP report made by medical experts. This leads to misunderstanding and wrong interpretation of IP findings, which result in rejection upon asylum cases, as mentioned also in Pettitt (2016). Their attitude that they are capable to judge the IP reports made by experts is mentioned on the following quote:

*'But what they often say is that you have this gradations from the IP and they say, well when is typical, when is highly consistent, it means that there are other possibilities that could have made the trauma. So that's why we don't believe someone. So they just kind of swipe it away, other possibilities and then is finished. And what we also often see is that the officer from the immigration service starts giving his/her own opinion about medical things. So they say, well this scar, because she has been tortured by this and this, but I think it is also that it was because of this and this'*(P14- Legal officer, NL)

## Discussion

By comparing Greece and the Netherlands, this study contributed to the scientific discussion about the IP, providing insight into the extent to which relevant actors comply with the Istanbul Protocol (IP) in each country and highlighting the consequences of their compliance on the alleged victims of torture (VoT). The theoretical framework used for this research is a combination of compliance theory (Guzman, 2002), focusing on how domestic enforcement affects the state's behaviour towards international law, and the street level bureaucrat's theory (Lipsky, 1980), focusing on the discretion of asylum officers and judges on how and when to comply with the IP affecting the alleged VoT. The main finding was the variation in compliance with the IP among the relevant actors, which has implications not only on the application of the IP but also on the alleged VoT who seek asylum.

Regarding the compliance of the states with the IP, it was found that the Dutch state complies with the IP, while the Greek state does not. Although the non-legally binding character of the IP results in non-compliance by both states, two further issues explain the variation between the countries. Firstly, the *domestic legal enforcement* (Hathaway, 2007) is greater in the Netherlands than that in Greece. Contrary to the Greek experts, the Dutch experts do believe that the state should comply with the IP and have been putting pressure for that reason, by meeting state actors at court. Secondly, the *collateral consequences* of the state's decision to comply with the IP differ between

the countries and create variations in their compliance. For instance, in Greece due to the fact that the experts do not object to the state's non-compliance with the IP, the state proceeds not to comply with it. On the contrary, in the Netherlands, the state complies with the IP, since the experts demand the application of the Protocol.

Furthermore, the compliance of asylum officers and judges with the IP was found to play an important role, as it influences the alleged VoT. While few differences were found between the two countries on the extent to which the asylum officers comply with the IP, the main pattern was that the asylum officers disbelieve not only the victims themselves but also the IP reports written by medical experts within NGOs. In both countries, the asylum officers follow the national regulation framework and not the international that recommends the IP. This behaviour is explained by a) the *legal knowledge* of the officers, b) the accuracy of the *national law* and c) their *personal attitude*, such as the perceived capability of them to judge upon the IP reports and the negative perceptions against alleged VoT's and NGO's motives (Dörrenbächer, 2017; Hunter et al., 2016; Winter, 2002).

Overall, the study was undertaken in such a way that few limitations exist related to the quality of data. Since this was a qualitative research, the risk of personal interpretation of the data was unavoidable (Winter, 2000). To mitigate this limitation, the researcher has been reflecting on her positionality and personal attitudes throughout the data collection and data analysis, making sure that the data is presented with credibility without personal bias (Bourke, 2014; Ritchie & Lewis, 2003). An important strength of the study, on the other hand, is related to the singularity of the research regarding its focus and methodology. In the literature, few studies focus on the IP, and even less in the compliance of relevant actors. Most of them are using non-qualitative methods to approach the topic. Furthermore, there are no other studies comparing Greece and the Netherlands on how they comply with the IP. The singularity of this study also relates to the use of social science theories to interpret the data, since other authors have researched the IP mostly from a medical or legal perspective. On the contrary, this study approached the IP by the perspective of the experts who work with it, using interdisciplinary theories.

