



The Public Committee Against Torture in Israel (PCATI)

Periodic Report: **DECEMBER 2009**

ACCOUNTABILITY DENIED

**THE ABSENCE OF INVESTIGATION AND PUNISHMENT
OF TORTURE IN ISRAEL**

"Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel"

The Public Committee Against Torture in Israel (PCATI) believes that torture and ill-treatment of any kind, under any circumstances, is incompatible with moral values, democratic standards, and the rule of law. PCATI was founded in 1990 in response to government policy that enabled systematic use of torture and ill-treatment during GSS interrogations.

In September 1999, following petitions filed by PCATI and other human rights organizations, the High Court of Justice ruled to prohibit some interrogation methods that had been employed at the time and which clearly constituted torture and ill treatment. This ruling was a significant advance, although it left an opening for the use of torture and ill-treatment in Israel. PCATI works towards the protection of detainees' and prisoners' rights, and the implementation of an absolute prohibition against torture.

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***"Accountability Denied: The Absence of Investigation and
Punishment of Torture in Israel"***

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“The Onion Defense:” Contradictions, Gaps, Personal Liability, and Systemic Immunity

Ishai Menuchin

My aim here is to introduce this report with some preliminary comments. I shall begin with a brief discussion of the relationships between the institutions of the state and its citizens, and of the contradiction between the declarative positions of the public authorities and the manner in which they operate in practice. I shall focus on instances involving GSS personnel and, in particular, on the notorious attempt to conceal the murder of the terrorists in the “Bus 300” affair, the fabricated “investigation,” and the report of the Landau Commission. I shall describe the layers of protection and immunity that currently coddle every GSS employee like the layers of an onion, regardless of actions they have committed or taken part in. One of these protective layers is the Officer in Charge of GSS Interrogee Complaints (the OCGIC, a function that examines complaints by GSS interrogees), along with the director of the Department of Special Tasks in the State Attorney’s Office and the Attorney General, who provides the rubber stamp for their decisions. These are the “heroes” of our report.

A

The relationship between the institutions of a state and its citizens are complex and convoluted. Israeli citizens, for example, must cope with numerous contradictions between the values and declarations of the state and its actual course of action, including the operations undertaken by its agents. “The law is a supreme interest of any society and a condition for its existence,” claimed Attorney General and Supreme Court Justice (ret.) Yitzhak Zamir (1990: 112),¹ reflecting a common declarative position presented by the establishment. Yet despite this, the authorities often pursue some of their operations in an unlawful manner. This is a common contradiction between theory and practice; between the declarations made by the agencies of the state regarding the need to act in accordance with the law and the unlawful manner in which they act in practice. Over the years the citizens of Israel have learned to live with this contradiction.

¹ Zamir Yitzhak, Feldman Avigdor (1990: 111-133), “The Boundary of Obedience in the Territories,” in: Menuchin Ishai (ed.), Democracy and Obedience, Siman Kriah Publishers.

On the one hand, the public is inundated by comments emphasizing the need to live under the “rule of law” and the “duty to respect the law,” without which anarchy will surely take hold. These are two of the key themes in the education system and in the public discourse that is promoted by the state and its authorities as the key message of citizenship. Citizens must act lawfully if they wish to be perceived and treated as normative members of society. When citizens fail to observe the law they are depicted as “enemies of the people,” particularly in democracies in which the citizens are the sovereign and the institutions of government present their actions as those of the people, by the people, and in the name of the people. The reverse side of this contradiction is that the state (including almost all its institutions) is the primary offender in Israel. Public authorities all too often seem to be indifferent to their own observance of the law when this interferes with a course of action they wish to take.²

The attitude of the state authorities seems to be that laws are for citizens, who must also pay the price for failure to observe laws. Yet the same authorities show remarkable tolerance toward senior civil servants and elected officials who often find “good reason” for failing to observe the law when it suits them. This phenomenon is particularly evident in the case of security issues and the violation of the human rights of “others” that are either concealed or justified to the public under the sacred explanation of national security needs.

Another common Israeli contradiction between theory and practice is the gulf between the pious declarations by senior figures that they accept responsibility, will be held to account, and are willing to pay the price this may entail and the systematic immunity enjoyed by state agents who violate the law. The clearest example of this is the history of whitewashing, concealment, and failure to account for legal violations relating to the rights of the Palestinians in the Occupied Territories. Reports and videos produced

² We should note that the failure on the part of the public authorities to observe the law or court instructions is not a new phenomenon. In July 1951, for example, the High Court of Justice (HCJ) ordered Israel to permit the evicted residents of Ikrit to return to their village; they are still waiting to do so. Fifty-six years later, in September 2007, the HCJ ordered the IDF to move the Separation Barrier in the village of Bil'in; the fence stands unchanged. Almost every year a report is published showing that many public authorities in Israel find creative ways to avoid paying the minimum wage as required by law. Many other examples could be quoted.

by human rights organizations such as Amnesty International, B'Tselem, Gisha, the Association for Civil Rights in Israel, the Public Committee against Torture in Israel, Adalah, PHR-Israel, and many other civil society organizations illuminate part of the problem, but the larger part of the black hole of occupation remains invisible even to us.

Sometimes, however, these contradictions and human rights violations are so apparent that they can no longer be concealed. In these cases creative public service attorneys work hard to provide a legal cover and to devise systemic new “legal” solutions in order to obscure or ostensibly to resolve the contradiction between values and laws, on the one hand, and the immoral and illegal policies and actions executed by the agents of the state, on the other.

B

Since the heroes of our report are the Officer in Charge of GSS Interrogee Complaints in the GSS (the OCGIC); the director of the Department of Special Tasks in the State Attorney’s Office; and the attorney-general, I shall attempt to describe in brief the specific socio-legal context in which these functions operate. I shall refrain from examining the early decades of the GSS’s work and shall begin with the “Bus 300” hijacking of 12 April 1984. Four Palestinians, members of the Popular Front for the Liberation of Palestine, hijacked a bus carrying forty-one passengers and forced the driver to travel toward Gaza. A few kilometers before the Gaza Strip, an IDF unit stopped the bus and the General Staff Reconnaissance Unit stormed it and freed the driver and passengers. One passenger was killed and seven wounded. The IDF Spokesperson reported that two of the hijackers were killed during the operation, while the other two were injured and died on their way to hospital. However, eyewitnesses reported that two of the terrorists were alive when taken off the bus. Alex Livak, a photographer with the Hadashot newspaper, photographed one of the hijackers who was supposedly “mortally wounded” walking away from the bus. It later emerged that the two men were executed on the orders of GSS Head Avraham Shalom. A GSS agent at the time,³ Ehud Yatom, stated in an interview that “on the

³ Yatom later became a Member of Knesset.

way I received an order from Avraham Shalom to kill the men, so I killed them” (Yedioth Ahronot: 1996).⁴

When the photographs were published and it became clear that the two Palestinian terrorists had been murdered, it was decided to establish a commission of inquiry – the Zorea Commission. A gag order was imposed on the details of the affair. Hadashot chose to report on the establishment of the Zorea Commission under the headline “The Hijacked Bus Affair: Commission of Inquiry Formed to Investigate How Terrorists Were Killed” (Hadashot: 27 April 1984). In response, the military censor closed the newspaper for four days.

The GSS employees who were questioned concerning the incident lied to the commission and influenced its work in a grossly unlawful manner. When details were revealed regarding the deception of the commission and the manner in which the GSS operated in the public arena a storm erupted. However, Shimon Peres, Yitzhak Rabin, and Yitzhak Shamir (the prime minister at the time of the murder) decided to protect the GSS staff from any form of punishment. They unseated Attorney General Yitzhak Zamir, who wanted to investigate the incident, and arranged a presidential pardon for all those involved in the murder and in the acts of perjury before the commission. State President Chaim Herzog pardoned GSS Head Avraham Shalom, Ehud Yatom, and two other GSS agents before they were brought to trial.

The case of Izzat Nafsu, an innocent IDF officer who was interrogated, tortured, and convicted of spying, led to widespread rumors concerning the actions and interrogation methods of GSS agents. In response, a state commission of inquiry was established in 1987, headed by former Supreme Court President Moshe Landau. The Landau Commission examined the working procedures in the GSS and after lengthy deliberation published a report (part of which remains classified to this day). The most famous decision by the commission prohibited torture, but permitted the GSS agents to use “a moderate measure of physical pressure.” The practical consequence of the permission to use “moderate physical pressure” was to break the taboo that prohibited torture as an interrogation technique. Once the taboo had been broken, the change was

⁴ Yatom later denied killing the men and making this statement in the interview.

not confined to “moderate physical pressure” but created a framework for the justification of torture and the beginning of a slippery slope freeing torturers of any liability for their actions.

The Landau Commission also found that for many years GSS staff had systematically lied to the courts and sought to change this situation. The commission’s report noted “the feeling on the part of the interrogators that their actions not only enjoyed the backing of their superiors but were also known to elements outside the service who gave their tacit consent. It was claimed before us that these elements include the prosecution system – both civilian and the military, the courts, and the political echelon [...] The GSS employees claimed that there was a kind of tacit and surreptitious agreement that the interrogator on the witness stand would deny using any physical pressure at all [...] A senior member of the Interrogations Unit who was involved in both the ‘Bus 300’ affair and the Nafsu affair claimed in his testimony before us that the heads of the GSS told the interrogators that the method of committing perjury in the courts was with the knowledge and agreement of the political echelon.”⁵ Although the commission reached the conclusion that senior prosecutors, judges, and prime ministers were unaware of the culture of lying in the GSS, it is difficult to imagine that they failed to notice such a complex and protracted pattern of systemic perjury. The commission itself did not take a harsh view of this culture of lying. No person was held to justice for institutionalizing and maintaining a systemic structure of deception and lying in the courts – a system that resulted in defendants being sent to jail.

In 1999, in **HCI 5100/94, Public Committee against Torture in Israel et al. v Government of Israel et al.**, the Supreme Court stated that there is a total prohibition on torture?? The court didn't mention torture if I remember correctly it just outlawed certain means of interrogation as the rest of the sentence says -Orah and prohibited certain interrogation techniques yet the Court failed to equate these techniques with torture. However, the prohibition applied only to a “reasonable interrogation;” in the case of the use of “physical means” in situations it referred to as a “ticking bomb,” the HCI provided a loophole enabling interrogators who use torture to evade the law. The

⁵ Report of the Commission of Inquiry Concerning the Interrogation Methods of the Israel Security Agency Concerning Hostile Terrorist Activity (1987: 28-29).

public perception was that the court had prohibited torture, but the large number of complaints received since the ruling show that GSS interrogators have continued to use torture in the interrogation rooms. They also continue to enjoy complete immunity thanks to a system that abuses and extends the loopholes created by the HCJ ruling.

C

Today the legal situation has changed. GSS interrogators again enjoy systemic legal immunity and do not require pardons before, during, or after trials. The immunity is granted without any reference to their actions. GSS employees are protected by layers of concealment, the withholding of information, and immunity shielding them like the layers of an onion.

The first layer of protection that accompanies the interrogator on a daily basis – and apparently one of the principles of operation that have guided the GSS in its operations since it began to work in the Occupied Territories – is non-identification. The interrogators remain nameless, and are referred to only by nicknames, accompanied in some cases by fictitious ranks: “Abu `Amr,” “Ariel,” “the Director,” “Herzl,” “the Colonel,” “Major Netzer,” “Mimon,” “Captain Avry,” “Captain Gur,” and so forth.⁶

The second layer of protection is the exemption from audio or visual documentation of the interrogation. The **Criminal Proceedings Law (Interrogation of Suspects), 2002**, which was intended to protect suspects against the violation of their rights during the course of police investigations in offenses carrying a penalty of ten years’ imprisonment or more, requires that the interrogations are to be videoed.⁷ The legislators were at pains to ensure from the outset that the GSS would not be obliged to meet the standards for recording interrogations. The recording obligation in the case of security-related interrogations by the police was supposed to come into force in 2008, but the Knesset amended the law and postponed the obligation to record police interrogations of individuals suspected of these offenses until 2012. The result

⁶ These are among the names that appear in Hoffstadter, Noam, Ticking Bombs – Testimonies of Torture Victims in Israel, Public Committee against Torture in Israel.

⁷ The law also requires audio or visual documentation in cases when it is not possible to document an interrogation in writing in the language in which it was conducted in the case of offenses carrying lesser penalties.

is that even the limited part of the interrogation of security suspects that is undertaken by the police – mainly the collection of confessions made in the GSS interrogation rooms – will not be recorded. Thus there will be no recorded evidence of the physical or psychological condition of the interrogee when making the confession to the police officers after coming out of the GSS interrogation. The exemption from the obligation to record these interrogations complicates investigations into complaints and conveys an inappropriate message to the interrogators.

The third layer of defense is the duplicitous system of recording of the course of the interrogation. It has emerged that two versions of the memorandum written after an interrogation are maintained. One version, for internal use, is revealed only to GSS staff and evidently details the means of interrogation (i.e. torture or other illegal means); the other is intended for the police and courts.⁸

The fourth layer of protection is the isolation of the interrogee from the outside world during the course of his interrogation. One way in which this is achieved is the blanket denial of meetings with an attorney during most of the period of interrogation, combined with military legislation permitting lengthy extensions of detention without anyone from the “outside world” having an opportunity to gain a direct impression of the detainee’s condition. GSS staff place the detainee in a legal situation that denies the opportunity to meet with any other human during the course of the interrogations, and prevent any access to attorneys or any other visitor who is not a GSS employee.⁹ This situation also prevents the possibility that any witness could testify to any injuries to the detainee or report the detainee’s complaints of torture and abuse. Most of the hundreds of testimonies from interrogees concerning torture and abuse received by PCATI relate to periods in which the detainees were prevented from meeting with their attorney.

⁸ See paras. 19, 42(5), and 113-120 in the application to punish for contempt of court submitted by Public Committee against Torture in Israel et al. in the framework of HCJ 5100/94. The application appears on PCATI’s website. It should be emphasized that the factual corroboration of this claim is based on classified protocols of hearings held in the military courts which cannot be revealed (Appendix G and H to the application).

⁹ Except for Red Cross personnel who usually are able to visit after 14 days.

The fifth layer of protection is the removal of medical documentation relating to the interrogation period from the complainants' medical files. When PCATI's attorneys ask to review the medical files of interrogees who report that they were subjected to torture or abuse, the material very rarely includes medical documents from the period of interrogation, despite the fact that it is obvious that they were examined during this period by medical personnel. This violates the obligation incumbent on the Israel Prison Service to hold and maintain medical records for the entire period of detention and to enable the patient or their representative to review this material. Sisyphean efforts by PCATI, PHR-Israel, and HaMoked – Center for the Defence of the Individual secured the following response from Dr. Alex Adler, who served until recently as the chief medical officer of the Israel Prison Service: “We do not forward to external bodies material unrelated to the IPS, such as IDF detention facilities, interrogation facilities, etc.”¹⁰

The sixth layer of protection, and the subject of this present report, is the façade of investigations into complaints of torture and abuse. As this report will make apparent, not a single one of the hundreds of complaints submitted in recent years has resulted in the opening of a criminal investigation. Complaints of torture by GSS interrogators submitted to the Attorney General are forwarded for inspection by the Officer in Charge of GSS Interrogee Complaints (OCGIC), a function filled by a GSS agent. Thus complaints of torture during GSS interrogations are examined by a GSS employee who does not constitute an independent or impartial investigator. The report prepared by the OCGIC on his examination is sent to the official in the State Attorney's Office responsible for this function. The official invariably approves the report, and this approval is invariably confirmed by the Attorney General. The GSS agents who have filled the function of OCGIC over the past decade have “examined and found” that every complaint submitted was incorrect, or that the interrogators' actions were justified. Accordingly, the Attorney General has granted the GSS agents who took part in these interrogations immunity even from criminal investigations in the complaints, under the guise of “the necessity defense.”

¹⁰ Letter dated 26 July 2009 from Dr. Alex Adler to Attorney Hava Matras of HaMoked.

Since 2001, over six hundred complaints have been submitted against GSS interrogators suspected of torturing interrogees. All these complaints have been forwarded to the OCGIC for examination.¹¹ The inspections, reports, and recommendations of the OCGIC, together with the support of his superiors in the Attorney General's Office for these "examinations," have resulted in a situation in which not a single criminal investigation has been opened by the Police Investigation Department. As will become apparent in this report, with the exception of four cases in which unsubstantiated comments were made concerning the opening of disciplinary proceedings, the Attorney General and the State Attorney's Office effectively grant immunity to interrogators. They do so by relying entirely on the findings of the OCGIC – a GSS agent – without applying any criticism to these findings. I should reiterate that the exemption from criminal liability is granted without a criminal investigation having been opened or pursued in even one of the complaints submitted.

The seventh layer of protection, institutionalized with the help of the Knesset, is the GSS Law of 2002. This law ensures, on the one hand, that the GSS agent "will not bear criminal or civil liability for any act or omission committed in good faith and in a reasonable manner in the framework of his function and for the purpose of filling the said function."¹² On the other hand, and alongside this complete immunity, the law also ensures that all the operating methods and names of GSS interrogators will remain confidential. This legal confidentiality prevents any possibility for the interrogee or their representative to know who conducted the interrogation; who authorized it; and whether the actions taken against the interrogee were in accordance with the working procedures or were authorized.

As noted, it is impossible to identify the interrogator; to secure full written documentation, not to mention a recording of the interrogation, or even of the making of the confession to the police following the GSS interrogation; to enable the interrogee to meet and consult with an attorney during the interrogation period; to obtain full medical files; to ensure that the interrogee's representatives or the court

¹¹ For example, see the concluding comments by PCATI in **The Implementation by Israel of the UN Charter against Torture and Cruel, Inhuman, or Degrading Treatment and Punishment** (2009), Public Committee against Torture in Israel and the World Organization Against Torture (OMCT), p. 80.

¹² Article 11 of the GSS Law, 2002.

have access to a full and precise memorandum describing the course of interrogation; or to ensure that the complaint is examined in an independent and impartial manner. All this is compounded by the full immunity granted to the GSS in accordance with the GSS Law. The reader may now appreciate the privileged position of the GSS interrogators at the core of these onion layers of protection, secure from any criminal investigation or prosecution in Israel.

As a further precautionary step, and in order to prevent the infiltration of the courts by individuals liable to damage Israel's security, the Committee for the Selection of Judges decided that "the GSS, rather than the Security Division in the Court Guard, will undertake security clearance for candidates for the position of judge [...] The GSS will not have a 'right of veto' concerning the candidate for the position of judge; their recommendations will be brought before the committee for discussion [...] During the period of office of the previous Minister of Justice, Daniel Friedman, the GSS suggested that candidates for the position of judge be moved to the 'top secret' classification, entailing a more comprehensive questioning process." (**Ha'aretz**: 5 July 2009).

The era when those suspected of war crimes and crimes against humanity enjoyed total immunity is nearing its end. An era is beginning when torturers may lose their systemic and complete immunity inside Israel and outside Israel's borders.

This report is dedicated to the Attorneys Generals and the officials in their offices responsible for the OCGIC – Malchiel Ballas, Naomi Granot, Dudi Zachariah, Menny Mazuz, Rachel Mattar, Eliakim Rubinstein, and Talia Sasson – who blocked any criminal investigation into the hundreds of complaints by GSS interrogees who reported that they were abused and tortured by GSS interrogators after the ruling in H CJ 5100/94, Public Committee against Torture in Israel et al. v the Government of Israel et al.

Introduction

This report focuses on one of the many layers of immunity that protect the personnel of the General Security Service (GSS) from the authority of the law. The function of this layer is to ensure that complaints of torture and abuse in the GSS interrogation rooms will never result in criminal investigation, indictment, or a legal hearing. The State Attorney's Office and the Attorney General are responsible for this mechanism: it is their handling of the complaints that permits torture to continue under a systemic legal cloak and that enables the GSS interrogators to enjoy unrestricted protection.

Since 2001, over 600 complaints of torture have been submitted to the law enforcement agencies in Israel by the victims of torture. Not a single one of these complaints has developed into a criminal investigation – the first step in the process of indictment, conviction, and the meting out of justice.

This fact, which more than any other illustrates the a priori authorization given to the GSS interrogators who act behind the closed doors of the interrogation rooms, will accompany this entire report. We shall detail and explain the absence of any response – legal or other – to the victims of torture and ill treatment. As we shall, and despite the state's declarations, torture is an institutionalized method of interrogation in Israel, enjoying the full backing of the legal system.

This report presents a comprehensive analysis of the current legal situation concerning torture and abuse during interrogations in Israel, and concerning the relevant mechanisms of inspection and supervision. To illustrate our analysis we include figures from a study undertaken by PCATI relating to the processing of all the complaints we submitted during the period 2004 – 2009.

Section One examines the legal framework that “regulates” the use of torture and abuse by GSS interrogators as interrogation methods. This will include detailed discussion of the “Torture HCJ Petition.” The ruling in this petition was granted a decade ago; despite its declarative importance, we shall see that the ruling has facilitated the practice of torture in Israel. As we shall see, the Attorney General was

quick to take advantage of the terms of the ruling in order to draft the guidelines that now shape the procedures for interrogation – procedures that we believe, contradict the HCJ ruling and constitute a gross violation of the absolute prohibition of torture and abuse in international law.