The findings of the research may have some implications in both countries. As this research showed, the variations in compliance with the IP by state, non-state actors, asylum officers and judges, have negative impact on the alleged VoT. The negative impact mostly relates to the fact that the alleged VoT are not easily believed and they have to go multiple times through an assessment, which is a re-traumatizing experience. A recommendation, in the case of Greece,

would be to incorporate the IP principles in the national legislation and to train the relevant actors on how to apply these principles when assessing alleged VoT who seek asylum. On the other hand, in the Netherlands, although there have been steps to exert pressure on states to incorporate the IP, this has not occurred. Therefore, the state actors are still using their own methods for assessment causing mismatch on the findings of the IP reports made by the NGO, compared to those made by the states. In this case, the use of a single assessment method is recommended in order to have comparable findings among the assessment reports written by the NGOs and the states. Training for the asylum officers on how to identify alleged VoT is necessary in order not only to stop rejecting applicants due to lack of credibility, but also to stop judging upon the IP medical findings without having the necessary medical knowledge.

All in all, the variation in compliance with the IP in the asylum procedure by different actors is caused by a combination of personal, organizational and regulation characteristics. This variation in compliance with the IP shows that the IP is still contested, which can be translated as a failure of the international law to promote justice. To make the IP more successful, it is necessary to make the IP principles legally binding, so as to make states formulate an accurate national legislation, which incorporates the IP principles, based on international law. However, this will not be possible if the relevant actors do not improve their communication and cooperation when deciding upon asylum cases of alleged VoT.

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## **Appendices**

### ***Appendix 1***

#### *Istanbul Protocol contents*

##### Main Contents

- I. Relevant International Legal Standards
- II. Relevant Ethical Codes
- III. Legal Investigation of Torture
- IV. General Considerations for Interviews
- V. Physical Evidence of Torture
- VI. Psychological evidence of torture

##### Annexes

- i. Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- ii. Diagnosis Tests
- iii. Anatomical Drawings for the Documentation of Torture and ill-treatment
- iv. Guidelines for the Medical Evaluation of Torture and Ill-treatment

*Source: United Nations, 2004*

### ***Appendix 2***

#### ***TOPIC LIST***

##### *Part 1- Introduction*

*Welcome the respondent. Re-explain the purpose of the interview, why he/she was chosen to participate and the expected duration of the interview. Ask if they have further questions about the research. Thank for the participation.*

*Present the **consent form**: (the form will include:)*

- *Explain the voluntary aspect of the research (withdrawal possible at any stage of the research, you don't need to answer all the questions if uncomfortable)*
- *Confidentiality and anonymity*
- *Recording the interview*
- *How the data will be stored*
- *Name and job title of the participant*
- *Name of organization, if any*

*Do you have any further question concerning the confidentiality?*

***Start recording!***

## *Part 2- Main Part*

### **1. Participant's relevance with the application of the IP**

- 1.1. How are you related (or involved in) with the application of the IP in the asylum procedure?
- 1.2. Talk about your Job, the organization you work at, the actions you take regarding the IP (interviews, training etc). Give examples.
- 1.3. Why are you involved?
- 1.4. What do you think about the IP as a tool for the health assessment of victims of torture in general and in the asylum procedures in particular?
- 1.5. What aspect of the IP do you find the most important? (legal/medical etc)

### **2. Application of the IP in the asylum procedure**

- 2.1. How is the IP applied in the asylum procedure?
- 2.2. How often is applied? When is it applied? Etc.
- 2.3. How is the IP functioned in practice compared to how is functioned in theory?
- 2.4. How does the IP influence the asylum procedure itself?
- 2.5. How much autonomy is there in applying the IP in the asylum procedure by different actors?
- 2.6. What do you think about the way the IP is applied in the asylum procedure?

### **3. Actors involved**

- 3.1. What other actors are related with (or involved) the application of the IP in the asylum procedure?
- 3.2. What do you think about how they apply the IP?
- 3.3. How does the professional background influence the way that someone apply the IP?  
Or How different actors and professionals apply the IP?
- 3.4. How different actors influence each other in the application of the IP?
- 3.5. How do different actors work together in the application of the IP?
- 3.6. Why they work together?
- 3.7. Are there differences between state and non state actors on how they apply the IP?