Section Two presents the current mechanisms used in Israel to process complaints of torture, highlighting the defects of these mechanisms. In order to illuminate the social vacuum within which the mechanism for processing complaints operates, we shall first present a history of the culture of lying in the GSS. The repeated exposure of the failings and lies of the GSS led to recognition of the need to establish mechanisms for inspection. The manner in which these mechanisms were established, particularly by means of the amendments to the Police Ordinance in the early 1990s, will be discussed in detail. We shall then present the main body of our study, including a statistical breakdown and qualitative descriptions of all the responses to complaints received by PCATI in the above-mentioned period. Lastly, we shall summarize the structural and theoretical problems reflected in the statistics, leading to the inevitable conclusion that complaints of torture result neither in criminal investigation nor in any form of meaningful examination.

Section Three examines in depth the provisions of international law concerning the obligation to investigate complaints of torture. It is all too apparent that the State of Israel has not consistently respected its obligations under customary international law and in accordance with the Convention against Torture and other conventions to which it is a signatory. These obligations include the requirement for the substantive and effective investigation of any complaint of torture or abuse. We shall then review the determinations of the UN Committee against Torture relating to Israel, before considering the subject of the personal liability of those involved in torture.

Section Four presents the conclusions and recommendations of our report. Our principal recommendation is the establishment of a genuine and effective mechanism for investigating cases of torture. This mechanism will open a criminal investigation into any complaint of torture or abuse submitted against GSS interrogators.

Taken as a whole, the report presents a depressing picture concerning the lack of processing of complaints of torture in Israel, contrary to the state's public declarations and international undertakings. As noted above, and as we shall see in the report, the failure to respond to these complaints exists within a broader framework of support and backing by the legal system, and in a cultural and legal vacuum that protects GSS interrogators even if they commit a grave criminal offense.

The sixth "onion layer" addressed by this report is thus a particularly thick and complex one. In itself it includes several strata, and the task of unraveling these is difficult and convoluted. We hope that this report will help at least a little in this process of unraveling and in unraveling the other layers of protection that facilitate torture. Our ultimate hope is that this will lead to a change of the current policy that prevents the investigation and penalization of cases of torture in Israel.

Section One: Torture in Israeli Law – A Barrier of Loopholes

This section examines the current legal approach of the law enforcement agencies in Israel regarding torture and abuse in GSS interrogations. This approach has its origins in the ruling established by the Supreme Court justices in the ruling in **HCJ 5100/94, Public Committee against Torture in Israel et al. v the Government of Israel et al.** (hereinafter – “the HCJ Torture Petition.”)¹³ We will analyze the report and present the inherent but unstated contradiction on which it is based – an absolute prohibition of torture, without exceptions, alongside recognition of the possibility to apply the necessity defense retroactively to those who commit torture. We shall then examine the necessity defense in greater detail as the tool that has served to permit the use of torture in interrogations. This section will illuminate the manner in which the HCJ Torture Petition paved the way for the approval of torture, and the way the Attorney General and the law enforcement agencies have chosen to follow and even to extend this approval.

A. The HCJ Torture Petition – A Double-Edged Sword

Background

The prohibition of torture in international law is both absolute – it cannot be abrogated even in a time of emergency – and customary – it is binding on all states, even if they have not signed an explicit agreement including the prohibition.¹⁴ The State of Israel has also signed and ratified the Convention against Torture.¹⁵ Despite this, there is currently no Israeli law that explicitly prohibits torture.¹⁶ The Israeli penal code includes several provisions relating to different aspects of torture, such as

¹³ HCJ 5100/94 Public Committee against Torture in Israel v Government of Israel, *Piskei Din* 53(4) 817.

¹⁴ Orna Ben Naftali and Yuval Shani, International Law between War and Peace, Ramot – Tel Aviv University, 2006, p. 282.

¹⁵ The Convention against Torture and Cruel, Inhuman and Degrading Treatment and Punishment, 10 December 1984. See PCATI’s website: www.stoptorture.org.il.

¹⁶ The UN Committee against Torture explicitly addressed this matter in its conclusions concerning Israel in a report published in May 2009. See the report of PCATI and OMCT: The Implementation by Israel of the UN Charter against Torture and Cruel, Inhuman, or Degrading Treatment and Punishment (2009), Public Committee against Torture in Israel and the World Organization Against Torture (OMCT), p. 80.

assault, abuse of defenseless persons, and the explicit prohibition of the use of force or threats by a public employee toward interrogees.¹⁷ Court rulings have also recognized the right not to be tortured as an absolute right,¹⁸ and in the HCJ Torture Petition the court interpreted the Basic Law: Human Dignity and Liberty as embodying the prohibition of the interrogation methods that formed the subject of the petition.¹⁹

Prior to the HCJ Torture Petition, the government permitted the GSS to use methods of torture and abuse referred to as “psychological pressure” and “a moderate degree of physical pressure” in a wide range of circumstances. This permission was granted on the basis of the recommendations of the Landau Commission,²⁰ which established that GSS interrogators are authorized to commit such acts on the basis of the necessity defense clause in the penal code. This clause, which we shall discuss in depth below, grants protection to a defendant in a criminal trial and established that a person “shall not be convicted of criminal liability for an act that was required in an immediate manner in order to save his life, liberty, person, or property or those of another from the danger of grave injury accruing from a given situation at the time of the act, when he had no course of action other than to commit this act.”²¹

Ruling

After deliberating on the issue for many months (and even years, in the case of some of the petitions), nine Supreme Court justices, headed by President Barak, convened in an expanded panel to hear a number of principle and individual petitions submitted by Public Committee against Torture in Israel and other human rights organizations

¹⁷ Penal Code, 5737-1977, Articles: 192, 277, 280, 322, 333, 334, 335, 341, 368B, 368C, 379, 380, 382, 427, 428.

¹⁸ Inter alia, see HCJ 7195/08 Ashraf Abu Rahma v Brig.-Gen. Avichai Mandelblit, Judge Advocate General (unpublished), granted 1 July 2009, para. 42 of the ruling by Justice Procaccia; and the HCJ Torture Petition, note 13 above. Although these rulings establish that the prohibition of torture is absolute, as we shall see below in many respects this determination is purely declarative.

¹⁹ HCJ Torture Petition, note 13 above, paras. 22-23 of President Barak’s ruling.

²⁰ Report of the Commission of Inquiry Concerning the Methods of Investigation of the Israel Security Agency Regarding Hostile Terrorist Activity (Jerusalem, October 1987), section 4.7. A detailed explanation of the commission’s conclusions and the circumstances that led to its formation will be presented below in Section Two of this report.

²¹ Penal Code, 5737-1977, Article 34K.

over the course of 1990s. The petitions against the State of Israel and the GSS asked the court to prohibit the use by GSS interrogators of interrogations methods and means some of which are tantamount to torture and are therefore absolutely prohibited in accordance with customary international law, without any exceptions. On 6 September 1999 the HCJ published its ruling.

The ruling, written by Supreme Court President Aharon Barak, constitutes an important milestone in the struggle against torture insofar as it recognizes the absolute prohibition of torture in international law:

“A reasonable interrogation is an interrogation that is free of torture, free of cruel, inhuman treatment of the interrogee, and free of his degrading treatment. It is prohibited to use ‘brutal and inhuman’ means during the interrogation... Human dignity also means the dignity of the person subject to interrogation... This conclusion is consistent with international covenant law – to which Israel is a party – prohibiting the use of torture, cruel and inhuman treatment, and degrading treatment... **These prohibitions are ‘absolute.’ They have no ‘exceptions’ and no balances.**”²²

Yet the court speaks with two voices. Alongside this absolute prohibition as presented in the above section, the ruling adds “escape hatches” that effectively enable the approval of torture. Thus the court has the best of both worlds: on the one hand, it establishes that torture and abuse are absolutely prohibited. On the other, it adds a series of determinations and assumptions designed to soften this prohibition and to empty its absolute status of any practical content.

Firstly, the court establishes that the absolute prohibition of torture and abuse is consistent with international **covenant** law, thus ignoring the fact that the prohibition has long enjoyed **customary** status – this despite the fact that no-one disputes that the articles concerning torture and abuse in the relevant conventions belong to **customary** law.²³ The fact that a right forms part of customary law may influence its status and implementation; one reason for this is that in the Israeli legal system it is not necessary to absorb a customary right by means of special legislation: it is absorbed

²² HCJ Torture Petition, note 13 above, para. 27 of the ruling by President Barak.

²³ Shani and Ben Naftali, note 13 above, p. 282.

automatically. This determination by President Barak grants the prohibition of torture in Israel in inferior status relative to that it enjoys in international law.

Secondly, President Barak makes a number of assumptions regarding matters on which, he explains, he is not required to establish a position. He assumes, for example, that the necessity defense also applies to a person acting on behalf of the government. He further assumes that this defense may be present in “ticking bomb” situations, and that the requirement for immediacy in the necessity defense relates to the immediacy of the act and not the immediacy of the danger. In other words, immediacy is also present if the information held by the interrogee relates to an event that will occur only in several days or weeks, provided that the realization of this danger is certain and that there is no possibility to prevent its actualization in any other manner.²⁴ The court did not determine a fixed position on these assumptions, and even noted the difficulties they entail; but they have subsequently been adopted as firm determinations by the law enforcement system.²⁵

Thirdly, and most importantly, President Barak establishes that if a GSS interrogator who employed physical interrogation means in order to save human life is brought to a criminal trial he may, in the appropriate circumstances, enjoy the “necessity defense.”²⁶ As we shall see below, this determination has far-reaching implications, since the necessity defense is the tool on which the legal perception permitting torture in Israel is based.

It is true that the court places obstacles in the path of the necessity defense on the course to permitting torture. The court establishes that **the assumed presence of the necessity defense should not imply the existence of a general administrative authority to make assumptions regarding the use of physical means during the**

²⁴ HCJ Torture Petition, note 13 above, paras. 34 and 35 of President Barak’s ruling.

²⁵ The guidelines written subsequently by then Attorney-General Eliakim Rubinstein apply Barak’s “assumptions” as if they were legally-binding determinations. The guidelines permit the application of the necessity defense to GSS interrogators who have committed torture without discussing the difficulties raised by President Barak himself concerning these assumptions. GSS Interrogations and the Defense of Need, A Framework for the Discretion of the Attorney General (Following the HCJ Ruling), letter no. 99-04-12582 dated 28 October 1999.

²⁶ HCJ Torture Petition, note 13 above, para. 35 of President Barak’s ruling.

interrogation by GSS interrogators. This is due to the character of the restriction of “need,” which relates to “the individual determination of a person responding to a given factual situation; this is an ad hoc action by way of a response to an event; it is the result of improvisation in the face of an unexpected occurrence.”²⁷ The ruling explicitly notes that “the government or the heads of the General Security Service do not have the authority to establish guidelines, rules, and permissions concerning the use of physical means during the interrogation of persons suspected of hostile terrorist activities that injure these persons’ liberty beyond the guidelines and rules required by the very concept of interrogation.”²⁸ Moreover: “the fact that a particular act does not constitute a criminal offense (due to the restriction of “need”) does not, in itself, authorize the administration to commit that act and thereby to violate human rights.”²⁹

However, these obstacles are circumvented by the court itself. The court immediately goes on to describe the authorities of the Attorney General. The grave determination is made that **“the Attorney General may guide himself concerning the circumstances in which interrogators who are alleged to have acted in an individual case from a sense of ‘need’ are not to be prosecuted.”**³⁰ In other words, the ruling enables the Attorney General to establish guidelines concerning the exemption from prosecution of interrogations who employ torture. **These guidelines effectively serve as a priori authorization – and not merely the post factum permission – to use torture in cases defined as a “ticking bomb.”**

President Barak ends his ruling with the following comments that accurately epitomize the problematic situation the ruling creates:

“The restriction of ‘need’ in the penal code cannot serve as the source of authority to employ these interrogation methods and there is no basis for the existence of guidelines for GSS interrogators enabling the use of such interrogation methods. At the same time, our decision does not negate the possibility that the restriction of ‘need’ will apply to the GSS interrogator, whether in the framework of the discretion of the Attorney General in deciding whether to prosecute or, if he is subject

²⁷ Ibid., *ibid.*

²⁸ Ibid., para. 38 of President Barak’s ruling.

²⁹ Ibid., para. 36 of President Barak’s ruling.

³⁰ Ibid., para. 38 of President Barak’s ruling.

to criminal prosecution, in the framework of the discretion of the court.”³¹

It would seem that the court did not wish to establish a rule explicitly contradicting the absolute prohibition of torture in international law. The court instead preferred to “have its cake and eat it:” to declare an absolute prohibition of torture, yet to enable the permission of torture, at least retrospectively. In so doing the court made a travesty of the absolute prohibition of torture and, as we shall see below, paved the way for the de facto and a priori authorization of torture.³²

B. The Defense of Necessity

What, then, is the necessity defense that serves to enable torture to be permitted in Israel through the back door?

Every criminal law system in the world includes various forms of defenses. These are intended to enable prosecutors and judges to act flexibly in cases in which no-one denies that an offense was committed according to the formal text of the law, but in which reasons are present to refrain from prosecuting or convicting those who committed the acts or, at least, to alleviate their penalty. These defenses may be divided into two principal types: those that apply when an action that in other circumstances would have been considered a criminal offense is perceived as justified; and those that apply in the case of an action or behavior that is undesirable, but when criminal liability is not to be imposed on the person that committed the action out of consideration for their condition (particularly their psychological condition). Thus a person who commits an offense in a moment of insanity will enjoy protection, though this protection naturally does not constitute support for the act they committed. It is worth noting that the Israeli penal code does not distinguish

³¹ Ibid., para. 40 of President Barak’s ruling.

³² In this context it is interesting to note the article by Dudi Zachariah, who after writing the article served as the director of the Department of Special Tasks in the State Attorney’s Office. In his article Zachariah analyzes the ruling and argues that it uses three different voices to address distinct audiences. Although these messages are contradictory they manage to coexist in the same text. Dudi Zachariah, “Torture Chambers and Acoustic Walls,” *Politika* 10, 61-86.

unequivocally and clearly between these two types, though defenses of both type may be found.³³

During the discussion in the HCJ, the state argued that the necessity defense in the penal code is a defense of justification – i.e. the interrogation methods employed are **morally justified in the circumstances of the matter**.³⁴ The Landau Commission, which proposes the necessity defense as the legal framework permitting GSS interrogators to use physical and psychological pressure without facing prosecution, also regarded this concept as a defense of justification, and even justified the use of such pressure in moral terms.³⁵

The HCJ does not provide a clear answer regarding the proper interpretation of the “necessity defense.” On the one hand, the court established, as noted above and contrary to the Landau Commission, that “the restriction of ‘need’ cannot imply a general authority to establish guidelines regarding the use of physical means during interrogations by the GSS interrogators;” in other words – the interrogation methods that are the subject of the petition do not constitute a permitted and lawful act, since the necessity defense applies to individuals, and not to the authorities; and since it applies only retroactively, and not a priori.³⁶ On the other hand, by accepting the possibility that the necessity defense will apply to interrogators who used torture in a “ticking bomb” situation, the HCJ effectively accepted the moral and legal arguments **justifying** torture in this situation.

The question of the manner in which the HCJ Torture Petition interprets the necessity defense is largely immaterial, however. In our opinion, and as we shall discuss in depth in Section Three of this report, this is also the consistent position of

³³ The fact that the perpetrator was a minor or was intoxicated may, in certain circumstances, create a defense of “exemption,” i.e. one that takes into consideration the condition of the perpetrator. By contrast, self-defense is a classic example of a defense of “justification.”

³⁴ HCJ Torture Petition, note 13 above, paras. 7-13; Complementary Notification on Behalf of the Respondents, 8 June 1999, paras. 3-12.

³⁵ The commission claimed that “everything depends on the weighing of evils against each other” – i.e. the evil of the damage that will be caused by the terrorist attack against the damage caused by breaking the law regarding assault, and so forth, in the case of the use of physical and psychological pressure against interrogees. See the Landau Report, para. 3.16.

³⁶ HCJ Torture Petition, note 13 above, para. 36.

international law. The necessity defense cannot apply to torture and abuse by interrogators during an interrogation, even in its most restricted sense.

Firstly, the rationale behind the necessity defense is that a person had **no other alternative** but to act in the manner in which they acted due to immediate danger to themselves or to another person. This situation is not appropriate to the context of an interrogation in which the disparity of forces makes it difficult for such a “lack of alternative” to apply. An interrogator has access to infinite means in an interrogation to extract the desired information and cannot tell which means will be the most effective in so doing.

Secondly, it is a condition of the necessity defense that the unlawful act was committed in a situation of **certainty** that it would prevent a disaster. This certainty does not apply in the interrogation situation, both because of the nature of the intelligence held by the interrogator, which is not usually certain, and because of the uncertainty that the torture will secure information that could not otherwise be secured.³⁷

Moreover, abuse or torture committed by persons in an official capacity against others in their custody cannot enjoy the protection of the “necessity defense,” since in a state of custody the interrogee and the developments in the interrogation are under the **complete control** of the interrogator. The necessity defense relates to an unpredictable situation in which unexpected circumstances and the loss of control over circumstances lead to exceptionally serious, immediate, and surprising situations regarding which it is impossible to establish due rules of behavior in advance. The occurrence of torture in an interrogation room under the supervision and full control of the interrogators prevents the justification of applying the necessity defense to such situations.

Thus the inability to predict complex situations in advance is one of the central rationales behind the “necessity defense.” Accordingly, even if we accept the

³⁷ This point was made by the CIA Inspector General in a report from 2004 on the subject of interrogation methods and detentions of persons suspected of terror activity, pp. 85-91. The report is available at: http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf.

possibility that this defense might apply to the case of torture – a possibility that we have shown to be remote – **the applicability of the defense must be determined solely in court, in the context of a criminal proceeding and, of course, post factum and not a priori.**

C. The Expansion of the Defense of Necessity

“Everything began with good intentions and with narrow and restricted application to isolated cases which in philosophical and moral and, perhaps, legal terms... may be justified. After the permission had been given regarding such cases, however, the permission swelled to appalling dimensions. Why? Not because people are evil, but because the need is enormous, the pressure to prevent terror attacks is enormous, and hence the ability to control the system, even with regard to good people, is very limited...”³⁸

The Attorney General was not tardy in interpreting the HCJ Torture Petition. According to this interpretation, the necessity defense permits the a priori formulation of guidelines concerning the criminal prosecution of interrogators who use torture. These guidelines, as we shall now see, effectively grant a prior permission to interrogators to use torture and abuse in ticking bomb cases.³⁹

Very soon after the publication of the ruling in the HCJ Torture Petition, then Attorney General Eliakim Rubinstein, together with Nava Ben Or (then director of the Criminal Department in the State Attorney’s Office), published two fundamental documents: “GSS Interrogations and the Defense of Necessity – A Framework for the Discretion of the Attorney-General,” and “Circumstances in Which GSS Interrogators Who Acted out of a Sense of ‘Need’ Are Not to be Prosecuted.”

The Attorney General’s document detailed the range of considerations to be taken into account when deciding whether the necessity defense applies to a particular case. The

³⁸ Excerpt from comments by Dan Meridor, from the Third Session: The Division between Democracy and the War on Terror: Legal Questions, Dan Meridor, chair, Chaim Fez, ed., The Battle of the Twenty-First Century: Democracy Fighting Terror, Discussion Forum, Israel Democracy Institute, 5767-2006, p. 114.

³⁹ Guidelines of the Attorney General, note 26 above. The guidelines are attached as an appendix to this report.

document recommends that senior echelons should be involved in this decision.⁴⁰ This guideline by the Attorney General ignores the determination in the ruling that **the GSS must not hold explicit guidelines permitting torture and abuse in advance**, so that their use will be the product not of an orderly administrative decision but rather of an **individual and spontaneous** decision. **The mere presence of information to the effect that the torture of a given individual took place with the approval of any managerial echelon in the GSS testifies that the interrogator had time to undertake consultation; this should negate the possibility of applying the necessity defense to the case**, which should therefore be forwarded for criminal investigation.

The guideline also explicitly establishes that in cases in which an interrogator employed a means of interrogation required **immediately** in order to secure **vital information to prevent tangible danger of grave injury** to state security or to human life, liberty, and integrity, and when **there is no other reasonable means** in the circumstances of the matter to prevent this injury, the Attorney General will consider refraining from instigating criminal proceedings. The Attorney General's decision in any case is to be made through a detailed examination of all the above components.⁴¹ In practice, however, it is almost never certain that a given means of interrogation will indeed prevent the danger. Most important, **torture and abuse in an interrogation are absolutely prohibited and, accordingly, they can never – whatever the circumstances – be considered reasonable means of interrogation.**

In the guideline the Attorney General further clarifies that since the State of Israel is involved in a constant struggle for its existence and security, and since the authority that bears the burden of combating hostile terrorist operations in the GSS, whose interrogators act lawfully on behalf of the State of Israel, they are entitled to a proper degree of legal certainty and to proper defense when “performing their work.”⁴² It is unclear why the Attorney General felt that the guidelines must provide a GSS interrogator with a greater degree of legal certainty than that enjoyed by a police or

⁴⁰ Ibid., section G 2(B)(4).

⁴¹ Guidelines of the Attorney General, note 26 above, section 7(1).

⁴² Ibid., section D. See also: Edna Arbel, “The State Attorney’s Office Coping with Times of Crisis,” Mishpat Vetzava 16 (5762) 37 41.

military police interrogator, in whose cases there is no a priori specification of circumstances in which their necessity defense will be recognized.⁴³

At the end of this guideline, and as if by way of a parenthetical aside, the Attorney General added the restriction that “the above shall not apply to means of interrogation the use of which constitutes ‘torture’ as defined in the Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment.”⁴⁴ In other words, these guidelines apply only to those means of interrogation that are not tantamount to torture. Following the approach of President Barak, the Attorney General does not go the pains of specifying which acts of torture he is excluding from his rules. Perhaps this explains why the guidelines have not prevented him or his successors from applying the necessity defense to overt instances of torture.⁴⁵ Moreover, as we shall discuss in detail in Section Three of this report, the prohibition against abuse and the prohibition against torture in both international law and Israeli case law⁴⁶ are absolute.

The true gravity of these documents, however, lies in the fact that they effectively constitute an outline of the legal certainty that grants a de facto guarantee to a GSS interrogator who tortures his interrogees that he will enjoy **exemption from criminal liability**. This list of criteria exposes a mechanism for the approval and supervision by senior GSS officials of the decision made by the torturing interrogator – a decision that is supposed to be autonomous, on a real-time basis, dependent on the specific incident, and pinpointed in its nature.

We should emphasize that the Attorney General did not confine himself to defining an internal and self-directed guideline regarding the circumstances in which

⁴³ HCJ Torture Petition, note 13 above, para. 20 of President Barak’s ruling. According to the ruling the investigative powers of the GSS are identical to those of the other investigative authorities. For further discussion of this aspect, see the application for ruling of contempt of court submitted by PCATI, the Association for Civil Rights in Israel, and HaMoked – The Center for the Defence of the Individual on 2 November 2008 on the basis of the liability for the policy of granting a priori authorization for the use of torture in grave violation of the HCJ ruling: Sundry HCJ Applications 5100/94 Public Committee against Torture in Israel v Prime Minister of Israel Mr. Ehud Olmert, para. 22 of the application.

⁴⁴ Guidelines of the Attorney General, note 26 above, section G(1).

⁴⁵ For example, see: Ticking Bombs Report, note 6 above.

⁴⁶ Abu Rahma HCJ Petition, note 18 above.

interrogators who claim to have acted out of a sense of “need” are not to be prosecuted – a guideline that ostensibly received explicit permission from the ruling in the HCJ Torture Petition.⁴⁷ He deviated from the permission granted by including in the same guideline a recommendation regarding the maintenance of an internal system of permits within the GSS for the practical application of torture. As noted, such a system is expressly prohibited and contrary to the content of the HCJ Torture Petition. The Attorney General writes: “it is desirable that the GSS have internal guidelines, inter alia regarding the system of consultations and authorizations within the organization required for this purpose.”⁴⁸

Thus the distance from the “legal certainty” the Attorney General sought to secure in drafting his guidelines to the presence of an explicit guideline (the **Need Interrogation Procedure**) determining the application of the necessity defense to GSS interrogators who tortured their interrogees – a guideline that constitutes a gross violation of the HCJ Torture Petition – is relatively short.

Sundry evidence indeed shows that a Need Interrogation Procedure indeed exists in the GSS, although it is confidential and not accessible to the public. For example, the reference by Judge Yoram Noam in 2005 to the Need Interrogation Procedure – which mentions only the chilling name of the procedure and not its content – suggests that the restrictive definition included of the necessity defense offered in the ruling is no longer relevant:

“... From the first moment that the above was brought for interrogation on 23 September 2004, Dotan explained to Ahmad that they already knew that he was head of the group that had caused the attack at Café Hillel... Despite this, Ahmad persisted in his denials. **Accordingly, the ‘need interrogation’ procedure was activated against him**, after which the above began to cooperate with his interrogators. It should be noted that during Dotan’s testimony in the court he was not questioned by counsel for the defendant concerning the need to activate this ‘need interrogation’ which led in a short time to the exposure of his involvement and that of his other partners in this affair. However, counsel for the defendant questioned Dotan regarding

⁴⁷ HCJ Torture Petition, note 13 above, para. 38 of President Barak’s ruling.

⁴⁸ Guidelines of the Attorney General, note 26 above, section G (2)(B)(4).

the nature of the exceptional means used against Ahmad during the course of this 'need interrogation.'”⁴⁹

The existence of such a Need Interrogation Procedure, whatever its actual content, is completely inconsistent with the ruling in the HCJ Torture Petition and its requirement that the applicability of the necessity defense must not be based on any procedures and guidelines provided in advance, but solely on the outcome of momentary and individual “improvisation.”⁵⁰

In this spirit, a GSS operator admitted to journalist Nir Hasson from the newspaper *Ha'aretz* in 2006 that “the authorization to use force in interrogations is given at least at the rank of head of the interrogation team, and sometimes comes directly from the head of the GSS.” A few days later the GSS asked to clarify that “**the above-mentioned authorization may be given only by the head of the GSS.**”⁵¹ Thus in stark contradiction to the HCJ ruling, the GSS now openly admits that **a priori authorization or permission** is now granted for the use of torture.⁵²

Conclusion

In this section we have reviewed the legal structure that directly or indirectly regulates the presence of torture in Israel. The double-edged and incoherent nature of the guidelines established in the HCJ Torture Petition left a crack that was swiftly widened by the Attorney General. The result is a legal model that permits torture and protects GSS interrogators from any meaningful legal or public examination. As we

⁴⁹ TA (JEr.) 775/04 State of Israel v `Amru `Abd al-`Aziz (decision dated 29 December 2005), para. 5 of the ruling of Judge Y. Noam.

⁵⁰ HCJ Torture Petition, note 13 above, para. 36 of President Barak's ruling.

⁵¹ Nir Hasson, Complaints: GSS Interrogators Rip Interrogees' Beards and Sodomize Them, *Ha'aretz*, 8 November 2006. On 10 November 2006 *Ha'aretz* printed the following clarification relating to the above-mentioned article: “Further to the article ‘Complaints: GSS Interrogators Rip Interrogees' Beards and Sodomize Them’ (*Ha'aretz*, day before yesterday), it is clarified that the authorization for the use of special means in interrogations may be given solely by the head of the GSS.”

⁵² We should note that in the application in accordance with the Contempt of Court Ordinance (Sundry HCJ Applications 5100/94, Public Committee against Torture in Israel v Government of Israel) the state claimed that “the procedure that existed previously was nullified immediately on the day the ruling was granted,” and that “this procedure was not reinstated, and neither was any other similar procedure issued” (para. 14 of the state's response). The court rejected the application without examining the substance of the claims; hence the point of disagreement remains intact.

shall see in the following parts, the foundations laid in the HCJ Torture Petition and subsequently in the Attorney General's guidelines are those that underpin the defective processing of complaints of torture. The guidelines and the processing both reflect the perception that GSS interrogators must be protected from the long arm of the law.

Section Two: Torture, Lies, and Absence of Investigation

This section discusses in depth the examination of complaints by GSS interrogees. We begin with a brief review of the sequence of events that led to public recognition of the need to examine the actions of GSS interrogators in general and the means of interrogation they apply in particular. We will then examine the various channels of examination, including the Officer in Charge of GSS Interrogee Complaints (OCGIC), which currently serves as the main body responsible for processing complaints by interrogees, together with the responsible official in the State Attorney's Office, and with the blanket support of the Attorney General. We will discuss the circumstances surrounding the establishment of the function of the OCGIC, analyze its powers, and present statistics describing its operations. We will also analyze the responses of the responsible official to complaints submitted by PCATI between January 2004 and September 2009, illustrating the structural and substantive problems these complaints raise. Lastly, we will examine the overall situation: not only does Israel not currently have any mechanism providing an appropriate response to interrogees' complaints, but the mechanism presently responsible for examining these complaints prevents the opening of investigations, prosecution, and penalization of those involved in torture and improper methods of interrogation.

A. Lies and Promises

1. Beyond the law: The culture of lying and immunity from punishment in the GSS

The history of the GSS is riddled with shadowy affairs that cast an indelible blemish on the GSS's behavior toward interrogees and toward the authorities of state. One after another, these affairs have revealed an organizational culture based on the systemic use of torture and abuse, false reports, the elimination of evidence, and failure to accept responsibility. As we shall see, the organizational culture that permits the torture and abuse of detainees is combined with a culture of concealing the truth, avoiding investigation, and preventing punishment of those responsible. Those

responsible for all these failings receive the pardon – whether formal or otherwise – of the law enforcement authorities.

Any comprehensive review of the failings of the GSS and the culture of lying it has embraced must begin with the “Bus 300” affair. This affair constituted a watershed in terms of the Israeli public consciousness and led to a shift in the public perception of the GSS.⁵³ During the course of this affair (the details of which appear in the Introduction to this report), Palestinians hijacked a bus and held its passengers hostage. In the rescue operation two of the hijackers were captured and executed by the GSS personnel, including Ehud Yatom, head of the GSS Operations Division.

Following the exposure of the details of the incident and the demand by Attorney General Yitzhak Zamir to investigate the affair, Defense Minister Moshe Arens appointed the Zorea Commission and charged it with investigating the circumstances surrounding the death of the two hijackers. The fact of the appointment of the commission was kept secret. Yatom and his staff who testified before the commission concealed their part in the circumstances leading to the killing of the kidnappers, committing perjury before the commission with the knowledge of the head of the GSS and its legal advisor. With the assistance of Yossi Ginossar, who served as a member of the commission of inquiry but collaborated with the GSS personnel and leaked information from the hearings, Yatom and his staff were able to disrupt the course of the investigation.

The report submitted by the commission established that blows to the head killed the two hijackers, but **no-one was held responsible for their death**. On the committee’s recommendation disciplinary action was taken against Ehud Yatom after stating that he slapped one of the hijackers. Disciplinary action was also taken against Brig.-Gen. Yitzhak Mordechai on the basis of Yatom’s testimony. **These disciplinary proceedings ended in the acquittal of the defendants.**

⁵³ Yechiel Guttman, A Shake-Up in the GSS – The Attorney General against the Government from the Tubiansky Affair through the “Bus 300” Affair, Tel Aviv, Yedioth Ahronot, 1995.

In November 1985, three senior officials in the GSS contacted GSS Head Avraham Shalom and demanded that he either reveal the details of the affair or resign. Shalom refused to resign and the three officials retired from the GSS. Approximately six months later, the three former officials contacted Attorney General Yitzhak Zamir and informed him of the details of the affair. Zamir subsequently sought to prosecute those involved in the affair. Prime Minister Shimon Peres vigorously opposed this possibility.⁵⁴

Following the public storm that erupted over the affair, Avraham Shalom was forced to resign from his position as head of the GSS, although he argued in his defense that all his actions had been undertaken “with authority and permission.” Yitzhak Shamir, who was prime minister at the time of the killings, did not comment on the issue. **State President Chaim Herzog pardoned Avraham Shalom, Ehud Yatom, and two other GSS officials.** The pardons were granted before indictments had been served – the first time in Israel’s history that the state president had pardoned a person who had not yet been tried and convicted.⁵⁵ Yossi Ginossar and IDF officers were also pardoned for their part in the affair.

The wide-ranging investigations into the affair revealed grave defects in the actions of the GSS, including its use of torture in interrogations. This finding – together with the alarming findings in the Nafsu affair as discussed in the Introduction to this report – led to the formation of the Landau Commission, a state commission of inquiry that focused on the investigative methods of the GSS. In October 1987 the Landau Commission submitted its conclusions concerning the investigative methods of the GSS in cases relating to hostile terrorist activity. Although the commission permitted the use of means of investigation entailing the use of “psychological pressure” and “a moderate measure of physical pressure,” in certain circumstances and for the purpose of preventing terrorism, its report also included revolutionary and unprecedented sections. The commission revealed in the report that for many years GSS representatives had consistently lied to the courts, denying the use of physical force

⁵⁴ As a result of the confrontation between the two men, Peres expedited the termination of Zamir’s period of office as Attorney General.

⁵⁵ A petition was submitted against the pardon but was rejected. See: HCJ 428/86 Barzilai v Government of Israel, *Piskei Din* 40(3) 505.

for extracting confessions from interrogees. This took place with the knowledge and approval of all echelons in the service, despite the fact that such behavior constitutes a grave offense in accordance with the penal code, which prohibits perjury. The commission quoted an internal GSS memorandum from 1982 that explicitly instructs interrogators to lie in court concerning the use of physical pressure. **Although the commission condemned the instances of perjury, it recommended that no criminal action be taken against GSS employees on account of cases of perjury committed prior to the publication of its recommendations.** One of the grounds stated by the commission for this recommendation was that the culture of lying no longer existed in the GSS.⁵⁶

The commission was wrong in this respect, however. Not long after, the culture of lying again raised its ugly head, this time in connection with the death of Khaled Sheikh `Ali on 19 December 1989 as the result of his torture at the hands of GSS interrogators. Two interrogators employed in the organization were prosecuted and convicted under the terms of a plea bargain for the offense of negligent manslaughter.⁵⁷

Ten years after the incident, in September 1999, the interrogators presented a different version to the media concerning the incident than they gave during their trial. They now claimed that additional GSS interrogators were involved in the interrogation, but that due to pressure from the organization they accepted full responsibility for the death. They claimed that all the interrogators involved in the incident gave false testimony to the police under the guidance of Yaakov Perry, head of the GSS at the time. They further claimed that the methods of interrogation used against Sheikh `Ali were not exceptional. At the time of his death, two simultaneous operating procedures were in force. On the declarative and official level, the GSS operated according to the standards established by the Landau Commission. However, the covert reality was that means prohibited by the commission were in fact used on a routine basis. The

⁵⁶ Report of the Commission of Inquiry Concerning the Methods of Investigation of the Israel Security Agency Regarding Hostile Terrorist Activity (5748) (published in the Landau Book (Vol. A, E. Barak, A. Mazuz – eds., 5755) 269, para. 4.22).

⁵⁷ State of Israel v Anonymous

former interrogators claimed that the deviations from the written procedures had been approved by MK Gideon Ezra, who at the time served as deputy head of the GSS.⁵⁸

The findings of the audit undertaken by the State Ombudsman on the subject of the interrogation system in the GSS during the period 1988-1992 (a summary of which only was published in 2000, eight years after the audit was completed) confirmed the interrogators' claim that the use of prohibited interrogation methods was systematic rather than the capricious act of individual interrogators. The report found that the GSS had not confined itself to the permissions granted by the Landau Commission to use "moderate physical pressure," but had added further interrogation methods to these, without permission or authority. It also emerged that even after the publication and implementation of the Landau Report, GSS interrogators had continued to lie systematically and to provide false reports to the relevant bodies as part of a secret working procedure.⁵⁹

The Harizat affair, which originated in events that occurred in 1995, provided a rare opportunity to gain a glimpse into the reality in the GSS interrogation rooms during the period between the publication of the Landau Report and the Torture HCJ Petition. `Abd a-Samad Harizat was arrested on 22 April 1995 and transferred for interrogation by the GSS at the Russian Compound in Jerusalem. According to the state's version, Harizat was shaken several times during the course of his interrogation, usually "by means of seizing the front part of his clothes," and twice "while holding his shoulders or his clothes over his shoulders."⁶⁰ This technique was contrary to the manner in which interrogators were instructed to undertake shaking on the basis of the conclusions of the Landau Commission.⁶¹ Some twelve hours after the interrogation began Harizat collapsed and was rushed to hospital, where he died on 25

⁵⁸ B'tselem, Legislation Permitting Physical and Psychological Pressure in GSS Interrogations, position paper, January 2000, p. 32, pp. 103-4.

⁵⁹ Summary of an Audit Report on the Subject of the Interrogations System in the Israel Security Agency (GSS), 1988-1992, Jerusalem, 5760-2000, pp. 3, 6.

⁶⁰ From the state's response in HCJ 2150/96, Harizat et al. v Attorney General et al., 26 March 2002, para. 13.

⁶¹ See also Ronen Bregman, Tortuous Law, Yedioth Ahronot, 21 November 2008.

April 1995. The findings of the pathological investigation suggested that his death was caused due to the shaking.⁶²

The statement on behalf of the State Attorney's Office in **HCJ 2150/96 Harizat v the Attorney General** clarified that one of the interrogators deviated from the instructions given to him;⁶³ the report by the Police Investigation Department stated that his identity was known. **Despite this, the PID reached the conclusion that no criminal liability was to be imposed on the interrogator, on any of the command echelons in the GSS, or on the members of the Ministerial Committee for GSS Affairs who permitted the use of this means; instead, it confined itself to the disciplinary prosecution of the interrogator who shook Harizat for deviation from the procedures.** This recommendation was adopted by the State Attorney's Office and confirmed by the Supreme Court.⁶⁴ Following the incident it was claimed that the Ministerial Committee for GSS Affairs updated the interrogation procedures and added "additional restrictions concerning shaking, beyond those previously determined in the procedures."⁶⁵ The use of shaking was not prohibited, however, despite the fact that it had led to the death of an individual.

These cases epitomize a dangerous culture of torture and false reporting within the GSS, and a no less dangerous culture in the government and the legal system that grants total immunity from punishment to torturers and perjurers. To date, the six-month sentences imposed on the two interrogators who beat Khaled Sheikh `Ali to death are the sole exception to this rule. Time after time the mechanisms that enable cover-ups are revealed and a serious incident leading to the death of an interrogee is uncovered, yet no-one is brought to account for the grave offenses that have been exposed. As we shall see below, the findings concerning the conduct of examinations into interrogees' complaints are consistent with the timeline outlined above and form part of a well-established system that conceals acts committed in the interrogation room and refrains from penalizing those responsible for such acts.

⁶² Harizat HCJ Petition, note 60 above, para. 1 of the ruling by Justice Strassberg-Cohen.

⁶³ *Ibid.*, para. 22 of the state's response.

⁶⁴ *Ibid.* The petition was rejected.

⁶⁵ HCJ 5380/95 Public Committee against Torture in Israel et al. v Attorney General et al., para. 32 of the state's response dated 28 September 1995.

2. The establishment of inspection mechanisms

The affairs described above led to vigorous public discussion concerning the absence of proper mechanisms for inspecting the operations of the GSS and its “extra-legal” status.⁶⁶ As a result of this discussion, two amendments were introduced to the Police Ordinance – Amendment No. 12 in 1994 and Amendment No. 18 in 2004.⁶⁷ These amendments extended the authority of the Police Investigation Department (PID) – established in the Ministry of Justice in 1992 as an external body charged with investigating offenses committed by police personnel – to include the investigation of offenses committed by GSS employees. The first amendment empowered the PID “to investigate suspected offenses by GSS employees during or in connection with an interrogation they undertook, or in connection with a person who was detained or arrested for the purpose of interrogation.” The second amendment extended the investigative powers of the GSS to **all** suspected offenses committed by GSS employees during or in connection with the performance of their duties, including those not related to interrogations. The wording of the law after both amendments is as follows:

“A suspected offense committed by an employee of the General Security Service in the framework of performing his duties or in connection with his duties shall also be investigated by the Department, if the Attorney General has so decided.”⁶⁸

The comments by MK Dedi Zucker (chairperson of the Knesset Constitution Committee at the time the first amendment was drafted and enacted) during the discussion in the Knesset plenum on the Second and Third Reading of Amendment No. 12 clarify the principles underlying the amendment: “When suspicion arises it is better that the organization not investigate itself,” since “no organization can investigate itself with complete reliability, and this rule is also valid and correct with regard to the General Security Service.” Zucker added: “A trained and qualified

⁶⁶ Shabak Shalom, Tom Segev, *Ha'aretz*, 1 October 1999; Arnon Regular, *The Poetics of Shaking*, *Kol Ha'ir*, 9 November 2001.

⁶⁷ See the current format of the law: Police Ordinance (Revised), 5731-1971.

⁶⁸ Section 49I1 of the Police Ordinance (Revised), 5731-1971.

investigator familiar with the rules of confidentiality, but also on the other hand with the rules of investigation, shall undertake this investigation.”⁶⁹

These motives appear positive and seek to respond to the grave defects revealed in the above-mentioned affairs. However, the legislator chose to go only half way, insofar as the procedure for investigating GSS employees was not brought into line with that for investigating police personnel. **Complaints relating to suspected offenses by police personnel are submitted directly to the PID, whereas complaints relating to a suspected offense by a GSS employee are submitted to the Attorney General, who is empowered to decide whether to forward the complaint to the PID for investigation.** This distinction creates an additional screening process to be completed by complaints, and has enabled – some would argue deliberately so – a situation whereby **not a single complaint submitted relating to offenses committed by GSS employees concerning torture or abuse has to date been investigated by the PID. The reason for this is that in practice the Attorney General has served as a barrier blocking complaints from reaching their destination – that body that is a supposed to be external, professional, and independent – viz. the PID.** This constitutes a complete betrayal by the Attorney General of the public trust invested in him as an official whose independence and objectivity should be even greater than those of the PID itself.