#### **4. IP impact on refugees and asylum seekers**

- 4.1. What is the impact of the IP for refugees and asylum seekers?
- 4.2. To what extent have asylum seekers and refugees knowledge about the IP?
- 4.3. When someone does not get the tortured status, how does this affects their life?

#### **5. Problems of applying the IP**

- 5.1. What problems occur in the application of the IP?
- 5.2. Why these problems exist?
- 5.3. How are these problems solved?
- 5.4. How would you solve them?

#### **6. Changes during the last years**

- 6.1. What has changed in the application of the IP in the asylum procedure during the last years? If so.
- 6.2. What has caused these changes? OR why the application has remained the same?
- 6.3. What do you think about these changes? OR what do you think about this stability?

### *Part 3 - The exit*

#### **7. (Policy) Recommendations**

- 7.1. If you had the chance, what would you change on the way the IP is applied in the asylum procedure?
- 7.2. What policy/law recommendations would you suggest?

## Appendix 3 - Coding Tree

### **1. Actors Involved**

- 1.1. cooperation with other actors (who dont do assessments)
- 1.2.diferences between State actors VS NGOs
- 1.3. Actors doing health assessment without using the IP
- 1.4. Actors using the IP in the asylum procedure
- 1.5. Conflict between actors using it vs those not using ip
- 1.6. volunteers

### **2. Impact**

- 2.1. re-traumatization

### **3. Participants relevance**

### **4. problems**

- 4.1. After effects of torture
- 4.2. awareness for the IP
- 4.3. bourned out
- 4.4. costly
- 4.5. IP not made for asylum
- 4.6. lack of Funding
- 4.7. lack training
- 4.8. misunderstanding of what torture is
- 4.9. non- recognition of the IP
- 4.10. not legally binding
- 4.11. proof (credibility)
- 4.12. time consuming
- 4.13. too many applicants

### **5. Recommendations**

- 5.1. importance of training

### **6. actors opinions**

- 6.1. IP as tool
- 6.2. IP principles
- 6.3. motivations

### **7. Alleged VoT who apply for IP assessment**

- 7.1. awareness of the IP
- 7.2. Characteristics

### **8. Factors that influence application**

### **9. gradation**

### **10. health assessment**

- 10.1. autonomy
- 10.2. interdisciplinary
- 10.3. Prioritization
- 10.4. the case of rejection
- 10.5. the role of referrals
- 10.6. using other methods

### **11. historical perspective (changes)**

### **12. independency (who should use the IP)**

### **13. interdisciplinarity character of the IP**

13.1.	conflict between disciplines
13.2.	how the profession affects the application of the IP
13.3.	Legal aspect (lawyers)
13.4.	medical aspect (Doctors etc)
<b>14. offered training</b>	
<b>15. Reasons why actors DO NOT use the IP</b>	
15.1.	when the IP should be used
<b>16. torture in greece</b>	

#### Appendix 4

Table 1: Participants' characteristics

<i>Country</i>	<i>Job title</i>	<i>Employee of</i>
<i>Netherlands</i>	Medical Doctor	Dutch NGO
	Professor of Sociology of Law	University
	Lawyer & IP trainer	International NGO
	Director	Dutch NGO
	Psychologist	Dutch NGO
	Medical Doctor	Dutch NGO
<i>Greece</i>	Legal Officer	Dutch NGO
	Medical Doctor	Greek NGO
	Psychologist	Greek NGO
	Medical Doctor	Greek NGOs, Adviser to the Minister of Health, State actor
	Assistant Project Manager	Greek NGO
	Psychologist & Trainer	Greek NGO
	Social Worker	Greek NGO
	Lawyer	Greek NGO
<b>Total sample:</b>	14 (13+1pilot)	

*Note: For anonymity and confidentiality reasons, the names of participants and their organization are not mentioned in the research.*