According to MK Eli Goldschmidt, who was involved in the amendment, this distinct channel was provided in order to strike a balance between security needs and the needs for investigation:

“This proposal reflects the maintenance of a line – and sometimes a thin line – between the needs of the rule of law and borderline cases in which it is necessary to act in a given manner when the action is for security needs. This is the real and proper reason why the discretion in determining when to investigate any particular incident must rest with the most senior authority, viz. the Attorney General...”⁷⁰

⁶⁹ Debate on the Proposed Law to Amend the Police Ordinance (No. 12), 5744-1994 (Second Reading and Third Reading), Knesset Protocols, Second Session, Bk. 39, p. 7249; the 182nd Session of the Thirteenth Knesset, Tuesday, 20 Shvat 5754 (1 February 2004).

⁷⁰ Ibid., *ibid.*

However, the granting of license seems in practice to have prevented the realization of the grounds for the law as detailed by MZ Zucker. As we shall see below, in practice the Attorney General **invariably** accepts the position of the Officer in Charge of GSS Interrogee Complaints (OCGIC) – an internal GSS body that is in no sense external and independent.

The law remains silent on two aspects, thus exacerbating the weakness of the distinct arrangement it creates with regard to GSS employees. Firstly, the law is silent regarding the criteria on the basis of which the Attorney General is to determine which cases should be forwarded for investigation by the PID. Secondly, the law is silent regarding what is to become of a complaint which the Attorney General decides **not** to refer to the PID for investigation. MK Zucker commented on this point:

“I would like to clarify something here that the committee promised not to establish in law, but to clarify here in the plenum in an explicit, lucid, and clear manner. What happens in a case in which a complaint is submitted and the Attorney General or the state prosecutor, or the person empowered thereby, decide that it is not to be forwarded to the Police Investigation Unit?... I wish to clarify that **the obligation to investigate imposed on the police in accordance with Article 59 of the penal code shall remain intact. This law is not intended to grant authority to the Attorney General or the state prosecutor to prevent an investigation in a complaint raising suspicion against a GSS employee, and the purpose of the amendment is not to worsen the existing situation.**

In other words, a situation shall not arise where the Attorney General decides not to refer the complaint to the State Attorney’s Office and accordingly the action shall not be investigated. If the Attorney General or the prosecutor decides that the complaint is not to be investigated by the Police Investigation Unit, the provisions of the legal arrangements shall apply and a police investigation shall be undertaken in the usual manner.

It should also be clarified that the police cannot infer from the proposed amendment that if another authority engages in investigations or is empowered to do so, it does not bear an obligation to investigate if the investigative agency or the State Attorney’s Office decides not to investigate. This clarification is necessary in order to appreciate that the purpose of the amendment is not to worsen the existing situation.”⁷¹

The outcome of the decision not to formalize these aspects in the text of the law itself – a decision whose motives are obscure – is that in practice **the police considers itself**

⁷¹ Ibid., *ibid.*

unqualified to process the complaint. Complaints submitted to the police relating to GSS employees are forwarded to the OCGIC. Thus a complaint submitted to the police by PCATI on 11 June 2008 was passed from hand to hand and eventually transferred to the OCGIC.⁷² As with all such complaints, it was closed by the OCGIC and his superiors.⁷³ Thus MK Zucker's fears were justified: the law has indeed been interpreted as authorizing the Attorney General to prevent investigations in suspected criminal cases. Contrary to the explanatory comments, the police has been quick to exempt itself from its legal obligation. In this sense, the amendments have been misinterpreted and have indeed worsened the pre-existing situation.

We should also note that the amendments extended the authority of the PID to include offenses committed by GSS employees, without any reference to the overlap created between these expanded authorities and the OCGIC, a function created in 1992. The concept of internal investigation by the GSS, as embodied in the function of the OCGIC, is inherently flawed. Nevertheless, the amendment to the law should have detailed the manner of integration of the two bodies – the OCGIC and the PID with its expanded authorities – or should have established a division of responsibility between them in cases relating to the investigation of offenses by GSS interrogators. MK Zucker's comments indicate that the rationale behind the amendment was to remove the investigative authority from the OCGIC and transfer it to an external body. In practice, however, this has not happened.

As we have shown, the above-mentioned amendments created considerable hope of an end to the unacceptable organizational culture in the GSS and among those responsible for the service. Despite the difficulties inherent in the amendments, their purpose was to promote meaningful and serious investigations relating to criminal offenses by GSS interrogators. With hindsight, however, the reality is that the amendments created a hermetic barrier preventing criminal investigation, since the Attorney General has chosen not to forward even a single case for investigation by the PID. To the best of our knowledge, the Israel Police has not opened a single investigation in this field.

⁷² As stated in a letter from Chief Superintendent Dvori Nov to PCATI dated 31 April 2009.

⁷³ The complaint dated 11 June 2008 concerned the case of Yazan Sawalha. The letter of reply archiving the processing of the complaint was received on 22 July 2009.

C. The Officer in Charge of GSS Interrogee Complaints (OCGIC)

The institution of the OCGIC was established in 1992. The position is filled by a GSS employee whose function is to examine complaints from interrogees . The discretion granted to the Attorney General by law has been delegated to the state prosecutor, who in turn has delegated it to the OCGIC. The examination by the OCGIC fills the void created by the amendment to the Police Ordinance empowering the Attorney General⁷⁴ to exercise discretion when deciding whether to forward a complaint relating to an offense committed by a GSS employee to the PID. As we shall see below, this discretion is replaced by the examination and conclusions of the OCGIC.

What is the source of the OCGIC's authority? PCATI has received various responses to this question over the years. One source of authority noted by various officials in the State Attorney's Office⁷⁵ is a government decision on the subject. Our efforts to obtain a copy of this government decision have been unsuccessful; we were informed that both the decision and the procedures published thereafter are classified. The government is indeed authorized to classify its decisions relating to issues involving state security.⁷⁶ However, it is doubtful whether the grounds for classifying information involving state security apply in our case, which relates to work procedures designed to ensure public scrutiny of the protection of interrogees' rights. The public importance of revealing such procedures requires no explanation.

A second source of authority mentioned in the letter from Attorney Naomi Granot, at the time the director of the Department of Special Tasks in the State Attorney's Office, is Article 13(D) of the GSS Law. The content of this article is as follows:

⁷⁵ Item 3 in the letter from Naomi Granot, at the time the director of the Department of Special Tasks , dated 24 April 2006 concerning the case of Mr. `Issam Walid Ibrahim Barghout, ID 946592087; the reply by Minister Daniel Friedman to the parliamentary question tabled by MK Dov Hanin, discussion in the Knesset plenum on 13 December 2006; item G in the state's response to a petition in accordance with the Freedom of Information Law, AA 8848/08 Public Committee against Torture in Israel et al. v Officer for the Freedom of Information Law, Ministry of Justice, dated 25 February 2009.

⁷⁶ Basic Law: The Government, Article 35; GSS Law, 5762-2002, Article 19.

“The head of the GSS is permitted, with the approval of the prime minister, to charge the Officer in Charge of GSS Interrogee Complaints with processing both complaints by GSS employees and complaints against the GSS, any of its employees, or a person acting on its behalf, **with the exception of matters processed by the Police Investigation Department in the Ministry of Justice in accordance with provisions of Section 4:2 of the Police Ordinance [revised], 5731-1971, and with the exception of interrogees’ complaints**; if the Officer has not been charged with processing the complaints as stated, the prime minister shall appoint another person to fill this function.” (Emphases added).

It is unclear why Attorney Granot chose to refer us to this article, which explicitly restricts the authority of the head of the GSS or the prime minister: they are not to charge the OCGIC or any other person with undertaking an examination in the GSS in the case of matters processed by the Police Investigation Department in the Ministry of Justice in accordance with the provisions of Section 4:2 of the Police Ordinance [revised], 5731-1971, or in the case of the processing of interrogees’ complaints. **The article specifically establishes that the prime minister or the head of the GSS do not have the authority to charge the OCGIC or any other person with examining interrogees’ complaints.**

In our letters to Attorney Granot we noted our surprise at this interpretation. Attorney Granot’s reply was laconic: “I do not find it appropriate to enter into an argument with you concerning the interpretation of any particular article.”⁷⁷

Attorney Granot further claimed in her letter that the authority of the OCGIC is also derived from the authority of the Attorney General to undertake a preliminary examination as recognized in AH CJ 1396/02 Movement for Quality Government v Attorney-General.⁷⁸ “Such an examination is necessary in accordance with the obligation incumbent on the State Attorney’s Office – as an administrative authority – to provide a proper factual foundation for any decision it takes in exercising the discretion it has been granted.”⁷⁹ It is doubtful, however, whether this authority of the

⁷⁷ Letter from Attorney Granot dated 11 December 2006 concerning the case of `Issam Walid Ibrahim Barghout.

⁷⁸ AH CJ 1392/02 Movement for Quality Government v Attorney General, ruling granted 24 April 2003.

⁷⁹ Ibid., para. 3 of the ruling of Justice Matza.

attorney-general, which entails the exercising of broad professional discretion, may be delegated – and particularly to an official within the organization regarding which the complaint was submitted.

Each of these three sources of authority thus raises grave doubts concerning the legal validity of the establishment of the OCGIC. It is strange that the usually eloquent staff of the State Attorney's Office suddenly seem to stumble when asked a simple legal question concerning the source of authority of a public body.

The uncertainty surrounding the legal source for the OCGIC's operations also characterizes the body's authorities and the rules according to which it operates. Here, too, it was stated that these rules were established at the above-mentioned secret government meeting and that it is not possible to provide a copy of the decision.⁸⁰ During the hearings in the petition submitted by PCATI to reveal details concerning the operations of the OCGIC, the court confirmed that it is not possible to provide copies of the relevant government decisions. However, several details regarding this function were provided in the framework of the petition:

“The OCGIC is an employee of the General Security Service who is accountable in professional terms to the director of the Department of Special Tasks in the State Attorney's Office. The function of the OCGIC is primarily to investigate reports concerning complaints by interrogees in the GSS and to undertake a preliminary examination of these reports, following which it is decided whether it is appropriate to forward the complaint for a criminal investigation proceeding...”⁸¹

The OCGIC “undertakes a thorough examination of the complaint [of the interrogee – our addition] in which framework the OCGIC receives all the investigative material in the interrogee's file; he generally meets the interrogee... and collects his version; he questions the relevant GSS employees; and, in appropriate cases, he undertakes additional examinations. The OCGIC summarizes his findings in an opinion and forwards to the director of the Department of Special Tasks in the State Attorney's Office all the raw material concerning the complaint as well as his opinion, including a summary of his findings, recommendations, and conclusions.”⁸²

⁸⁰ Response of Justice Minister Daniel Friedman to the parliamentary question of MK Dov Hanin, and the state's response to PCATI's petition in accordance with the Freedom of Information Law, note 78 above.

⁸¹ Letter from Attorney Tenne, note 77 above.

⁸² The state's response to PCATI's petition in accordance with the Freedom of Information Law, note 78 above, paras. 14, 15.

Transferring complaints to the OCGIC and the adoption of his findings are what brought about, **in practice, a situation in which the examination and recommendations of the OCGIC constitute the main barrier to the implementation of Amendments 12 and 18 to the Police Ordinance – provisions that extend the investigative authorities of the PID to include the investigation of offenses committed by GSS employees while performing their functions.** As we shall see below, the difficulties we have raised are not merely theoretical; they are clearly reflected in the statistics provided by the official bodies themselves and in the manner in which complaints of torture are processed.

B: The Processing of Interrogees' Complaints – Findings

Having reviewed the events that led to the recognition of the need for an external body to examine the GSS, the relevant legislation, and the framework within which the OCGIC operates, we now turn to a discussion of the findings of a study undertaken by PCATI. Our study examined the responses from the director of the Department of Special Tasks in the State Attorney's Office as received by PCATI in recent years.⁸³ The importance of this study is due to the fact that in practice the submission of a complaint to the Attorney General (which complaint is then forwarded to the OCGIC and the director of the Department of Special Tasks) is the only path open to a complainant who has suffered torture or abuse. Accordingly, in order to understand fully the problem of the failure to process interrogees' complaints and to penalize GSS interrogators, it is important to gain a detailed picture of the functioning of the OCGIC and the defects inherent in this functioning.

We begin by presenting statistics relating to the operations of the OCGIC. We shall then provide a substantive analysis of 169 complaints submitted by PCATI on behalf of interrogees from January 2001 through September 2009. The analysis will examine the duration of processing of complaints; the wording of the replies sent to the complainants; the manner of execution of the investigation as reflected in the replies; and the grounds stated for closing the complaint.

⁸³ Two examples of typical responses are included in Appendix X to this report.

1. Statistics concerning the operations of the OCGIC

As we have noted, it is far from easy to obtain data relating to the operations of the OCGIC. The Freedom of Information Law, 5758-1998, which seeks to ensure that information held by the authorities is accessible to the public, exempts the GSS from this basic obligation.⁸⁴ Thus while in the past an unofficial smokescreen surrounded the operations of the GSS, the Knesset chose to formalize this smokescreen in the framework of the Freedom of Information Law and to exempt the GSS from the obligation incumbent on any public authority in Israel: to share information with the public relating to its operations. In any case the Attorney General does not enjoy such protection; data held by the Attorney General and relating to his actions should be available for public inspection.

During the course of the administrative petition submitted by PCATI and requests submitted by other human rights organizations, the following key details have been secured: During the period from the beginning of 2001 through the end of 2008, 598 complaints were submitted to the State Attorney's Office relating to the abuse of interrogees by GSS personnel. Of all these complaints, not a single one was forwarded for a criminal investigation.⁸⁵ The following data are taken from the notifications made by the State Attorney's Office in the framework of the petition:

In 2007:

- A total of 47 examinations were opened by the OCGIC.
- As of 20 June 2008, processing was completed in 30 complaints out of the 47 submitted.
- **Not a single complaint relating to a GSS investigator was forwarded for investigation and no steps (including disciplinary action) were taken against the interrogators.**

In 2006:

- A total of 67 examinations were opened by the OCGIC.

⁸⁴ Freedom of Information Law, 5758-1998, Article 14.

⁸⁵ Data forwarded to B'Tselem by Attorney Michal Tenne, Freedom of Information Officer in the State Attorney's Office, dated 29 December 2008; [B'Tselem – Failure to investigate alleged cases of ill-treatment and torture.](http://www.btselem.org/english/torture/impunity.asp)
<http://www.btselem.org/english/torture/impunity.asp>

- Processing has not yet been completed in five of these cases.
- **Not a single complaint relating to a GSS investigator was forwarded for investigation and no steps (including disciplinary action) were taken against the interrogators.**

In 2005:

- A total of 64 examinations were opened by the OCGIC.
- **Not a single complaint was found to provide the basis for a criminal investigation by the PID; a disciplinary proceeding was opened regarding two complaints but no details were provided regarding the outcome of these proceedings.**

On 20 October 2009 a freedom of information request was submitted to the Ministry of Justice to obtain updated information for 2008 and 2009. As of the time of writing no reply had been received in our office.

We are also in possession of various details provided by the spokesperson of the Ministry of Justice at the end of 2001 in an unusual statement relating to the processing of complaints about torture by the GSS: In 1998, the OCGIC examined 63 complaints; in 1999 it examined 52 complaints; and in 2000 it examined 35 complaints. The release included only partial data for 2001 – 42 complaints. The statement added that “over the past three years no case has been found that has required criminal attention; however, there have been disciplinary responses.”⁸⁶ The spokesperson did not clarify the grounds for disciplinary action, nor why these same grounds did not also lead to the opening of a criminal investigation. Neither was any information provided concerning the results of the said disciplinary action, so that it is impossible for us to determine their quality. In any case, torture and abuse are naturally too serious offenses for disciplinary action to constitute an appropriate response.

⁸⁶ The data were provided by the spokesperson of the Ministry of Justice to the journalist Arnon Regular, and were forwarded to PCATI on 20 November 2001.

2. Duration of processing of complaints

Complaints of torture by GSS interrogators are usually addressed to the Attorney General. In most cases these complaints meet with two preliminary and standardized responses stating that the complaint has been forwarded to the director of the Department of Special Tasks and thereafter to the OCGIC, as well as a final and concluding response describing (in a partial and laconic manner as described below) the outcomes of the examination by the OCGIC and the content of the decision. The following data detail the period of time that passes from the submission of the complaint through the final decision in the case and relate to all complaints submitted by PCATI during the period 2005 through 2009:

66 complaints were answered within six months.
30 complaints were answered in between six and twelve months.
19 complaints were answered in between twelve and eighteen months.
28 complaints were answered after more than eighteen months.
24 complaints have not yet received an answer, of which 14 were submitted over six months prior to the date of writing of this report.

The processing times described above are grossly unreasonable, and **certainly cannot be justified in the case of an examination that is supposedly preliminary** in nature, and which should properly be confined to a superficial examination of the facts prior to referral for a substantive criminal investigation. No examination by the OCGIC has ever been forwarded for a criminal investigation, but in the theoretical eventuality that this occurred, the timeframes detailed above could certainly not be considered to meet reasonable times for investigation.

3. The laconic and standard format of the responses from the director of the Department of Special Tasks

In most cases the response from the director of the Department of Special Tasks is brief and laconic. The typical length of the official's response is no more than one and a half pages. This includes a telegraphic repetition of the details of the complaint, as well as unsubstantiated determinations concerning the unfounded nature of the complaint or the unreliability of the complainant.⁸⁷

⁸⁷ Examples of typical responses from the director of the Department of Special Tasks are included in an appendix to this report.

The following are examples of formulaic phrases included in the responses by the director of the Department of Special Tasks :

“The complaints in your letter are baseless.”

This formula, which is not usually accompanied by any elaboration, grounds, example, or further substantiation of any kind is generalized in nature. It negates all the details of the complaint in a single blow, without any grounds and without any concrete and specific attention to each item in the complaint.

“The interrogation was pursued in accordance with the procedures.”

What does it mean to claim that “the interrogation was pursued in accordance with the procedures?” What are these procedures? Are they subject to any judicial or public review? **Do procedures exist permitting torture or abuse?** This response does not detail the relevant procedure according to which the interrogation was pursued, and accordingly it is impossible to examine whether it was indeed pursued in accordance with that procedure. **Accordingly, this response – which does not deny the facts of the case – is tantamount to an admission that procedures exist in the GSS that permit torture or abuse.**

*“After the interrogators have been questioned and the complainant’s claims have been examined one by one, the Attorney General has reached the conclusion that **no defect occurred in the interrogators’ behavior.** Accordingly, there is no cause to take any legal action against them.”* [Emphasis added].

Does the statement that no defect occurred in the interrogators’ behavior mean that the investigation by the OCGIC did not find any support for the claims concerning prohibited acts, or does it mean that exhaustive proof was found that all their actions were permissible – i.e. that the actions were indeed committed, but that no legal defect was found therein and they are covered by the said procedures? Once again, in order to determine whether or not the interrogators acted properly, it is vital to examine the procedures according to which they operate and to clarify the basis of the examination that determines that they acted in accordance with these procedures.

The complaint submitted by PCATI in the case of Hamza Salem Mahmud Qa`aqr on 12 September 2006 states, among other details, that Qa`aqr was arrested on 27 July 2005 and subjected to severe physical violence (such as an attempt to puncture his wrist using a ring and causing severe injuries, shaking, the entry of a dog into the interrogation room, slaps, and choking to the point of loss of consciousness). During the course of the interrogation Qa`aqr was rushed to hospital in Afula due to the serious condition of his hand and subsequently returned for interrogation. His interrogators denied him sleep for three consecutive days.

During the course of his detention, Qa`aqr was visited twice by representatives of the Ministry of Justice (probably on behalf of the OCGIC). The first visit was at Kishon Detention Center while Qa`aqr was in the midst of the violent interrogation. His interrogators warned him that if he cooperated with the representative from the Ministry of Justice he would be held in isolation.

Although the threat relating to cooperation with the OCGIC was brought to the attention of the relevant bodies, there was no mention of this point in the response received on 18 March 2009, almost three years after the complaint was submitted. In the letter Attorney Rachel Mattar, the director of the Department of Special Tasks , closed the complaint on the grounds that “the facts were thoroughly examined by the OCGIC, and **some** of the complaints were found to be baseless. According to the findings it was not appropriate to take legal or disciplinary action against the interrogators. However, the examinations undertaken yielded lessons for the future, including a change to the procedures.”

Which of the complaints were found baseless? Which complaints were found to be correct, and why was no criminal investigation opened on their account? The response from the director of the Department of Special Tasks does not answer these questions and does not address substantively any of the claims raised in the complaint.

The responses from the director of the Department of Special Tasks bear almost no relevance to the complaint. They certainly do not explain in any way the reasons why the complaints were closed. The information provided about the nature of the

investigation undertaken into the substance of the complaints is meager and incomplete at best. A review of the responses leads to the conclusion that no thorough investigation was undertaken into the claims, or that if such an investigation did take place its outcomes have been “laundered” by the very mechanism responsible for the investigation.

It should be emphasized that the obligation to state grounds for a decision has been recognized by administrative law. The reason for this is obvious: only if the authority states proper grounds can the citizen be confident that an in-depth and proper deliberation has taken place regarding his or her complaint. The obligation to provide grounds for making a decision is an effective tool for the complainant to critique the decision and to identify its flaws. Conversely, the absence of grounds prevents the possibility of challenging claims. Unless the claims in the complaint are addressed substantively and the reason for closing the investigation is detailed, the complainant has no way of knowing whether a meaningful investigation took place and, if it did, what findings it reached.⁸⁸

4. Defects in the conduct of the investigation by the OCGIC

The responses by the director of the Department of Special Tasks and information gathered by PCATI from complainants paint an alarming picture of the manner in which the OCGIC conducts its investigations.

As noted above, the general information secured in the framework of the petition submitted by PCATI under the Freedom of Information Law stated that the OCGIC “undertakes a thorough examination of the complaint [of the interrogee – our addition] in which framework the OCGIC receives all the investigative material in the interrogee’s file; he generally meets the interrogee... and collects his version; he questions the relevant GSS employees; and, in appropriate cases, he undertakes additional examinations.”

In practice, the OCGIC’s meetings with the complainant take place without prior notification; the OCGIC refuses to permit an attorney to be present on the

⁸⁸ Eliad Shraga and Roi Shachar, Administrative Law, Shesh, Tel Aviv, 2008, p. 352.

complainant's behalf or to prepare the complainant ahead of the investigation. The meeting between the OCGIC and the complainant is naturally an extremely sensitive event that overturns the usual relationship between a Palestinian interrogee and the interrogating agency. In this meeting the Palestinian is no longer a suspect from whom information is to be extracted, but the victim of an offense who has complained of injury. An atmosphere must therefore be created that enables the complainant to recall his traumatic experiences under interrogation in as authentic a manner as possible. A natural part of this process should be the presence of an attorney on the complainant's behalf, as someone who is familiar with the complainant's rights and with the details of his complaint. The attorney could help reinforce the complainant's confidence that he does not have the status of a suspect or defendant in such a proceeding; that he does not face any danger if he complains against his interrogators; and that he is to describe precisely what happened to him and to trust that justice will be meted on those who harmed him.

In a letter to the director of the Department of Special Tasks dated 22 December 2004, PCATI discussed this problematic situation. The reply received⁸⁹ stated that it is not possible to permit the complainant's representative to participate in his questioning since the presence of an attorney on behalf of the complainant is liable to injure the "interests of the investigation" and the ability to collect authentic testimony without interruption or interference; the presence of an attorney would create a burden for the investigative bodies (who "cope with considerable pressure") in coordinating such meetings; the presence of an attorney should not be of any benefit to the complainant, since he is not supposed to have any cause to conceal any matter or to fear the questions the OCGIC intends to ask him; the conversation between the OCGIC and the complainant is recorded (the official claims that this takes place with the complainant's consent), so that the director of the Department of Special Tasks can assess the content of the meeting in an accurate and authentic manner and ensure that the clarification was complete and comprehensive; and the PID follows a similar instruction stating that the complainant's attorney is not to be present in the examination of complaints against police personnel.

⁸⁹ Reply dated 9 January 2005 to PCATI's correspondence from Attorney Dudi Zachariah, at the time the director of the Department of Special Tasks .

These arguments fail to address the structural defect inherent in the fact that the OCGIC is a GSS employee – an integral part of the organization. They assume the presence of trust between the complainant and the OCGIC, while it is unclear on what basis such trust might emerge. They assume that the OCGIC will make a strenuous effort to explain to the complainant his role in the conversation and its importance – something that in the cases known to us, at least, has not been the case.⁹⁰ It is also obvious that the fact that the conversation is recorded cannot compensate for the absence of an attorney since, in most cases, neither the complainant nor any person acting on his behalf has access to the recordings. We should also note that victims of sex offenses, for example, are entitled to be interviewed in the presence of an accompanier, reflecting the legislator’s recognition of the special circumstances involved in reliving their trauma.⁹¹ In similar manner, torture victims should be questioned in the presence of their attorney or another person of their choice.

The concerns we raise are not theoretical. In the past PCATI has received alarming testimonies concerning the manner in which the meeting between the OCGIC and the complainant took place. In two cases it emerged that the OCGIC met with the complainant in the GSS interrogations wing in the prison; the questioning took place while the complainant was shackled; and, in one case, the abusive interrogator even entered the room during the meeting, as the victim described in his testimony:

“At the end of November Uri arrived and said he was a representative of the Ministry of Justice. **Our meeting took place in Petach Tikva in the interrogation rooms.** The strange thing is that **all the time he spoke to me I was shackled with my hands behind my back to a chair fixed on the floor. The whole meeting took place while I was in the same position on the chair** – we sat together for approximately one hour. **He did not ask them to release me...** he asked me questions about the whole interrogation process. He wrote notes on paper and there was also a tape-recorded there. He wrote down and recorded. He asked to the interrogators’ names and I remembered some names, one of which was Segal. **And by chance Segal came into the room and then I said to Uri, here – this is Segal – and Segal immediately went out as if he was afraid and running off.** As if he was surprised to see us...

Uri left me, went after Segal, and came back after a few minutes. He said: ‘But you’re from Hamas.’ I said, ‘What does that mean? If I’m

⁹⁰ This is the conclusion based on the affidavits collected by attorneys for PCATI after the visit by the OCGIC.

⁹¹ Rights of Victims of an Offense Laws, 5761-2001, Article 14.

from Hamas then you're allowed to do what you did?' He apologized and said, 'Let that pass, I didn't mean it,' and we continued..."⁹²

PCATI contacted the director of the Department of Special Tasks concerning the above case and an additional case. The replies did not differ substantively from those that are regularly received following other complaints; they state that the factual claims made in the complaints are groundless. The replies also claim that "discussions have taken place recently on the subject of making the work of the OCGIC more efficient and improving its functioning and the manner in which its examinations are conducted."⁹³

To be fair we should note that these unpleasant testimonies are not typical; in many cases the meeting with the OCGIC is conducted in a more respectful manner. However, the presence of such cases proves that the possibility that the examination by the OCGIC will humiliate the complainant is not spurious. Moreover, this reality again illustrates the attitude of the entire mechanism for examining complaints toward the interrogee, who is considered a person without rights whose words are to be regarded with great suspicion.

5. Grounds for closing the complaint

As already mentioned, the response from the director of the Department of Special Tasks usually includes a brief mention of the findings that led to the closure of the complaint. An analysis of these findings reveals several typical grounds for closure. Although the grounds are presented in laconic language, they provide a valuable insight into the manner in which the OCGIC, the director of the Department of Special Tasks in the State Attorney's Office, and the Attorney General perceive their function and the extent to which they genuinely to undertake an in-depth and reliable examination leading to the opening of a criminal investigation.

⁹² Excerpts from the affidavit of As`ad Mohammed Nimr Abu Ghosh taken by Taghrid Shbeita on 3 March 2008 in Megiddo Prison. PCATI submitted a complaint to the Attorney General in the case of Mr. Abu Ghosh on 27 November 2007

⁹³ Reply dated 18 June 2009 from Attorney Rachel Mattar, the director of the Department of Special Tasks , concerning the case of As`ad Mohammed Nimr Abu Ghosh; reply dated 13 August 2009 from Attorney Rachel Matter, the director of the Department of Special Tasks , concerning the case of Mustafa `Ali Ahmad Abu Mu`amar.

I. The late submission of the complaint

In their concluding replies relating to a number of complaints,⁹⁴ the officials responsible for the OCGIC chose to note that the complaint was submitted long after the events to which it related. This was included as a contributory factor in the conclusions of the examination (which, as noted, invariably lead to the closure of the complaint). A more frequent claim is that the complainant had earlier opportunities, during the interrogation and detention, to make a complaint but failed to take opportunity of these.

In some responses the late submission of the complaint is quoted not as grounds for closing the complaint, but as grounds for examining the complaint without meeting with the complainant. In other words the mere delay in submitting the complaint creates a form of “obsolescence” in the sense that it results in a more superficial examination. As the wording of the response shows, this is not due to any technical or physical difficulty in gaining access to the interrogees, but rather to a policy that applies regardless of the circumstances. Thus complaints submitted after the said date of obsolescence – a date that is unknown, unofficial, and unlawful – receive from the outset inferior attention relative to other complaints.

PCATI’s complaint in the case of Nasser Mohammed Mahmud Sharha was submitted on 24 September 2007. The complaint claimed that Sharha, who was arrested on 5 May 2006 and transferred to Shikma Detention Center, was held during the GSS interrogation in a difficult and painful position; that one of his interrogators spat on him and cursed him; and that on the twelfth day of his interrogation the complainant was interrogated continuously from 10:00 am in the morning on Thursday through 16:00 on Saturday with only a single three-hour break.

The reply from Rachel Mattar, the director of the Department of Special Tasks , dated 27 January 2008 stated that “in view of the date on which the letter of complaint on your behalf was submitted, the OCGIC did not meet with the complainant. However, the complainant’s version as presented in the letter on your behalf was examined by the OCGIC.”

⁹⁴ Similar grounds were mentioned relating to ten interrogees in the sample.

Another complaint concerned the case of `A.A.M.R. The complaint, submitted on 20 July 2006, described the serious violence used against R. during his detention and interrogation, including beatings, shaking, the ripping of his beard, and his placement in a difficult and painful position for many hours. In a letter dated 14 December 2006, Naomi Granot, the director of the Department of Special Tasks , stated as one of the grounds for closing the complaint the fact that during the extensions of detention at which the complainant was present, he failed to complain to the court of violent behavior on the part of the interrogators.

The reference to delays in complaining as a contributory factor in the decision to close complaints of torture or abuse has no legal foundation. The prohibition of torture in international law is absolute and is not subject to any statute of limitations.⁹⁵ It is important to emphasize that in any case the period of time that elapsed between the events and the submission of the complaint has never met the statute of limitations or the maximum delay even for more minor offenses, and let alone for the serious offenses of torture and abuse.

We should also add that the underlying rationale behind the claim of delay – and particularly the difficulty in substantiating facts and locating relevant evidence – is not present in the case of complaints of torture which examine the propriety of the actions of an institutional body. The identity of the body is known and the relevant findings, including the documentation of interrogations in the form of memorandums including the nicknames of the interrogators, are accessible; they do not become obsolescent and their validity is not marred. Neither is it clear how the passage of time impairs the ability to meet the complainant.

⁹⁵ For example, see: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law . Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Article 6: “Statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”

Moreover, and as in the case of the victims of sexual abuse and rape, the victims often require a protracted period to gather the courage and psychological strength required in order to face the trauma they experienced and to submit a complaint.⁹⁶ Torture victims must also pass another psychological hurdle on the way to submitting a complaint: from their perspective, the complaint is to be submitted to the same occupying power that caused and continues to cause injustice to them and their relatives. With this in mind, the common claim in the OCGIC's replies that the complainant failed to raise his claims before the military judge is an unreasonable one. In the typical encounter between the Palestinian complainant and the Israeli military court, the former is taken before the judge in the midst of the GSS interrogation, and possibly while he is being subjected to torture or abuse. In most cases the encounter takes place while the detainee is denied access to an attorney, and accordingly he is present on his own in the hearing, without having received any explanation or legal aid. In some cases the interrogators have previously made false representations to the detainee concerning their unlimited authority or the authorization they hold to forward the detainee for a "military interrogation."⁹⁷ The detainee is well aware that it is highly likely that at the end of the hearing he will return to the interrogation room and to the total control of the interrogators. Moreover, the hearings on the extension of detention in the military court often take place on a "conveyor belt" basis, and only a few minutes are devoted to the case of each detainee.⁹⁸ Moreover, the complainant has no confidence in the law enforcement system of the Israeli occupation and does not believe that the military justice system wishes to act justly and to defend his rights. In some cases the complainant received a reduced sentence as part of a plea bargain and does not wish to jeopardize the bargain by submitting a complaint.⁹⁹ In these circumstances, the fact that a complainant failed to take advantage of the encounter with the judge – a military employee in uniform –

⁹⁶ On this aspect, see: Explanatory Comments to the Proposed Obsolescence Law (Amendment No. 4), 5767-2007.

⁹⁷ On 28 February 2009, PCATI received a letter from Attorney Naomi Granot, then the director of the Department of Special Tasks, in which it was decided to order GSS interrogators to cease the use of the term "military interrogation."

⁹⁸ See also: Yesh Din, Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories, December 2007.

⁹⁹ In this context we should note that PCATI has learned on several occasions of plea bargains including the condition that the interrogee must not complain of actions against him during his interrogation (as reported to us in conversations with detainees).

in order to raise complaints of torture or abuse taking place at the time cannot be interpreted as implying that these acts were not taking place.

In a letter to Attorney Malchiel Ballas dated 4 August 2004, PCATI raised its concern at the fact that if a detainee fails to complain during the early stages of his detention (such as during the legal hearing in the extension of detention) and time passes before a complaint is submitted, the official bodies consider this sufficient reason to question the veracity of the complaint, and sometimes even as justification for refraining from investigating the complaint. In his reply, Ballas stated that “during the course of their interrogation, GSS interrogees meet various objective bodies who forward their complaints for examination, including the representatives of the Red Cross, interrogees’ attorneys, and so forth. Accordingly, the question of the time that passed from the interrogation and until the submission of the complaint is one of the indicators taken into account in processing the complaint. Naturally, however, this is not the sole indicator and each case is examined on its own merits.”¹⁰⁰ Even if this is not a sole factor, however, it is unclear why the fact that the interrogees met with such bodies suggests that their complaint is unreliable, since as we have explained there may be many reasons why the complainant chose not to present his complaint to these bodies.

Lastly, this is a classic case of the pot calling the kettle black. Given the protracted nature of the OCGIC’s own examinations, the claim concerning the delays in submitting the complaint have an almost ironic nature. The OCGIC would do well – as an authority with access to resources – to meet the same standards it seeks to impose on complainants who lack resources and are unfamiliar with the intricacies of the system.

II. Inability to question the complainant since he is in the Occupied Territories

In some replies, the OCGIC states that the complainant has been released from detention and has returned (or, more usually, has been returned) to the Palestinian

¹⁰⁰ Letter dated 4 August 2004 from Hannah Friedman, then executive director of PCATI, to Attorney Malchiel Ballas, then the director of the Department of Special Tasks ; reply from Ballas to Friedman dated 20 September 2004.

Authority areas.¹⁰¹ In this situation no meeting takes place between the OCGIC and the complainant, and this point is noted explicitly by the officials responsible for the OCGIC in their replies.

The claim that the OCGIC cannot meet an interrogee who is present in the Occupied Territories is puzzling. Other bodies, such as the Investigative Military Police, regularly hold such meetings. The complainant's representative, through whom the complaint was submitted, can serve as a liaison and help locate the complainant. The fact that a meeting with a complainant in the Occupied Territories requires complex and expensive security arrangement must not constitute grounds for failing to hold such a meeting. After all, if the slightest suspicion had been raised against the Palestinian complainant – rather than his GSS interrogators – no-one would even consider raising an argument that the meeting could not take place due to security needs.

As part of the obligation to undertake a thorough examination into complaints, the Attorney General must ensure that investigators meet personally with every complainant and hear the complaint directly. In rare cases in which there is a genuine difficulty in locating the complainant, the Attorney General may rely on the complainant's written complaint and forward this to the PID for examination.

We should note that at the beginning of 2005 PCATI was informed that the possibility was being considered of holding meetings with complainants who had been released in the Territories in order to collect their testimony.¹⁰² We have not been informed of any decision in this matter, however, and we continue to receive replies stating that it is not possible to meet a complainant who is in the Occupied Territories.

¹⁰¹ A similar argument was raised concerning three interrogees in the sample.

¹⁰² This was stated in a reply dated 24 January 2005 from Attorney Dudi Zachariah, then the officer responsible for the OCGIC, in the complaint concerning Q.R.M.H.J. submitted on 10 September 2003.

III. Blanket preference for the interrogators' version over that of the complainant

The replies from the director of the Department of Special Tasks show that the interrogators' version of events is always preferred to that of the complainant. Any contradiction between the two versions generally leads to the closure of the complaint, without any further examination to clarify the reason for preferring the interrogators' version.

A complaint submitted by PCATI on 13 March 2005 in the case of Ahmad Ibrahim Ahmad Bsisi stated, among other claims, that during his interrogation he was held in a difficult and painful position and that his interrogators cursed him, threatened to rape him, deprived him of sleep, and spat on him.

The reply dated 20 February 2006 from Naomi Granot, the director of the Department of Special Tasks, summarized the processing of the complaint and established, inter alia, that contrary to the claim in the complaint one of the interrogators who questioned the complainant had unintentionally emitted a drop of spittle that had struck the complainant's face. The interrogator wiped away the spittle and apologized to the complainant. With the exception of this incident, none of the interrogators had spat on the complainant.

A complaint submitted by PCATI on 30 November 2005 in the case of `M.A. stated that during the course of his interrogations the interrogators slapped him and one of them punched him in the head. Although Mr. A.'s interrogation took place during the fast month of Ramadan, he was questioned for fourteen hours consecutively and his interrogators deprived him of food until midnight.

The reply dated 24 September 2007 from Rachel Mattar, the director of the Department of Special Tasks, summarized the processing of the complaint and claimed that the complaints were groundless. The reply stated that none of the complainant's interrogations had continued from morning to midnight – they were all significantly shorter. It was also claimed that the complainant had not been interrogated at all on one of the dates to which many of the details of the complainant referred, and that during the meeting with the OCGIC the complainant denied that food and drink had been withheld from him at the end of the daily fast. During the same meeting the complainant narrowed the scope of his complaint regarding his

beating. According to the OCGIC, “no basis or support” was found even for this reduced version of the complaint.

Inaccuracies in the complainant’s version of events – and particularly with regard to the time of interrogations, given that the complainant does not have access during his interrogation to a watch, calendar, sunlight, attorneys, or other outside bodies – do not necessarily imply that this version is so unreliable as to justify the determination that the claims are groundless and the complaint is to be closed. It is only reasonable that a person against whom suspicions of a criminal offense are raised will deny these suspicions. The denial itself, or a contradictory testimony clearing the person making the testimony of guilt, cannot constitute grounds for refraining from an investigation. This is particularly true when the matter is examined against the long history of mendacious reports in the GSS. The lessons have not been learned and the mechanisms of examination of supervision continue to follow the interrogators’ versions of events without question.

IV. Contradictions between facts stated by the complainant in the complaint and facts stated in the meeting with the OCGIC

The director of the Department of Special Tasks sometimes closes a complaint on the pretext that during the meeting with the OCGIC the complainant raised facts that contradict the facts in the complaint.

In a reply regarding the complaint of `A.`A., submitted on 30 October 2007, Attorney Rachel Mattar, the director of the Department of Special Tasks , stated that substantive differences were found between the complainant’s version in his complaint and his version in the meeting with the OCGIC. Thus, for example, the complainant told the OCGIC that he had been deprived of sleep for three days, rather than five days as reported in the complaint. He also stated that only one interrogator had beaten him, contrary to the content of his complaint.

In the reply dated 28 August 2008 from Rachel Mattar, the director of the Department of Special Tasks, it was stated that “the complaint detailed in your letter and the complainant’s version before the OCGIC have been examined by the OCGIC and no support has been found for the various versions.”

The reply from the director of the Department of Special Tasks does not always specify the nature of the contradiction. In such cases the official's comments are vague in nature, and it is impossible to know whether the contradictions are substantive or technical and, particularly, whether the complaint as presented to the OCGIC raises details that are worthy of investigation. When contradictions are found, these may reflect the nature of the meeting with the OCGIC, during which an individual item or section is discussed in detail; the time that elapses between the occurrence of the events, the submission of a complaint, and the meeting with the OCGIC; or the difficulty in recalling precisely traumatic incidents.

In a long and detailed letter to PCATI dated 17 December 2003, Attorney Talia Sasson, then director of the Department for Special Functions in the State Attorney's Office, raised the argument concerning "discrepancies, sometimes extremely substantive, between the claims raised by PCATI and those raised before the OCGIC by the same complainants." In her replies and even added that "it would seem that a defect has occurred in the level of inspection of the complaints by PCATI." Sasson stated that "a public body that wishes its claims to be taken seriously must accept responsibility for the reliability of the complaint." Sasson dismissed in a brief aside the possibility that the discrepancy between the versions was due to the OCGIC's identity as a GSS employee, the manner in which the complainants were questioned, and the location where the questioning took place: "My impression is that these complainants were not afraid to present their complaint to the OCGIC. Some of them shared complaints with the OCGIC – but not the same complaints stated by PCATI."

Human rights NGOs filing complaints on behalf of interrogees are not charged with verifying the complainants' reliability. This requires an independent and distinct mechanism of investigation that can examine the discrepancies between the versions, if any, and gauge the reasons therefore. A discrepancy between the complainant's versions cannot constitute the sole reason for closing a complaint, particularly when the nature of the discrepancy is not detailed in the letter, or when it does not relate to the essential core of the complaint.

It is worth reiterating here that the problem would be resolved if the GSS did not enjoy exemption from the video documentation of its interrogations, as PCATI has recommended for years. As we noted in the Introduction to this report, the legal provision requiring the police to videotape its interrogations excludes GSS interrogations.¹⁰³ Thus the absence of accurate and reliable documentation of the interrogations not only conveys the message to interrogators that “anything goes,” but also disrupts the possibility of investigating what actually occurred. In our opinion, the complainant should not bear the burden of the consequences of this lack of documentation, and this reason alone is sufficient to open a criminal investigation in any case of a discrepancy between the versions of the events.

Moreover, the lecture about the behavior of a “public body” is surprising, if not infuriating, when it comes from another public body that has not seen fit to forward for criminal investigation even one of the hundreds of complaints submitted over the past nine years that raise prima facie and grave suspicion of the systemic use of torture and abuse in GSS interrogations.

V. The “ticking bomb” and the “necessity defense”

In some cases a different type of reply is forthcoming.¹⁰⁴ These are cases in which the facts presented in the complaint (or some thereof) are not denied, but the complaint is closed, evidently because the OCGIC, together with the director of the Department of Special Tasks in the State Attorney’s Office and the Attorney General, believe that the necessity defense applies to the case.¹⁰⁵ In other words, these cases fall under the system of permits enabling interrogators to torture or abuse interrogees when they face the situations referred to as a “ticking bomb.”

In the past PCATI received replies explicitly stating that the relevant cases fell under the “necessity defense” and had therefore been closed. However, the law enforcement

¹⁰³ Criminal Proceedings Law (Questioning of Suspects), 5762-2002. The state noted to PCATI that the exemption granted from the requirement to videotape GSS interrogations is temporary and is due to expire at the end of December 2010.

¹⁰⁴ Replies along the lines presented here were received regarding eighteen interrogees from the sample.

¹⁰⁵ See the previous section for a discussion of the applicability and limitations of the necessity defense.

agencies, including the director of the Department of Special Tasks , were apparently aware of the problematic legal status of such a wording. At a meeting with representatives of PCATI, Attorney Sasson, then the director of the Department of Special Tasks , stated that “you will not receive any more letters in that format [i.e. a format explicitly stating the “necessity defense”]... Our replies will all be in the format that ‘no defect occurred in the interrogators’ behavior.”¹⁰⁶

The format of the reply implying that permission was granted on the basis of the necessity defense has indeed been amended over the years. Then as now, however, the format is standard and only the names are changed – a further indication that both torture and its justification have become a matter of fixed procedure. In most cases the State Attorney’s Office adopts the following format:

“An examination of the matter founded that Mr. XXX was detained for interrogation due to serious suspicions against him, on the basis of reliable prima facie information suggesting that he was involved or assisted in committing serious terror activities that were liable to occur within the immediate timeframe and which could injure or endanger human life.”

A complaint was submitted on 26 June 2006 in the case of Amjad Mohammed Qassam Abu Salha. Abu Salha was arrested on 19 November 2005 and held in detention for the purpose of interrogation for 93 days. During six days of interrogation Abu Salha was held in a difficult and painful position that caused injuries. He was beaten and kicked and the interrogators inserted their fingers in his mouth and stretched it forcefully. He was shackled in a painful manner. He was not permitted to take a shower for twelve days and was deprived of sleep for an uncertain period of time. He was also denied access to food and water. It should be noted that a separate complaint was also submitted to the judge-advocate general concerning violence against Abu Salha by soldiers during his arrest. The reply sent on 25 August 2008 (over two years after the submission of the complaint!) by Rachel Matter, the director of the Department of Special Tasks , summarized the closure of Abu Salha’s complaint and stated: “The complainant was arrested for interrogation due to serious

¹⁰⁶ Minutes dated 21 January 2004 of a meeting between representatives of PCATI and Attorney Talia Sasson, then the director of the Department of Special Tasks .

suspicion against him, on the basis of reliable information, suggesting that the complainant is the key to revealing a network of laboratories for the production of weapons and of hiding places for weapons for the Hamas infrastructure in Nablus; the information further substantiated the tangible suspicion that the complainant was holding information regarding the planning of a suicide attack in which the structure was engaged prior to his arrest and which was due to be executed in the immediate timeframe.”

However, Attorney Mattar’s letter failed to address an additional important event that occurred during the years in which the complaint was discussed. On 10 December 2006, as part of a plea bargain signed between the military prosecutor and Abu Salha’s attorney, Abu Salha admitted four charges detailed in an amended indictment that included only a fraction of the numerous charges (thirteen in number) that had appeared in the original indictment served at the beginning of the legal proceedings, namely military training; trading in weapons; activity in an unlawful association; and providing shelter. He was sentenced to 25 months’ imprisonment, a 15-month suspended sentence for five years, and a NIS 3000 fine. In the sentence the judge, Deputy President Major Amit Pararis, noted that the defendant had been convicted of “a sequence of offenses each of which has minor circumstances and between which there is neither substantive nor temporal contiguity.”

The conclusions of the OCGIC and of the director of the Department of Special Tasks that sought to substantiate the claim that Abu Salha constituted a “ticking bomb,” in order to justify the harsh measures used against him in his interrogation, should also have been examined in light of the judge’s comments. The letter of reply in the complaint completely ignores the interrogation material, the indictment, and the ruling, all of which raise the possibility that there was no suitable factual basis for determining that Abu Salha’s interrogation was covered by the necessity defense.

In the situation described here, where the reply from the director of the Department of Special Tasks does not deny the grave facts included in the complaint, a criminal investigation is warranted even more clearly than in other cases. The examination of the applicability of the necessity defense, to the extent that it applies to torture – a

legal creation of specific and rare application – **must take place solely in court**, and not by the body that processes the complaints, whether this be the OCGIC, the director of the Department of Special Tasks , or the Attorney General.

Beyond their convoluted wording, these replies effectively constitute an **admission** of the most appalling facts: Officials in the State of Israel tortured helpless prisoners over periods of many days, and this torture was justified – at least retroactively- by the Attorney General, who exempted the torturers not only from punishment but even from a criminal investigation.

It should be added here that in any case, according to the guidelines of the Attorney General, the necessity defense does not apply in the case of torture.¹⁰⁷ This should have been noted in the replies from the director of the Department of Special Tasks , at least in complaints raising suspicion of the use of torture per se, and in which the facts raised in the complaint are not denied. The behavior of the law enforcement agencies in ignoring the restriction included in the guidelines of the Attorney General is questionable at best.

3: The Mechanism for Examining Complaints by GSS Interrogees – Key Failings

Having presented statistics and reviewing replies from the OCGIC illustrating the structural flaws inherent in the functioning of the OCGIC, we shall now discuss some of the theoretical issues raised by the study. The main issues are: A body responsible for investigating torture and improper means of interrogation cannot be an organ of the GSS; such a body cannot operate as a substitute for a criminal investigation; the investigation must be transparent and open to public criticism.

1. There is no external and independent examination

In a decision that defies common sense, Israeli law and international law, the Attorney General chose to transfer the examination of interrogees' complaints to a body that forms part of the system under examination. The fact that the substantive examination is undertaken by a GSS employee has grave ramifications in terms of the functioning

¹⁰⁷ Guidelines of the Attorney General, note 45 above.

of the entire mechanism and its ability to meet the criteria of an independent and fair examination. However decent and honest the OCGIC may be on a personal level, he cannot undertake the required examination in an impartial manner. The GSS pays his salary; he has professional and personal ties with his GSS colleagues – the interrogators who are the subject of the complaints; and his ability to observe situations correctly is extremely limited. The fact that the OCGIC is a partner in the “work” of the GSS, whose professional past – and, more importantly, future – are in the organization mean that his perspective is inevitably that of the interrogators. The probability is that he will identify with their objectives and function in the interrogation situation and will not find it easy to criticize their actions.

From the complainant’s perspective, the fact that the complaint is investigated by a member of the organization that tortured him has profound ramifications in terms of the motivation to submit the complaint. The complainant clearly will not have confidence in this system and may be reluctant to submit himself once again to its inspections and questioning.

It is true that the work of the OCGIC is supposed to be examined by the official in the State Attorney’s Office responsible for this function; this official is expected to examine the quality of the investigation before approving its findings. It is possible that the official has established guidelines or procedures that apply to the OCGIC. However, the replies received from the director of the Department of Special Tasks consistently show that the OCGIC’s recommendation is always accepted in full. In practice, therefore, the future of the complaint rests with the OCGIC and not with the official responsible for him or by the Attorney General who relies on his decisions. This reality serves only to exacerbate the immutable flaw that stems from the OCGIC’s identity as an integral part of the body under examination, rather than an external and independent function.

It is therefore evident that as long as the Attorney General’s decision is based entirely on the findings of the OCGIC, and as long as the OCGIC has complete control over the course of the examination, Israel does not maintain an independent mechanism for examining complaints of torture.

2. Lack of criminal investigation

PCATI believes that any complaint raising a priori suspicion of torture and abuse must lead, at the very least, to a criminal investigation. Although the Supreme Court ruled in the HCJ Torture Petition that the Attorney General is permitted to establish guidelines concerning prosecution,¹⁰⁸ this does not derogate from the obligation to open a criminal prosecution as a preliminary step to prosecution, with all the public, organizational, and legal ramifications this entails.

The amendments to the Police Ordinance and the manner in which these have been interpreted by the law enforcement agencies, as described in detail in this section, have created a legal structure that invariably closes the examination into complaints of torture before a criminal investigation is opened. Effectively, therefore, the system is one of **pardon before investigation**, following the model of the pardon granted by the state president to those involved in the “Bus 300” affair as described above in detail.

As we have also noted, the State Attorney’s Office takes the position that the OCGIC’s examination constitutes a preliminary inspection – i.e., the inspection that the Attorney General is entitled to undertake before deciding whether a complaint is to be forwarded to the Police Investigation Department. A preliminary investigation on such a grave and substantive issue as torture may be justified, if at all, only for the purpose of removing complaints that are factually spurious from the Attorney General’s workload. In any case, our position is that, firstly, it is unreasonable that such a preliminary examination should be undertaken by a part of the same body that is under investigation. Secondly, the preliminary investigation as conducted is inadequate: It is less comprehensive than a criminal investigation; it does not carry the same substantial public ramifications; its purpose is to collect factual material rather than to discuss their legal ramifications. Furthermore, it may be assumed that this preliminary investigation does not have access to the same investigative tools as a criminal investigation, including monitoring, wiretapping, confrontation, investigative exercises, and the use of a polygraph. For this reason, too, this examination cannot constitute a proper substitute for a criminal investigation.

¹⁰⁸ HCJ Torture Petition, note 13 above, para. 38 of President Barak’s ruling.

Various replies received from the official responsible for the OCGIC suggest that this official perceives the function as including the authority to amend the interrogation procedures in the GSS. At a meeting with representatives of PCATI in 2004, for example, Attorney Sasson commented: “We learn from the complaint, draw conclusions, and change procedures. The results of the investigation may lead to a delay in promotion. We do not announce such information to external sources. The main contribution made by PCATI’s complaints is that they lead to changes within the organization.”¹⁰⁹

There would be nothing wrong with this approach if a parallel and independent mechanism existed for investigating complaints and ensuring the justice is served against those suspected of torture or abuse. After all, the fact that the procedures were changed constituted admission that at least some of the facts raised in the complaint were found to be accurate, and that the previous procedures were found to be inadequate. In such a situation, the author of these procedures, insofar as they enabled a person to be subject to torture or abuse, should be subject to criminal prosecution.

In practice, the preliminary investigation does not merely replace the criminal investigation;¹¹⁰ it “launders” the offenses and failings by subjecting them, at the most, to a lenient and ineffectual examination. Thus the OCGIC’s examinations create the façade of an investigation while in practice, given the legal framework explained above in this section, they constitute the main obstacle to the opening of a criminal investigation. By the consistent adoption of the OCGIC’s conclusions, which always and without exception favor the interrogators, the OCGIC’s superiors prevent any possibility of a criminal investigation, thus providing a legal rubber stamp for acts of torture and abuse that occur during the GSS interrogations.

¹⁰⁹ Minutes of a meeting with Attorney Talia Sasson, note 109 above.

¹¹⁰ For a discussion of the different rationale behind criminal and disciplinary law, see: http://www.idi.org.il/PublicationsCatalog/PublishingImages/MM%2056/mm56_256.gif.

3. The confidentiality of the examination and its findings

The curt replies received from the director of the Department of Special Tasks do not provide any substantive information regarding the findings of the examination or the circumstances that led to the recommendation to close the complaint. Neither do these replies specify the framework of considerations that guide the director of the Department of Special Tasks or the Attorney General in discussing the OCGIC's recommendation and accepting it without reservation.¹¹¹

The imposition of a sweeping confidentiality on material relating to the OCGIC's examination and findings on the grounds of preventing injury to "clear public interests" is incompatible with the remarks by Justice Strassberg-Cohen:

"The importance of ensuring that the truth is revealed during the OCGIC's investigations is not to be belittled... However, there is a great gap between this point and the sweeping determination that revealing the comments made by GSS interrogators before the OCGIC will hamper the effectiveness of the investigation... and that this may be tantamount to endangering state security. I am aware that the work of collecting material and proving the guilt of defendants accused of terror activities... is far from easy. However, in our legal system and in our democratic regime, every person is entitled to a fair trial and we must jealously maintain the rules we have established for ourselves."¹¹²

The blanket secrecy imposed on the examination is typical of the approach taken by the Israeli legal system to security considerations, in general, and to supervision and legal steps against GSS interrogators who have broken the law, in particular. **This secrecy constitutes a further layer of protection for the interrogators and creates a further obstacle to their prosecution.**

This policy naturally has grave ramifications in terms of the ability to appeal effectively against the conclusions of the examination. Without details concerning the substantive grounds and considerations behind the decision, it is impossible to

¹¹¹ This situation differs from the appeal proceeding concerning the conclusions of investigations by the PID (and from the right of a criminal defendant to receive the investigative material in their case), in which it is possible to obtain the investigative material in order to prepare the appeal. This difference is emphasized and magnified by the fact that the OCGIC's action is an examination and does not constitute a criminal investigation – a procedure that permits more meaningful public supervision.

¹¹² Sundry Crim. Applications 4705/02 Anonymous v State of Israel [unpublished].

challenge the decision or examine whether it is reasonable. Ensuring that the substantive points of a decision remain confidential enables the authority to act in an arbitrary, unreasonable, and rash manner at best, and to whitewash and conceal findings at worst.

In this context we should add that the appeal process relating to the conclusions of the examination, which generally takes place through a process known as an “application to review the decision of an administrative authority,” rather than through the right of appeal, is inferior and limits the appellant’s rights. The procedure is not formalized in law and is less open to judicial review and public inspection. This procedure does not include a statutory right to review the material relating to the examination. The procedures according to which an investigation mechanism operates should be published and subject to public criticism; the decisions taken on the basis of these procedures should be detailed. The right of appeal against the decisions of this mechanism must be institutionalized and formalized in law.

Conclusion

As we have shown repeatedly throughout this section, the lack of criminal investigation of complaints of torture by GSS interrogators does not exist in a vacuum. The circumstances, laws, rules, and loopholes created by the HCJ ruling have enabled a situation whereby complaints of abuse and torture are not investigated at all and the inquiry that the Attorney General conducts is not thorough, effective or transparent. As a result, GSS interrogators who have committed torture are not prosecuted.

The past two decades have seen progress in terms of public attitudes on this issue, and this change has also been reflected in legislation. However, the central core of the actions by GSS personnel – the interrogation and the manner in which it is conducted – is still largely beyond the law and not subject to the same administrative procedures as other actions by the authorities. In part this is due to the fact that this core is confidential and effectively immune to effective supervision by the law enforcement authorities. Moreover, the mechanism for processing complaints of torture in Israel in its current form functions as a screen behind which the authorities can hide. While making the presentation that complaints are examined by the relevant bodies at the

highest level – the State Attorney’s Office and the Attorney General– this mechanism actually creates an impenetrable barrier to criminal investigation and to the prosecution of GSS personnel.

The systemic failure to conduct criminal investigation has grave consequences. It perpetuates the culture of lying in the GSS – a culture which from time to time, following a “mishap,” is revealed in part of the public. It creates a culture of disrespect for the rule of law and for the values of human rights. It denies relief to victims seeking to repair the physical and psychological damage they have suffered, and it also creates an obstacle preventing victims from securing their right to claim compensation through a civil proceeding.

Section Three: The Obligation to Investigate and Penalize Those Responsible for Torture and Abuse in International Law

This section details the standards established in international law regarding the processing of complaints of torture or cruel, inhuman or degrading treatment or punishment (abuse). We shall begin by examining the nature of the prohibition of torture in international law and its reference to the concept of the “necessity defense.” We shall then review the requirements of international law concerning the obligation to investigate and prosecute those involved in torture. The discussion will include a review of the conclusions of the United Nations Committee against Torture, which is responsible for the implementation of the Convention against Torture, relating to Israel. Lastly we shall discuss the possibilities for criminal prosecution within the framework of international law.

1. Torture, Abuse, and the “Necessity Defense” in International Law

The right not to be tortured is an unusual right within international law. Of all the different rights, this is one of very few that have been determined to apply regardless of a state of emergency. No circumstances can justify the violation of this right. Its elevated status reflects an understanding that torture constitutes the ultimate violation of human dignity and integrity.

This approach is the fact that the right not to be subjected to torture or to ill treatment is formalized in several legal structures within international law.

Firstly, the absolute prohibition of torture and cruel, inhuman, and degrading treatment is formalized in a series of **key agreements and conventions** relating to human rights, most notably the Covenant on Civil and Political Rights¹¹³ and the Convention against Torture.¹¹⁴ Israel has joined both these conventions of its own free will and has undertaken to maintain their provisions, without noting any reservation regarding the absolute prohibition of torture and abuse.

¹¹³ International Covenant on Civil and Political Rights, Article 7. For the full text of the covenant see PCATI’s website: www.stoptorture.org.il.

¹¹⁴ Convention against Torture, note 14 above.

Secondly, international humanitarian law applies in the Occupied Territories. This sphere of law includes the laws of occupation, which apply to the manner in which the State of Israel treats the residents of the Territories. The 1949 Geneva Convention relative to the Treatment of Prisoners of War includes an article explicitly establishing that torture and any other form of coercion, physical or mental, are not to be used in order to extract information from prisoners of war.¹¹⁵ This prohibition is sweeping, regardless of the type of information the interrogators wish to extract.¹¹⁶ An identical prohibition is included in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, including persons living in occupied territory.¹¹⁷ Israel has also joined these conventions of its own free will and has thereby committed itself to maintaining their provisions without objection. We should note that all the nations of the world are now party to the Geneva Conventions.

Thirdly, this prohibition is formalized in **customary international law**.¹¹⁸ Customary international law includes rules regarding which there is very broad consensus among the nations of the world, as reflected in their (legal) behavior, and which are also the subject of broad agreement among other bodies and experts. These are binding on all the nations of the world, including those who have not undertaken any written obligation.¹¹⁹ There is universal agreement that, at the least, the prohibition of torture is also defined as *jus cogens* – an undisputed rule, i.e. one that no state may restrict or limit.¹²⁰

The Convention against Torture, which constitutes the central document on the subject of torture and abuse, defines torture as follows:

¹¹⁵ Geneva Convention relative to the Treatment of Prisoners of War, Article 17. We should note that the State of Israel claims that the convention does not apply to the Occupied Territories; however, it recognizes that the human rights provisions in the convention do apply therein.

¹¹⁶ Jean S. Pictet, ed., *Commentary – III Geneva Convention*, 163-164

¹¹⁷ See the Fourth Geneva Convention, Article 31.

¹¹⁸ Ruby Segal, *International Public Law*, Jerusalem, Hebrew University, 2003, p. 174.

¹¹⁹ *Ibid.*, p. 13. We should note that it is possible that a state that expressed forceful opposition to a custom will not be bound thereby. Israel has never expressed any objection to the absolute prohibition of torture.

¹²⁰ Yuval Ginbar, *Why Not torture Terrorists?*, Oxford University Press, 2008, pp. 3-282 and the sources mentioned therein.

“... 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.”¹²¹

Actions that do not meet the degree of severity inherent in the definition of torture fall under the definition of “cruel, inhuman, or degrading treatment or punishment” (in this report, we have used the term “abuse” to refer to these actions, for the sake of brevity). These actions are subject to the same absolute prohibition as applies to torture.¹²²

Unlike most prohibitions in international law, which – however grave they may be – can be derogated in a state of emergency, the prohibition on torture and abuse in international law may not be derogated even in the most extreme circumstances. The Convention against Torture explicitly establishes that a state may not raise claims concerning the presence of special circumstances as justification for torture. This provision, established in Article 2(2) of the convention, constitutes an unequivocal response to any attempt to challenge the absolute provision in the name of national security during the struggle against terror.¹²³ Although Article 4 of the Covenant on Civil and Political Rights permits the retraction of some of its provisions in a state of emergency, but this does not apply to the article discussing torture and abuse.¹²⁴ The customary consensus regarding the prohibition includes consensus regarding its absolute nature.

International criminal law, like domestic law, recognizes the right of suspects and defendants to enjoy certain defenses. These include the “necessity defense,” although

¹²¹ Convention against Torture, note 14 above, Article 1.

¹²² Article 4 and 7 of the Covenant on Civil and Political Rights.

¹²³ Manfred Nowak and Elizabeth McArthur, The United Nations Convention against Torture, A Commentary, Oxford University Press, 2008, pp. 89, 119.

¹²⁴ See Article 4 and 7 of the covenant

in the vast majority of cases heard in international courts, this term actually refers to what is known in Israeli law as “duress” [*korach*]:

A person shall not bear criminal liability for an act he was ordered to commit under a threat reflecting tangible danger to his life, liberty, person, or property or those of another, and which he was forced to commit pursuant thereto.¹²⁵

In these cases, the defendants argued that they faced an impossible choice between committing an international crime and danger – usually mortal danger – to themselves. Thus, for example, industrialists accused of employing forced labor during the Second World War argued that they were obliged to do so due to their fear that they would otherwise be harmed; some of these defendants were acquitted.¹²⁶

In a few cases, defendants have argued a type of “necessity” defense by way of justification, claiming that they committed an international crime in order to serve a higher cause or prevent a greater evil. However, the courts have rejected all such claims. This was the case, for example, in the 1940s in the trial of a German physician who justified undertaking cruel experiments on prisoners of war and civilians on the ground that this was necessary in order to improve the health of German prisoners.¹²⁷ Similarly, a Serbian defendant in the 1990s claimed that he abused prisoners in order to save them from a worse fate.¹²⁸

This is the background against which we should understand the defenses clause in the Rome Statute, which regulates international criminal law and provides for the prosecution of defendants accused of genocide, war crimes, and crimes against humanity. The relevant clause includes the following section:

“A person shall not be criminally responsible if, at the time of that person’s conduct [...] the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the

¹²⁵ Article 34L of the Penal Code.

¹²⁶ For example, see: *US v Friedrich Flick et al.*, (Case No. 5, the Flick case), TWC Vol. VI 1187 (1952).

¹²⁷ See: *US v Brandt et al.* (Case No. 1, the Medical case), TWC Vols. I-II.

¹²⁸ See: *Prosecutor v Aleksovski*, Case No. IT-95-14/1-A, Appeals Court, Judgment of 24 March 2000.

person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control."¹²⁹

While this provision bears some resemblance to the necessity defense in Israeli law, the key word to be noted in this provision is “duress.” The International Criminal Court has not yet issued any rulings, let alone principled rulings relating to the subject of these defenses. However, it is reasonable to assume that if it is required to address this subject, the court will adhere to the “duress” line adopted by its predecessors. The alternative – finding justification for the worst crimes in humanity – is horrifying and contrary to the entire concept underlying the establishment of the court.¹³⁰

The formalization of the prohibition of torture in all the main international conventions, and its establishment as an absolute prohibition both in the conventions themselves and by key tribunals in the field of human rights, position the right not to be subjected to torture as a basic and indisputable human right that imposes an obligation on the state not merely to refrain from torture and abuse, but also to inspect, protect torture victims, investigate any complaint of torture and abuse, and punish those who violate this grave prohibition.

2. The Foundations of the Obligation to Investigate

As noted above, the Convention against Torture did not confine itself to defining the offense, but also imposes on member states an obligation to provide appropriate mechanisms for investigation and penalization.¹³¹ A review of the founding documents of the UN Committee against Torture, the body responsible for implementing the convention; the UN Human Rights Committee, which is responsible for implementing the Covenant on Civil and Political Rights; and the rulings of the main international tribunals all reflect the requirement that the system for processing

¹²⁹ Rome Statute, 1998, Article 31, 31(d). The statute may be found on the website of the International Criminal Court: <http://www.icc-cpi.int/>.

¹³⁰ The preamble to the statute states, inter alia: “the most serious crimes of concern to the international community as a whole must not go unpunished.”

¹³¹ Convention against Torture, note 14 above, Articles 12-13.

complaints of torture and abuse must be efficient, completely independent, effective, and reliable.¹³² The powers and capacities of this system must advance an investigation in any case in which a complaint is received or suspicion raised of the presence of torture.¹³³ It must also permit the realization of the victims' right to submit a complaint.

The conventions reflect the prevailing perception that the ability to submit a complaint that will be properly processed in itself constitutes an important right for the victims. The complaint also provides information for the relevant bodies concerning the committing of an offense and concerning the prevention of an interrogation designed to bring the perpetrators to justice. The submission of a complaint enables the activation of mechanisms of investigation and punishment. It also reinforces the message of prevention and makes a significant contribution to restoring the dignity of victims and their sense of being masters of their own destiny. A complaint of torture may also constitute the first step by the victim to securing additional relief, such as compensation or restitution, which are almost impossible to secure without proof secured through an official investigation.

Two articles in the Convention against Torture address the obligation to investigate:

“12. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

“13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

A. The obligation to open an investigation

The Committee against Torture has determined that the relevant authorities must open an investigation not only in response to “external” complaints, but also to “internal”

¹³² Commentary, note 123 above, pp. 418-420.

¹³³ Convention against Torture, note 14 above, Articles 12-13.

complaints, i.e. ones from within the system.¹³⁴ In this spirit, it has been determined that there is no obligation that the victim submit an official complaint. It is sufficient that information is brought to the attention of a relevant body for that information to be the subject of an immediate investigation. This obligation complements the obligation incumbent on official bodies to report any case of torture or cruel, inhuman, or degrading treatment.¹³⁵ These provisions recognize that in some cases the victims of torture are in no position to submit a complaint.¹³⁶

The obligation to investigate also appears in the recommendations of the UN Special Rapporteur on Torture, which state that **every** claim and accusation relating to torture must be investigated, and that those suspected of committing offenses should be suspended, unless the suspicion clearly seems to be unfounded.¹³⁷ The document formulated on 1 July 1957 by a UN conference on the subject of minimum international standards for conditions of imprisonment also establishes that the authorities must process any complaint, unless it is grossly worthless and unsubstantiated.¹³⁸

In this context, the committee has determined that law enforcement agencies shall not enjoy discretion regarding the obligation to investigate, since this would be diametrically opposed to the text and spirit of Article 12 of the convention. Thus, for example, the committee made the following comment regarding the prosecution system in Burundi:

¹³⁴ Commentary, note 123 above, p. 421. See also: Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 15.

¹³⁵ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

¹³⁶ REDRESS, Taking Complaints of Torture Seriously, Rights of Victims and Responsibility of Authorities, September 2004, pp. 11-12.

¹³⁷ UN Doc. E/CN.4/2003/68/Add.2, 3 February 2003, para. 70(f).

¹³⁸ Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Standard 35(4), available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>. For further details, see also: Taking Complaints Seriously, note 135 above, pp. 13-14.

“The State party should consider introducing an exception to the current system of assessing the appropriateness of prosecution in order to conform with the letter and spirit of article 12 of the Convention and to remove all doubt regarding the obligation of the competent authorities to institute, systematically and on their own initiative, impartial inquiries in all cases where there are substantial grounds for believing that an act of torture has been committed.”¹³⁹

B. The obligation to open an investigation immediately

The Committee against Torture and the professional literature have occasionally established that immediacy in opening an investigation relating to complaints of torture forms an important and substantive tool in preventing torture. Immediacy is required for various reasons: in order to ensure that the victim of torture does not continue to be subject to torture;¹⁴⁰ physical marks and traces, insofar as these are left behind by “modern” methods of torture, may disappear after time;¹⁴¹ a delay in opening an investigation increases the chances that victims and witnesses able to support the victims’ version (who are in any case difficult to find in cases of torture, which usually take place in isolation, concealment, and in the presence of few individuals) may be subject to intimidation; immediacy reflects the determination of the responsible bodies to act against the phenomenon of torture and those responsible for its perpetration and prevents suspicion that torture is being tacitly tolerated; the immediate opening of an investigation also conveys an important public message concerning the maintenance of the rule of law.¹⁴²

According to the Committee against Torture’s interpretation of Article 12 of the covenant, an investigation should be opened immediately that suspicion of the use of torture arises and without any delay – within hours or a few days.¹⁴³ In one case the committee established that a delay of fifteen months in opening an investigation into claims of torture was unreasonable and failed to meet the requirements of the

¹³⁹ Conclusions and recommendations of the Committee against Torture : Burundi; UN Doc, CAT/C/BDI/CO/1 20 November 2006. The committee made the same determination regarding New Zealand: *Concluding observations of the Committee against Torture : New Zealand*; UN Doc. CAT/C/NZL/CO/5, 14 May 2009.

¹⁴⁰ UN Doc. CAT/C/Mex/CO/4, 6 February 2007, Para. 16.; REDRESS, Reparation for Torture, A survey of Law and Practice in Thirty Selected Countries: Mexico, May 2003.

¹⁴¹ Blanco Abad v. Spain, CAT/C/20/D/59/1996 (1998), para. 8.7

¹⁴² *Waiting for Justice*, p. 16.

¹⁴³ Commentary, note 123 above, p. 434.

convention.¹⁴⁴ In another case it noted that a delay of ten months in opening an investigation, followed by a further two-month delay following the publication of a report by an official commission of inquiry that proposed an investigation into the case, constitute a violation of the content of Article 12.¹⁴⁵ The committee even ruled that a period of **three weeks** between the date of receipt of medical documentation regarding a complaint and the commencement of investigation proceedings failed to meet the standards required in Article 12 of the convention regarding the immediate opening of an investigation.¹⁴⁶

Conversely, the Committee against Torture appears to have recognized mitigating circumstances relating to delays in the **submission of a complaint** of torture. These circumstances are somewhat similar to those regarding the behavior of the victims of sex offenses, when the humiliation and trauma they have suffered make it very difficult for them to submit a complaint soon after the relevant events occurred. Many legal systems provide special attention to such victims in their laws. Similarly, the committee has determined that no statute of limitations should be applied by law to the offense of torture.¹⁴⁷

C. The obligation to manage the investigation efficiently

Once an investigation has been opened it must be pursued professionally, efficiently, and without unnecessary delays. Thus, for example, the Committee against Torture has determined that an investigation that lasted for ten months due to the lengthy intervals between collecting the various affidavits and analyzing the medical findings constituted an unreasonable period.¹⁴⁸

The European Court of Human Rights specified the required properties of an efficient and swift investigation: The proper management and documenting of the investigation file; proper and thorough management of the questioning of the witnesses and the scene of the torture; proper timing of the analysis of the medical evidence; staging an

¹⁴⁴ In the case of Halimi-Nedyibi v Austria. See No. 8/1991 and No. 8/1991§ 13.5.

¹⁴⁵ CAT/C/23/D/60/1996.

¹⁴⁶ Blanco Abad v Spain, note 140 above, para. 8.7.

¹⁴⁷ UN Doc. CAT/C/CR/30/5, 2003, §7(c); UN Doc. CAT/C/CR/32/5, 2004, §7(f).

¹⁴⁸ Blanco Abad v Spain, note 140 above, para. 8.7.

identity parade as soon as possible after the date of submission of the complaint; and refraining from delays in undertaking a psychiatric examination of the complainant.¹⁴⁹ The court even included the conducting of an ineffective investigation in torture, and the failure to prosecute those held to be involved in torture, as part of the prohibition on torture itself as mentioned in Article 3 of the European Convention for the Protection of Human Rights.¹⁵⁰

The European Committee against Torture established that in order for the investigation of complaints relating to torture to meet the requirement of effectiveness, it must be thorough and comprehensive; it must be undertaken swiftly and without delays; and those responsible for pursuing the investigation must be independent and unconnected with elements involved in the events under investigation.¹⁵¹ The European Committee sharply criticized the returning of complainants to the same interrogation facilities in order to collect affidavits relating to their version and for additional investigative actions, despite explicit requests from the complainants not to be sent to places where they had been tortured in the past, due to the fear that the torture would be repeated. The committee emphasized the supreme importance attached to the conduct of the investigation in a safe environment, in places other than the locations in which the torture addressed by the investigation occurred and unconnected with the law enforcement agency whose personnel were involved therein.¹⁵² The committee also emphasized that during the investigation the complainants are not to be returned to custody of the law enforcement agency in which the torture that is the subject of the investigation occurred.

¹⁴⁹ For details, see Wiating for Justice, pp. 21-23; Taking Complaints Seriously, note 135 above, pp. 19-21.

¹⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

¹⁵¹ CPT Statement on the Chechen Republic; para. 5.

¹⁵² CPT Statement in the .41 Chechen Republic, Extracts from the Report to the Government of the Russian Federation on the visits to the North Caucasian region carried out by the CPT, para 51.

D. The obligation to pursue an impartial investigation

The core of the obligation to investigate is, perhaps, the requirement that the investigation be undertaken independently and in an impartial manner. The wording of Article 12 makes this requirement explicit. The committee has noted the independence of the examining body as a key component in a fair investigation in numerous cases brought before it.

One example of this was raised during the visit to Jordan by the Special Rapporteur on Torture in 2006. During the visit, the rapporteur received assurances from official government sources that all accusations of torture were investigated with due seriousness by bodies established for this purpose. It emerged that only serving police officers investigated prima facie accusations of torture by elements within the police; only intelligence officers investigated prima facie accusations of torture by elements in the intelligence service; and only army officers investigated prima facie accusations of torture by elements in the army.¹⁵³ The rapporteur therefore determined that it was hardly surprising that the Jordanian government was unable to identify even a single case of conviction for torture, despite repeated accusations.

Thus the investigation must be undertaken by an **external body** that has no direct connection to the unit in which the torture is alleged to have occurred. Such a body must have full investigative powers (summonsing witnesses; unfettered access to the torture victim; questioning of official bodies suspected of torture or of involvement in a decision to use torture; the examination of official documentation; and forensic tests).¹⁵⁴

E. The obligation to forward the results of process of complaints to the complainants and to publish them for review by the general public

The Committee against Torture has also interpreted the obligation to hold a fair, objective, and impartial investigation as including the obligation to update the complainants on the results of the investigation. The committee recommended that states that are party to the convention should publish the results of investigations into

¹⁵³ Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Jordan A/HRC/4/33/Add.3,5 January 2007, para. 52-63.

¹⁵⁴ Commentary, note 123 above, p. 438.

complaints of torture and establish a central public database for storing complaints of torture and abuse and the results of the investigations. One purpose of such a database is to ensure that objective and open investigations are conducted.¹⁵⁵ The UN Human Rights Committee has also urged states that are party to the convention to publish data on the number of complaints of torture submitted, together with details of their content, the investigations opened, and the steps taken as the result of the investigation, including the punishment received by those guilty of committing offenses.¹⁵⁶

The European Court of Human Rights¹⁵⁷ and the Inter-American Committee of Human Rights¹⁵⁸ have also established that states must report to complainants on the results of the processing of their complaint. The Inter-American Court further determined that a state is obliged to publish these results.¹⁵⁹ The Istanbul Protocol¹⁶⁰ includes the most detailed description of the requirements for such publication. The protocol states that:

“A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report shall be made public. It shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified with

¹⁵⁵ Convention Against Torture, Summary Record of the Public Part of the 246th Meeting: Armenia, (1996), para. 37; **The United Nations Convention against Torture, A Commentary** *ibid*, p. 437

¹⁵⁶ As *Waiting for Justice*, *Ibid*, p. 21; Concluding observations of the Human Rights Committee on Germany’s State Party report, UN Doc. CCPR/CO/80/DEU, 15 April 2004, para.16 and by the Committee against Torture, UN Doc. CAT/C/CR/32/7, 18 May 2004, para.4 (c); Israel’s State Party report, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para.18, on Portugal’s State Party Report, UN Doc. CCPR/CO/78/PRT, 5 July 2003, para.8 (b), on Estonia’s State Party Report, UN Doc. CCPR/CO/77/EST, 15 April 2003, para.18 and on Togo’s State Party Report, UN Doc. CCPR/CO/76/TGO, 26 November 2002, para.12.

¹⁵⁷ *Anguelova v Bulgaria* (Application no. 38361/97), 13 June 2002, also available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698382&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACBCD1763D4D8149>

¹⁵⁸ *El Caracazo Case*, Judgment of November 11, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 58 (1999), also available at: <http://www1.umn.edu/humanrts/iachr/C/58-ing.html>

¹⁵⁹ *Ibid.*, *ibid.*

¹⁶⁰ We should note that this protocol does not have binding legal status. See: <http://www.irct.org/the-istanbul-protocol/background---purpose.aspx>

the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation, and, as appropriate, indicate steps to be taken in response.”¹⁶¹

F. The obligation to open a criminal investigation and to prosecute

The committee has consistently taken the position that in cases raising suspicion of the presence of torture or abuse there can be no discretion concerning prosecution. Granting such discretion to law enforcement personnel constitutes a violation of Article 12 of the convention:

“The Committee is concerned at the system of assessing the appropriateness of prosecution, which leaves State prosecutors free to decide not to prosecute perpetrators of acts of torture and ill-treatment involving law enforcement officers or even to order an inquiry, which is clearly in conflict with the provisions of article 12 of the Convention (art. 12).”¹⁶²

Similarly, the committee expressed its concern at the procedure for the prosecution of torture suspects in France, which grants the state prosecution system discretion and empowers it to refrain from prosecuting torture offenses involving police personnel and even to refrain from investigating such cases. The committee determined that such a proceeding is clearly contrary to Article 12 of the convention. The committee explicitly determined that in order for the system responsible for receiving and processing complaints of torture to meet the requirements of the convention, the discretion relating to the obligation to open an investigation must be eliminated.¹⁶³

G. Formalizing the prohibition against torture in criminal law

The Committee against Torture has repeatedly emphasized that Article 4(1) of the convention requires the integration of the offense of torture in domestic criminal law,

¹⁶¹ Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 August 1999), p. 57. Also available at: <http://physiciansforhumanrights.org/library/istanbul-protocol.html>; REDRESS, *Waiting for Justice, The Politics of Delay in the Administration of Justice in Torture Cases: Practice, Standards and Responses*, May 2008, p. 21.

¹⁶² [Conclusions and recommendations of the Committee against Torture : Burundi](#); CAT/C/BDI/CO/1 Adopted 20 Nov. 2006 during its 37th Session (6-24 November 2006) art.22

¹⁶³ UN Doc. CAT/C/FRA/CO/3 (date etc.), § 20.

including the adoption of the definition including all the foundations of the offense of torture as detailed in Article 1 of the convention.¹⁶⁴

Although the committee has not established any minimum penalty that will properly reflect the gravity of the offense of torture, it has determined in at least one case that a penalty of between six and twenty years' imprisonment will usually be considered appropriate, and that imposing excessively lenient sentences (one year's imprisonment, for example) on a person found guilty of torture constitutes a violation of Article 4(2) of the Convention against Torture, which requires the imposition of penalties for torture "which take into account their grave nature." Pardons granted to those convicted of torture release them from criminal liability for their actions and effectively encourage the recurrence of torture. Accordingly, such pardons constitute a violation of Article 2(1) of the convention, which requires effective measures against torture.¹⁶⁵

In conclusion, the absence of investigations into complaints of torture, or failures and defects in the implementation of these investigations, lead to a grave situation in which those responsible for and involved in torture go unpunished. This situation injures the victims, their families, and society at large, and encourages the continued presence of the torture and abuse that form the subject of the complaints.¹⁶⁶

3. The Conclusions and Recommendations of the Committee against Torture relating to Israel

The State of Israel has signed and ratified the Convention against Torture and, accordingly, it is obliged, among other provisions, to observe the convention's mechanism of supervision and control. This mechanism is based on periodic reports by the states and on responses thereto, as well as on periodic discussions at the

¹⁶⁴ Association for the Prevention of Torture (APT) and the Center for Justice and International Law CEJIL), Torture in International Law, a guide to jurisprudence, (2008 p. 18; UN Doc. A/55/44, 1999, §69(c); UN Doc. A/51/44, 1996, §117; UN Doc. CAT/C/CR/32/5, 2004, §7b; UN Doc. CAT/CO/34/BHR, 2005, §6d; UN Doc. CAT/C/CR/31/7, 2005, §6.

¹⁶⁵ *Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005, §6.7.

¹⁶⁶ Taking Complaints of Torture Seriously, note 135 above, p. 7.

committee attended by the representatives of the state and representatives of organizations.

Since Israel joined the convention in 1991, the committee has followed with concern cases of torture and abuse in GSS interrogations, as well as the systems Israel has created to exempt torturers from punishment. As early as 1994 the committee clarified to Israel that “the law in Israel regarding the defenses of ‘justification’ and ‘necessity’ constitute a clear violation of the state’s obligations in accordance with Article 2 of the convention.”¹⁶⁷

At the end of 1996, in a departure from its usual practice, the committee demanded that Israel submit a special report following the HCJ ruling explicitly permitting “physical pressure” against interrogees.¹⁶⁸ After examining the report, the committee determined that the interrogation methods employed by the GSS in this period constitute torture.¹⁶⁹

The committee’s report following the HCJ Torture Petition generally welcomed the content of the ruling and noted its importance. However, it expressed regret that the ruling did not include an explicit prohibition of torture and the use of sleep deprivation even when this constitutes part of the circumstances of the interrogation. The committee also criticized the determination by the HCJ that interrogators who use physical means of pressure in extreme circumstances (“ticking bomb”) may not bear criminal liability for their actions.¹⁷⁰ Thus the committee removed any doubt, had any existed, regarding the position of international law concerning the guidelines established by the HCJ, which – as we explained in Section One of this report – speak in two voices, on the one hand presenting an absolute prohibition of torture, while on the other leaving scope for the authorization by refraining from punishing the perpetrators.

¹⁶⁷ See: Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention: Israel, UN Doc. A/49/44, 28 April 1994, para. 167.

¹⁶⁸ HCJ 8049/96 **Mohammed `Abdulaziz Hamdan v Israel Security Agency**, decision dated 14 November 1996.

¹⁶⁹ See: Concluding observations of the Committee against Torture: Israel, 9 May 1997, UN Doc. A/52/44, para. 257.

¹⁷⁰ Report of the Committee against Torture, UN Doc.. A/57/44 (2002) para. 52(a)(iii).

The most recent report of the committee, published in May 2009, addressed violations of the convention by Israel, including such aspects as conditions of detention and imprisonment; protracted detention in isolation; illegal facilities; the detention of minors; and the use of force during military operations. In addition, the committee expressed its concern that the offense of torture had not been introduced into Israeli law, and that:

“... the ‘necessity defense’ exception may still arise in cases of ‘ticking bombs,’ i.e., interrogation of terrorist suspects or persons otherwise holding information about potential terrorist attacks... The Committee is concerned that GSS interrogators who use physical pressure in ‘ticking bomb’ cases may not be criminally responsible if they resort to the necessity defense argument.”¹⁷¹

On the basis of the report submitted by PCATI and the OMCT,¹⁷² the committee noted that according to official Israeli statistics, between 1999 and 2002 ninety prisoners had been interrogated under the necessity defense. The committee reiterated its unequivocal recommendation that “the State party completely remove necessity as a possible justification for the crime of torture.”¹⁷³ We should emphasize that this position is shared by the UN Special Rapporteur on Torture¹⁷⁴ and by the UN Human Rights Committee.¹⁷⁵

Regarding the mechanisms for the inspection of complaints, the UN Committee against Torture again determined that the State of Israel should “ensure that all allegations of torture and ill-treatment are promptly and effectively investigated and perpetrators prosecuted and, if applicable, appropriate penalties are imposed.”¹⁷⁶ The committee expressed its concern at the fact that not one of the 600 complaints of

¹⁷¹ See: Concluding observations of the Committee against Torture: Israel, UN Doc. CAT/C/ISR/CO/4, 23 June 2009, para. 14.

¹⁷² See: The Public Committee Against Torture in Israel, OMCT - World Organisation Against Torture, Israel – Briefing to the UN Committee Against Torture, Jerusalem & Geneva, April 2009, para. 7.

¹⁷³ See: Concluding observations of the Committee against Torture: Israel, UN Doc. CAT/C/ISR/CO/4, 23 June 2009, para. 14.

¹⁷⁴ See: UN doc. E/CN.4/2000/9 (2000), para. 675.

¹⁷⁵ See: Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 18.

¹⁷⁶ See: Concluding observations of the Committee against Torture: Israel, UN Doc. CAT/C/ISR/CO/4, 23 June 2009, para. 19.

torture and abuse by GSS interrogators received by the OCGIC in the period 2001 through 2008 led to a criminal investigation, and noted the inherent difficulty in the fact that the OCGIC, although subject to the supervision of the Attorney General, is employed by the GSS. In its recommendations the committee determined that:

“The State party should duly investigate all allegations of torture and ill-treatment by creating a fully independent and impartial mechanism outside the GSS.”¹⁷⁷

The committee also expressed its explicit concern at the fact that GSS interrogations are exempt from video documentation, and determined that video recordings constitute a significant step in protecting the detainee, and for that matter in protecting law enforcement personnel. The committee recommended that the State of Israel as a matter of priority require the video recording of interrogations as a further means to prevent torture.¹⁷⁸

In the committee’s summary, which specified Israel’s undertakings for the coming years, it requested that the State of Israel respond within one year to five paragraphs among its many recommendations.¹⁷⁹ These paragraphs relate to various issues, including the lack of investigation and penalization of interrogators and police personnel suspected of torture and abuse. Thus the committee views these defects in Israel’s behavior as particularly grave and urgent.

4. Individual criminal liability

Not only should the state be held to account for what happens in the interrogation rooms. The interrogators themselves, together with their commanders and the entire administrative, political, and legal structure that protects them, should also be held to account.

Although international law traditionally deals with states, it has for some time addressed the fact that in some cases it is not sufficient to condemn or impose sanctions on a state. Broad-based violations of certain rights require the **criminal**

¹⁷⁷ Ibid., para. 21.

¹⁷⁸ Ibid., para. 16.

¹⁷⁹ Ibid., para. 40.

prosecution of the responsible officials. Moreover, violations of certain rights, including the right to freedom from torture, require an appropriate response against those responsible on the international level, even if they occurred “only” once. Over the years the international community has developed various legal tools intended to enable the criminal prosecution of offenders in international forums or through international cooperation.

A. Prosecution by international forums or through international cooperation

The severity with which the international community views torture and abuse is also reflected in international law concerning the prosecution of criminals. Torture is a **crime** under the Convention against Torture and in accordance with customary law. Torture or inhuman treatment in the context of an armed conflict constitute war crimes.¹⁸⁰ In the event of a systematic or broad-based attack on a civilian population, whether in war or peace, torture and inhuman treatment constitute crimes against humanity as established, for example, by the Rome Statute that established the International Criminal Court.¹⁸¹ Since the Convention on the Prevention and Punishment of the Crime of Genocide includes among the crimes “causing serious bodily or mental harm,”¹⁸² wide-scale torture, including rape (which in many contexts constitutes torture) may also be considered a crime of genocide.¹⁸³

A defendant accused of torture may be tried in several legal forums. First and foremost, each state bears an obligation to prosecute its citizens suspected of torture and who are present within the territory of the state or under its control. According to the Convention against Torture, however, this obligation applies not only to

¹⁸⁰ For example, see Article 147 of the Fourth Geneva Convention (the term used in the convention is “grave violation.”)

¹⁸¹ See: Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2001, Articles 7(1)(f); 7(1)(k).

¹⁸² See: Convention on the Prevention and Punishment of the Crime of Genocide (1948). General Assembly resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951, Article 2(b).

¹⁸³ For example, the International Criminal Tribunal for Rwanda convicted Jean-Paul Akayesu of responsibility for genocide (among other crimes), in part due to his responsibility for acts of rape on account of which he was also convicted of responsibility for torture. See: *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, judgment of 2 September 1998, paras. 706-7.

defendants who are citizens of the state, or who are accused of torture within the state or against its citizens. Each of the 146 states that are party to the convention is obliged to arrest any person suspected of torture, regardless of their citizenship and of the place where the torture occurred; and to prosecute them, or extradite them to a state that will prosecute them or to an international tribunal.¹⁸⁴ This obligation is known as universal jurisdiction. An identical obligation is borne by all the states that are party to the Geneva Convention regarding persons suspected of torture or inhuman treatment during war.¹⁸⁵

For many years states tended to make very sparing use of this power, among other reasons out of concern over possible political complications. In recent years, however, a growing willingness has been seen to extend jurisdictional authority to persons responsible for international crimes, including torture.

Since July 2001 advocates of justice on the international stage have turned to the **International Criminal Court in The Hague**, a forum established under the Rome Statute signed in 1998. This statute collates the international criminal code in a single document. The International Court has the authority to prosecute suspects for four types of offenses detailed in the statute: genocide, war crimes, crimes against humanity, and aggression.¹⁸⁶ As noted, the items detailing war crimes and crimes against humanity include torture and inhuman treatment.¹⁸⁷

¹⁸⁴ See Articles 5-9 of the convention.

¹⁸⁵ See, for example, Article 146 of the Geneva Convention.

¹⁸⁶ Agreement has not yet been reached regarding the content of the last of these types of offense.

¹⁸⁷ In three cases the prosecutor of the International Criminal Court has sought to investigate suspicions relating to torture (in two cases as a crime against humanity under Article 7(1)(F) of the Rome Statute and in one case as a war crime under Article 8(2)(vi)(e)). In the case of *The Prosecutor v Jean Pierre Bemba Gombo*, the pre-trial forum did not ratify the indictments concerning torture as a war crime and as a crime against humanity, and accordingly these were deleted. The judicial forums have in three cases approved the prosecutor's requests to open an investigation and issue arrest warrants:

Situation in Darfur, Sudan

ICC-02/05-01/07, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*

ICC-02/05-01/09, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*

Situation in the Central African Republic

ICC-01/05 -01/08

The Prosecutor v. Jean-Pierre Bemba Gombo

B. Who may be subject to criminal prosecution?

International criminal law¹⁸⁸ recognizes several types of direct and individual criminal liability that may be applied to the **actual perpetrator**, the planner, the issuer of the order, and the assistant. Vicarious liability is also recognized and may be imposed on military commanders or civilian leaders on account of grave crimes committed by their subordinates. In order to establish vicarious liability, the existence of a framework of relations of subordination must be proved. In other words, the existence of actual control with and over the perpetrator must be established. It must also be proved that the senior official – the commander or superior – “knew or... should have known”,¹⁸⁹ about the crimes and that they failed to take all necessary and reasonable steps at their disposal in the circumstances of the matter to prevent the crimes or to punish the perpetrators.¹⁹⁰ In addition to the Rome Statute, these principles are also established in the constitutions or case law of various criminal tribunals and in legislative provisions in many countries.¹⁹¹

These provisions mean that those who bear criminal liability are not only those who themselves commit torture, but also their directors, commanders, and superiors, whether these gave explicit instructions or whether they merely knew about the torture or abuse; whether they were present on the scene or gave a remote order; and also if they knew of the offenses and declined to intervene.

Not only torturers and their commanders should be prosecuted. Such an institutionalized and systemic system of torture could not have been maintained with the legal authorization that is granted every time a complaint from a torture victim is closed. The systematic closure of complaints could not have been maintained without

¹⁸⁸ On this subject, see the comprehensive rulings of the international tribunals following the Second World War, the International Criminal Tribunal for Rwanda, and most recently Articles 25 and 28 of the Rome Statute.

¹⁸⁹ *Ibid.*, Article 28(a)(i).

¹⁹⁰ *Ibid.*, Articles 28(a)(ii), 28(b)(iii).

¹⁹¹ For a comprehensive review of military legislation on this subject, see: The International Committee of the Red Cross (Jean Marie Henckaerts and Louis Doswald-Beck, eds.), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), pp. 3745-3751.

the active and tacit assistance of the shell legal personnel whose actions meant that cases of torture were not the subject of criminal investigation, thus effectively enabling their continuation. The hands of those politically responsible for the GSS are also not clean, of course. For example, proceedings were recently opened against personnel who served in the law enforcement system under the Bush Administration who authored legal documents permitting methods of interrogation that constitute torture.¹⁹²

C. Applicability to persons responsible for torture and abuse in Israel

The State of Israel has not ratified the Rome Treaty;¹⁹³ Israel and the USA are the only Western countries to refrain from doing so. Accordingly, a complaint against an Israeli citizen involved in torture in Israel may only be submitted through the UN Security Council. In the current political constellation the chances of this happening are negligible, as long as the USA maintains its full support for Israel and enjoys a veto in the Security Council. Recently the Palestinian Authority has attempted to join the Rome Statute and has given its ad hoc approval for the investigation of crimes in its territory.¹⁹⁴ The prosecutor at the International Criminal Court in The Hague is currently considering the possibility of applying his authority to the Palestinian Authority Territory.¹⁹⁵

However, GSS interrogators who used methods of torture and abuse, and their commanders, may be prosecuted in a forum in any state that applies universal jurisdiction as explained above in accordance with the Convention against Torture or the Fourth Geneva Convention. On 16 May 2008, for example, a Palestinian victim of torture submitted a complaint against Ami Ayalon to the law enforcement authorities in The Netherlands on account of the grave torture to which he was subjected while Ayalon served as head of the GSS. The prosecution authorities ruled that Ayalon's

¹⁹² http://www.nytimes.com/2009/03/29/world/europe/29spain.html?_r=2&scp=1&sq=Spanish%20Court%20Weighs%20Inquiry%20on%20Torture%20for%206%20Bush-Era%20Officials&st=cse

¹⁹³ Although Israel was actively involved in drafting the statute, it declined to ratify the final version due to the article relating to the transfer of population as a war crime.

¹⁹⁴ The Palestinian Authority declared its willingness to do so on 21 January 2009 under the terms of Article 12(2)(3) of the Rome Statute.

¹⁹⁵ OTP Weekly Briefing, 3-9 November – Issue #12, p.3.

visit to The Netherlands granted them right of jurisdiction. However, this decision was taken after Ayalon had left the country, and accordingly the prosecution was nullified.¹⁹⁶

In addition, insofar as any of the persons responsible for torture and abuse in Israel hold foreign citizenship, they may be prosecuted in the country of citizenship; the country of citizenship will constitute a due forum of jurisdiction. Moreover, citizens of countries that have signed the Rome Statute may be prosecuted under the framework of the Criminal Court in The Hague. We should note in this context that if the victim holds an additional citizenship this grants the same authority of jurisdiction.

Conclusion

In this section we reviewed the standards in international law and showed that the obligation to maintain an efficient and reliable mechanism for examining complaints relating to torture and abuse is unequivocal. As the details in the previous sections show, **the State of Israel has failed to meet these requirements, to which it is obliged under international law.** Even the most basic and obvious of these obligations, and above all the obligation to open a criminal investigation into any complaint of torture, is not respected. The UN Committee against Torture has noted this matter for some years. As we have shown in our discussion of international criminal law, political and legal developments in the field of international jurisdiction and human rights laws may lead to a situation in which, in the absence of due relief for complaints of torture in Israel, international forums will become the proper place to try and penalize torturers and abusers.

¹⁹⁶ Palestinian Centre for Human Rights Press Release, ref 111/2009, 30 October 2009.

Section Four: Conclusion and Recommendations

This report has reviewed in detail the bodies in Israel responsible for processing complaints of torture and abuse in GSS interrogations, particularly the Attorney General, the director of the Department of Special Tasks in the State Attorney's Office, and the OCGIC. We have presented the numerous failings in the processing of complaints and the structural and institutional difficulties inherent in the various mechanisms that process complaints. We have reviewed the requirements of international law relating to the obligation incumbent on states to process complaints of torture and to punish those responsible, as well as the comments of the Committee against Torture and other UN human rights bodies concerning the failings of the State of Israel in this respect. We have shown that the defective processing of complaints of torture is not an isolated phenomenon. It forms part of a long tradition of refraining from examination and punishment, and is consistent with Israel's questionable approach to its international obligations in the field of human rights.

The clear and unambiguous conclusion on reading this report is that **Israel does not maintain a genuine mechanism for investigating complaints of torture**. This fact, which has its roots in part in an HCJ decision that created an opening for exempting torturers from punishment has resulted in absolute immunity for interrogators who commit grave criminal offenses. The absence of such a mechanism effectively implies the consent – if not the encouragement – of the law enforcement system for acts of torture that occur in the GSS interrogation rooms.

The fact that not one of over 600 complaints has led to the opening of a single criminal investigation is the clearest proof of the purely cursory nature of the examinations. The failings of the OCGIC – an institution that is inherently flawed – and of the director of the Department of Special Tasks and the Attorney General are obvious. For years the processing of complaints has been cumbersome and slow. The replies to complaints are laconic and terse. A range of pretexts are used to explain the refusal to undertake a meaningful examination, let alone criminal investigation, and the necessity defense is applied en masse when all other excuses fail. It is reasonable

to assume that the encounter between the OCGIC and the complainant, when it takes place, causes considerable discomfort to the complainants and takes place in a manner that fails to respect their rights.

The structural defects in the mechanism for the examination of complaints are equally apparent. As we detailed at length in Section Two, the body responsible for investigating torture and improper interrogation methods cannot be a constituent organ of the GSS; such a body cannot form a substitute for a criminal investigation; it must undertake an investigation in a manner that is transparent to all; and it must enjoy substantive investigative powers in order to influence the functioning of the GSS interrogators and, above all, prevent prohibited torture. This therefore forms the core of the failing of the mechanism for processing interrogees' complaints: in complete contradiction of common sense, Israeli law, and international law, the examination mechanism creates a channel enabling the Attorney General to close complaints relating to torture without even discussing them. Instead, the complaints are examined by an internal and dependent function that is neither professional nor external. As a result, **there is no substantive processing of complaints of torture, not to mention bearing of responsibility and punishment.** Moreover, a sweeping authorization is granted by the Attorney General and those acting on his behalf to all those engaging in torture and abuse.

Furthermore, the mechanism for examining complaints does not exist in a vacuum. It is maintained alongside the systemic torture and abuse of Palestinian detainees, and alongside the silence, if not the actual support, of the legal system. The undertaking of a purely nominal internal examination – a conclusion that is difficult to avoid in the context of the findings detailed in this report – as a substitute for a serious criminal investigation into one of the gravest of offenses forms part of a world view, and a view of justice, that sees torture is an appropriate tool in the war on terror, and that the State of Israel must defend and protect those who engage in this “work” at any cost.

We believe that the State of Israel must meet standards of human dignity, justice, and equality of law and must respect its obligations under international law. A criminal investigation, with the attendant criminal and public ramifications, conveys a strong and clear message that all forms of torture and abuse are absolutely prohibited since

they fatally injure human dignity and the human person. This is a message that must not be ambiguous.

Accordingly, the law enforcement system in Israel, and the Attorney General at its head, should act in accordance with the following standards:

- In any case of torture or abuse, whether raised in a complaint or in any other manner, a criminal investigation is to be opened immediately. The Attorney General cannot be granted discretion in this matter. This interpretation is required both by international law and by Israeli criminal law. The UN Committee against Torture has expressed its explicit demand on this matter.
- The criminal investigation must be fair, substantive, and independent and must be undertaken by an external and independent body whose promotion, organizational affiliation, and salary are not connected to the subject of the investigation.
- The investigation must maintain clear and transparent criteria. It must include a hearing of the victim of the offense, who must enjoy legal representation, and it must take place within a reasonable timeframe. Its conclusions must be published.
- The complainant must receive in an orderly manner all the material collected in the investigation, whether this ended in an indictment or in the closure of the complaint.
- If the criminal investigation ends in a decision not to indict, the complainant must be enabled to submit an effective appeal against the decision.
- The obligation to open an investigation obviates the need for a preliminary examination. In any case, a preliminary examination cannot be undertaken by an organ of the body that is the subject of the investigation. Accordingly, the institution of the OCGIC should be abolished. If the GSS wishes to examine itself it may do so, as may any other body, by means of its internal auditor.
- Action must be taken to ensure the effective documentation of all interrogations. The exclusion of GSS interrogations from the rule requiring the videotaping of interrogations must be nullified immediately. The documentation must be transparent and accessible, at least, to the interrogees and their representatives.

- In accordance with Israel's undertakings in the Convention against Torture, and given the moral gravity of the offense of torture, torture and abuse should be defined explicitly as offenses under law.
- The State of Israel should join the Optional Protocol to the UN Convention against Torture and thereby permit external monitoring mechanisms, both Israeli and international, for all incarceration, imprisonment, and interrogation facilities, without exception.

These demands are derived from the basic demand: there must be a basic change in the approach to torture and torture must be absolutely condemned. A monitoring mechanism is required not only in light of the substantive issue and international law, but also as a reflection of the world view that complaints of grave human rights violations are to be investigated in good faith and out of a genuine desire to uproot such violations.

As noted in section 40 of the recommendations of the UN Committee against Torture, the State of Israel must address within one year (from May 2009) the maintenance of its obligation to investigate effectively complaints of torture and abuse. Accordingly, the State of Israel should act as quickly as possible to amend the current situation in order to ensure that the above-mentioned report will reflect a substantive change in the way in which the State of Israel perceives its obligation to investigate and to respect in practice its obligations under international and domestic law.

At the beginning of this report we analyzed in detail the difficulties inherent in the legal doctrine created by the Supreme Court in the ruling in the HCJ Torture Petition. As we showed, this ruling created an opening for the use of the necessity defense to exempt torturers from punishment. The dual nature of the ruling is not merely a legalistic phenomenon. Far from the courts, in the basements of the GSS, interrogators have been informed in weak language that they must not torture. At the same time they have received assurances that no harm will come to them if they do so.

There can be no doubt that all branches of government – the executive, the legislature, and the judiciary – have provided GSS interrogators with multiple layers of protection. There can also be no doubt that GSS interrogators have exploited these

layers of protection in order to emerge unscathed after committing unconscionable actions in moral and legal terms. PCATI believes that it is essential to end the era when torturers enjoyed total immunity in Israel or elsewhere.